NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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ROBERT F. ORR[4]

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JAMES G. EXUM, JR.[5]

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1. Appointed by Governor James B. Hunt, Jr. and sworn in as Chief Justice 3 January 1995.
2. Appointed by Governor James B. Hunt, Jr. and sworn in 3 January 1995 to replace Burley B. Mitchell, Jr. who became Chief Justice.
3. Elected and sworn in 3 January 1995.
4. Elected and sworn in 5 January 1995.
5. Retired 31 December 1994.
6. Retired 31 December 1994.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

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	JAMES CLIFFORD SPENCER, JR.	Burlington
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	L. TODD BURKE	Winston-Salem
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	FORREST DONALD BRIDGES	Shelby
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1. Retired 30 June 1995 and sworn in as Emergency Judge 5 July 1995.
2. Appointed and sworn in 7 July 1995.

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1. Appointed and sworn in 23 June 1995.

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27A	Kellum Morris	Gastonia
28	J. Robert Hufstader	Asheville

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

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

PETITIONS TO REHEAR

GENERAL STATUTES CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

UNITED STATES CONSTITUTION CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPEALLATE PROCEDURE CITED AND CONSTRUED

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 State Bar by comity by the Board of Law Examiners on the 12th day of May, 1995 and said persons have been issued certificates of this Board:

MARY LYNCH JARRELL ..... Charlotte
Applied from the State of Ohio
MICHAEL CARL SHOLTZ ..... Durham
Applied from the State of Pennsylvania
KEVIN THOMAS LONERGAN ..... Charlotte
Applied from the State of Nebraska
MARY C. FAIRLEY ..... Pittsburgh, Pennyslvania
Applied from the State of Pennsylvania
ELAINE MOYE WHITFORD ..... Pittsburgh, Pennsylvania
Applied from the State of Pennsylvania
ERIC H. KASSOR ..... Knightdale
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 24th day of May, 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 were admitted to the North Carolina State Bar by comity by the Board of Law Examiners on the 23rd day of June, 1995 and said person has been issued a certificate of this Board:

ANTHONY WILLIAM CUMMINGS ..... Raleigh
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 10th day of July, 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 examination of the Board of Law Examiners as of the 18th day of August, 1995, and said persons have been issued license certificates.

AARON JARRET ABERSON ..... Dunwoody, Georgia
KENNETH JAMES ABNER ..... Fayetteville
CHRISTINA MARIE FESKO ACKERMAN ..... Charlotte
THOMAS JONATHAN ADAMS ..... Raleigh
ROBERT C. ADAMS ..... New Orleans, Louisiana

ANNE MICHEAUX AKWARI . . . . . Durham
R. STUART ALBRIGHT . . . . . Greensboro
NANCY F. AMODEO . . . . . Getzville, New York
MICHAEL J. ANDERSON . . . . . Durham
ELLEN D. ANDREWS . . . . . Durham
TIMOTHY W. ARANT . . . . . Matthews
CARLA NOLITA ARCHIE . . . . . Charlotte
DAVID PAUL ATKINS . . . . . Hays
LEIGH ANN AUGHENBAUGH . . . . . Garner
CHARLES J. BABINGTON, JR. . . . . Cary
KRIS DOUGLASS BAILEY . . . . . Athens, Georgia
DAVID JOSEPH BAKER . . . . . Huntersville
LAURA SNIDER BAKER . . . . . Huntersville
RACHEL DICKSTEIN BAKER . . . . . Chapel Hill
MARK WILLIAM BAKKER . . . . . Bradenton, Florida
GAREY MALCOLM BALLANCE . . . . . Warrenton
ANN HOWARD BANZET . . . . . Warrenton
CATHERINE ALLEN BARNES . . . . . Charlotte
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PAUL J. BARRINGER III . . . . . Sanford
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MURALI BASHYAM . . . . . Raleigh
CAROL ANN BAUER . . . . . Morganton
TODD MICHAEL BEJIAN . . . . . Winston-Salem
KEVIN WALTER BENEDICT . . . . . Cary
JULIE DIANE BENKO . . . . . Charlotte
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MARGARET HOWELL BENSON . . . . . Cary
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ERICA CATHERINE BERGMAN . . . . . Dana Point, California
DONNA RAY BERKELHAMMER . . . . . Winston-Salem
ADAM BERNHOLZ . . . . . Chapel Hill
BRIAN ORLANDO BEVERLY . . . . . Durham
AMY L. BIRCHER . . . . . Winston-Salem
ROBERT A. BITTERMAN . . . . . Charlotte
LAURA ELIZABETH BLAIR . . . . . Charlotte
BRIAN L. BLANKENSHIP . . . . . Crewe, Virginia
CRAIG MITCHEL BLITZER . . . . . Chapel Hill
EDGAR FRANKLIN BOGLE . . . . . Mooresville
BAMBEE NOELLE BOOHER . . . . . Winston-Salem
BRANDON GARY BORDEAUX . . . . . Raleigh
CHARLES MARCUS BOSTIAN . . . . . Charlotte
STELLA ANNE BOSWELL . . . . . Durham
KATHLEEN CAVA BOYD . . . . . Wake Forest
CYNTHIA PAGE BOYER . . . . . Fayetteville
DEE WAYNE BRAY JR. . . . . Fayetteville
CURTIS C. BREWER IV . . . . . Raleigh
LEE ELKINS BRITT . . . . . Jacksonville
JOHN H. BRITTON . . . . . Fayetteville
JONATHAN MARK BROOKS . . . . . Whitsett

LAURA EVE BROWN ..... New Bern
GEORGE H. BROWN III ..... Greenville
DEAN P. BROZ ..... Durham
PAUL ANTHONY BRUSTOFSKI ..... Raleigh
MATTHEW HALLMAN BRYANT ..... Winston-Salem
DAVID HAGOOD BRYSON, JR. ..... Durham
CARYN LEE BRZYKCY ..... Taylorsville
ANGELA M. BULLARD-GRAM ..... Chapel Hill
CATHERINE WESTRAY BUNN ..... Winston-Salem
SUSAN R. BURCH ..... Thomasville
MICHAEL PITTARD BURNETTE ..... Oxford
MARK RICHARD BUSCH ..... Philadelphia, Pennyslvania
GREGORY MITCHELL BYRD ..... Buies Creek
CHARLES L. BYRD, JR. ..... Banner Elk
JILL RENEE CAIRO ..... Carrboro
CHARLES CRAWFORD CAISON ..... Durham
DEREK RICHARD CALDWELL ..... Chapel Hill
SONYA MICHELLE CALLOWAY ..... Chapel Hill
STEPHEN NEAL CAMAK ..... Raleigh
ROBERT FRANKLIN CAMERON ..... Wrightsville Beach
GINA ELISE CAMMARANO ..... Chapel Hill
J. ALAN CAMPBELL ..... Durham
JOHN HARRISON CAPITANO ..... Raleigh
NESTOR CAPOTE ..... Raleigh
MISTI DAWN CARDEN ..... Graham
PETER NEIL CARLINO ..... Charlotte
CHRISTINE CATHERINE CARLISLE ..... Durham
AMIE FLOWERS CARMACK ..... High Point
MICHAEL HEATH CARROLL ..... Dunn
LAURA K. CHALK ..... Winston-Salem
AMES COLBY CHAMBERLIN ..... Greensboro
JEFFREY NEIL CHAPMAN ..... Apex
CHARLES DAVID CHENEY ..... Charlotte
DAVID THOMAS CHERRY ..... Chapel Hill
SUZANNE M. CHESTER ..... Raleigh
KEVIN LEE CHIGNELL ..... Greensboro
RACHEL ERIKA CHURCHILL ..... Greenville
DOUGLAS A. CLAXTON ..... Weaverville
CHRISTOPHER ROBERTS CLIFTON ..... Winston-Salem
MICHELLE BOWDEN CLIFTON ..... Winston-Salem
JO LEIGH CLOUSE ..... Fayetteville
RENEE ANGLEY COBB ..... Durham
CHRISTOPHER PAGE COLLIE ..... N. Wilkesboro
JENNIFER LONG COLLINS ..... Raleigh
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KATHLEEN SUZANNE CONNER ..... Ft. Belvoir, Virginia
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PATRICK NEAL COOK ..... Washington
CAROLE BROWN COOPER ..... Greenville
STEVEN BRYAN CORLEY ..... Chapel Hill

ERIC HARBROOK COTTRELL . . . . . Norfolk, Virginia
MARY ELIZABETH FOWLER COVINGTON . . . . . High Point
PHILLIP WAYNE COVINGTON . . . . . Chapel Hill
COLEMAN MACDONALSON COWAN . . . . . Greensboro
ROBERT AUBREY COX, JR. . . . . Winston-Salem
BRADLEY ANDREW COXE . . . . . Wilmington
ELIZABETH FAECHER CRABILL . . . . . Chapel Hill
JULIA LYNN PIERCE CRAZE . . . . . Rock Hill, South Carolina
JENNEFER JANE CROSS . . . . . Winston-Salem
JOHN M. CROSS, JR. . . . . Marion
JOSEPH N. CROSSWHITE . . . . . Statesville
KELLY ELIZABETH CROWELL . . . . . High Point
DAVID C. CROWELL . . . . . Chapel Hill
STEVEN JUDSON CROWELL . . . . . Pfafftown
JUAN-CARLOS CSAPEK . . . . . Cary
LINDA LEIGH CZYZYK . . . . . Durham
KELLY KATHLEEN DAUGHTRY . . . . . Chapel Hill
BENJAMIN RANDALL DAVID . . . . . Durham,
HILLARY ANN DAVIS . . . . . Winston-Salem
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MICHAEL JOHN DAYTON . . . . . Raleigh
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STEPHEN MARSH DEAN . . . . . Raleigh
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HENRY MURRAY DOYLE . . . . . Zebulon
CHRISTOPHER GEORGE DRESCHER . . . . . Raleigh
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AMY REBECCA EDGE . . . . . Charlotte
ELIZABETH REYNOLDS EDWARDS . . . . . Charlotte
TIMOTHY DEAN EDWARDS . . . . . Coats
SUSAN M. EDWARDS . . . . . Holly Springs
KATHLEEN TOMANN EGAN . . . . . Greensboro
VALERIE ELIZABETH ELDER . . . . . Charlotte
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TODD R. ELLIS . . . . . Columbia, South Carolina
CHARLES WADE EMORY, JR. . . . . Greenville, South Carolina
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DONALD RALPH ESPOSITO, JR. . . . . Clemmons
CURTIS WILLIAM EULER . . . . . Goldsboro
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Douglas Lashmit Hall ..... Reidsville
Susan Joyce Hall ..... Fayetteville
Kellie Corinne Harrah ..... Alexandria, Virginia
Julia Kate Harris ..... Winston-Salem
Anna Frances Harris ..... Raleigh
Elizabeth Rogers Harrison ..... Wilson
Rodney G. Hasty ..... Greensboro
Kurt Friedrich Hausler ..... Fuquay-Varina
Stephanie Doss Hawke ..... Wendell
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Karen A. Hill ..... Durham
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Anthony Ray Hinson ..... Chapel Hill
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Delores Holland-Swails ..... Raleigh
Richard Shannon Holloway ..... Lenoir
Peter Duncan Holthausen ..... Raleigh
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Andrew Leighton Howell ..... Charlotte
Michael Patrick Howley ..... Charlotte
Jeffery Warren Hudson ..... Durham
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John Timothy Jeffries ..... Charlotte
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Jason James Kaus ..... Raleigh
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ALICE LEE MCNEER . . . . . Durham
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BRYAN ANDREW MEER . . . . . New Bern
GAY PARKER MELTON . . . . . Raleigh
M. LEANN MELTON . . . . . Rocky Mount
MATTHEW WILLIAM MERRIMAN . . . . . Garner
ANDREW THOMAS MEUNIER . . . . . Chapel Hill
ANNE MURRAY MIDDLETON . . . . . Winston-Salem
SHERRY ELAINE MILLER . . . . . Fayetteville
HOLLY KENDRA MILLER . . . . . Clemmons
MARTY ERIC MILLER . . . . . Plymouth
JEANNE ELLEN MILLER . . . . . Chapel Hill
SANDRA WOODS MITTERLING . . . . . Raleigh
CLAIRE ANN MODLIN . . . . . Raleigh
CHRISTOPHER T. MONICA . . . . . Columbia, Maryland
TIMOTHY KEITH MOORE . . . . . Kings Mountain
ROBIN ELIZABETH MOORE . . . . . Atlanta, Georiga
JOHN BENTON MORRIS . . . . . Winston-Salem
LYN MARIE MORTON . . . . . Charlotte
LISA JEANNINE MOYLES . . . . . Wilmington, Delaware
ANNE MARIE MULDER . . . . . Raleigh
PATRICIA A. MURTAUGH . . . . . Charlotte
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DENNIS WAYNE NACHTRIEB . . . . . Cary
DANIEL NEEDLEMAN . . . . . Raleigh
JOHN WESLEY NOOE . . . . . Eden
DAVID SPENCER NORRIS, JR. . . . . Forest City
DANIEL PATRICK O'BRIEN . . . . . Carrboro
KRISTEN A. O'NEILL . . . . . Lancaster, South Carolina
WILLIAM DEVAUGHN ORANDER III . . . . . Goldsboro
ERIC PATRICK ORBOCK . . . . . Winston-Salem
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DAVID CHRISTOPHER OSBORN . . . . . Charlotte
SUSAN ASHLEY OSMENT . . . . . Chapel Hill
JOHN COVINGTON OVERFIELD . . . . . Winston-Salem
SALLIE H. PAGE . . . . . Winston-Salem
TROY RANDOLPH PAGE . . . . . Carrboro
LAURA FARRELL PAGE . . . . . Raleigh
KRISTIN D. PARKS . . . . . Chapel Hill
TRACY L. PASFIELD . . . . . Charlotte
GREGG SEAN PASTERNAK . . . . . Durham
BRIAN PAXTON . . . . . Wilson
HUNTER ANDREW PAYNE . . . . . Winston-Salem
THOMAS RHEA PEAKE II . . . . . Carrboro
LEIGH ANN PEEK . . . . . Hillsborough
RICHARD A. PELAK . . . . . Chapel Hill

STEPHANIE KAYE PELL ..... Carrboro
DANA ALLYSON PELLIZZARI ..... Durham
SEAN F. PERRIN ..... Durham
REBECCA PERRY ..... Raleigh
JEAN FAW PERSON ..... Currituck
MELISSA RIDER PETERSMARCK ..... Chapel Hill
VICTORIA HOLLY PETERSON ..... Chapel Hill
BRIAN DONALD PHELAN ..... Springfield, Virginia
VALERIE BETH PICHNEY ..... Potomac, Maryland
CLINTON RUSSELL PINYAN ..... Winston-Salem
ROBERT STEVEN POOLE ..... Hillsborough
SUSAN M. POORE ..... Newland
WILLIAM MICHAEL POPE ..... Coats
DONALD RAY POSEY ..... Hickory
KATHLEEN ANNE POST ..... Goldsboro
EDWIN AVERYT POSTON ..... Charlotte
MATTHEW SCOTT POTEET ..... Hickory
PAUL STEPHEN PRELIPP ..... Buies Creek
PARMELE EDELIN PRICE ..... Charlotte
CHARLES DANIEL PRUITT ..... Charlotte
KAREN L. PRUS ..... Durham
CINDY KAYE PULLEY ..... Henderson
VALERIE MOORE QUIETT ..... Raleigh
JOSEPH NELSON QUINN, JR. ..... Marion
RIPLEY EAGLES RAND ..... Raleigh
TYLER LEE RANDOLPH ..... Charlottesville, Virginia
EUGENE F. RASH ..... N. Wilkesboro
LEONARD HOLDEN REAVES ..... Fayetteville
CAROLE LLEWELLYN REECE ..... Greensboro
JASON HOYT REECE ..... Buies Creek
RUSSELL MANN REED ..... Starkville, Mississippi
ALTON ALFRED REEDER, JR. ..... Lincolnton
SONJA MARTIN REEVES ..... Winston-Salem
SCOTT WARNER REID ..... Cary
SHARON REISS ..... Olney, Maryland
JOY ELIZABETH RHYNE ..... Newton
JULIE HAUSCHILD RICHARDSON ..... Cary
THOMAS MCCOY RICHARDSON, JR. ..... Marion, South Carolina
ERIC BERNS RIDENOUR ..... Sylva
DEBORAH COSBY RINEHART ..... Charlotte
KEVIN TIMOTHY RISTAU ..... Novelty, Ohio
STEPHEN M. RITCHIE ..... Winston-Salem
MICHAEL EDWARD ROBBE ..... Nashville, Tennessee
MATTHEW B. ROBERTS ..... Columbia, South Carolina
MATTHEW EDWARD ROEHM ..... Winston-Salem
BETH L. ROGOFF ..... Bethpage, New York
IVEY RORIE ..... Lewisville
MARCEY PATRICIA ROSE ..... Charlotte
PHILLIP GRAHAM ROSE ..... Raleigh
JASON EMANUEL ROSS ..... Washington, DC
ROBERT MARC RUBIN ..... Coral Gables, Florida

JOHN HUBERT RUOCCHIO . . . . . Raleigh
ELLIOT ASHCRAFT RUSHING . . . . . Monroe
STEVEN K. SANBORN . . . . . Fuquay-Varina
WILLIAM KIRKPATRICK SANDERS . . . . . Winston-Salem
ROBERT A. SAR . . . . . Raleigh
MEEKA SAVAGE . . . . . Virginia Beach, Virginia
AMY THORNDIKE SCHUTZ . . . . . Chapel Hill
ERIC B. SCOTT . . . . . Charlotte
TODD GALMIN SCOTT . . . . . Buies Creek
AIMEE CAROLE SCOTTON . . . . . Staley
TERESA MICHELLE SEVIER . . . . . Dunn
THOMAS STONE SHAVER . . . . . Carrboro
BARBARA ANNE SHERMAN . . . . . San Diego, California
DAVID BRYAN SHICK . . . . . Raleigh
SUSAN HUDSON SHIPTENKO . . . . . Atlanta, Georgia
RONALD JAY SHORT, JR. . . . . Reidsville
PATRICIA A. SIEWERT . . . . . Chapel Hill
SANDRA HELEN COPENHAVER SIMOS . . . . . Charlotte
STEPHANIE SINGLETON . . . . . Charlotte
LAURA LYNETTE SKINNER . . . . . Durham
THOMAS BROOKS SKINNER, JR. . . . . Durham
NONNA SKUMANICH . . . . . Durham
RICHARD E. SLIPSKY . . . . . South Ogden, Utah
MARIE LYNN SMITH . . . . . Jacksonville
JEROME LAFAYETTE SMITH . . . . . Winston-Salem
JAMES EMERSON SMITH, JR. . . . . Columbia, South Carolina
JAMES WILLIAM SNYDER, JR. . . . . Wilmington
LAWRENCE BOWEN SOMERS . . . . . Clemmons
JOHN TIMOTHY SPARKS . . . . . Charlotte
DOW MAURICE SPAULDING . . . . . Graham
KIMBERLY MCGINNIS SPICER . . . . . Kings Mountain
ROBERT BENNETT SPIRO . . . . . Jacksonville, Florida
GREGORY WAYNE STAFFORD . . . . . Chapel Hill
SHEILA LYNN STAFFORD . . . . . Dunn
MICHAEL B. STEIN . . . . . Charlotte
JOSHUA HAROLD STEIN . . . . . Raleigh
RICHARD VERNON STEVENS III . . . . . Sautee, Georgia
MARCIA KAYE STEWART . . . . . Smithfield
MICHAEL ALLAN STONE . . . . . Erwin
J. DAVID STRADLEY . . . . . Statesville
JACK M. STRAUCH . . . . . Winston-Salem
CONRAD BOYD STURGES III . . . . . Louisburg
MATTHEW SCOTT SULLIVAN . . . . . Angier
F. CATHERINE SURLES . . . . . Durham
MICKEY E. SUTTLE . . . . . Hickory
DAVID ALLEN SWANSON . . . . . Durham
JEREMY KYLE TANNER . . . . . Raleigh
MALLORY ASTOR TAYLOR . . . . . Chesapeake, Virginia
TODD CAMERON TAYLOR . . . . . Greenville

CHERIE R. TEAT ..... York, South Carolina
SAMANTHA H. TERRES ..... Dallas
JOHN DAVID THALHIMER ..... Roswell, Georiga
JENNIFER LEIGH THOMASON ..... Charlotte
ROBERT TOLLEFSEN THOMPSON ..... Fayetteville
JOHN HAGOOD TIGHE ..... Columbia, South Carolina
ANDRE LARONE TIPPENS ..... Charlotte
WALTER LYNDO TIPPETT, JR. ..... Fayetteville
EMILY A. TOBIAS ..... Southern Pines
MARGA CHRISTINE TORRENCE ..... Vienna, Virginia
JAMES B. TRACHTMAN ..... Raleigh
MINETTE CONRAD TROSCH ..... Charlotte
LISA ANN VENTURELLI ..... Charlotte
DION FRANK VINIK ..... Birmingham, Alabama
ANN BLANNIE WALDO ..... Durham
CHARLTON CRAIG WALKER ..... Durham
FREDA IRENE WALLACE ..... Rock Hill, South Carolina
KIMBERLY ANN WALLIS ..... Alexandria, Virginia
WILLIAM JAMES WALSH ..... Wilmington
CHERYL ANN WALTON ..... Fayetteville
MICHAEL ROBERT WARD ..... Raleigh
JOHN DUNCAN WATSON III ..... Buies Creek
RANDALL S. WAYLAND ..... Cary
GAINES M. WEAVER ..... Raleigh
CAMDEN R. WEBB ..... Raleigh
ROBERT SHAWN WELLONS ..... Winston-Salem
EDWIN LOVE WEST III ..... Wilmington
RENEE NICOLE WHITE ..... Chapel Hill
ROBERT E. WHITLEY, JR. ..... Kinston
JOHN KEATING WILES ..... Wake Forest
AARON CHANCE WILKINSON ..... Oxford
FRANK BLAIR WILLIAMS ..... Raleigh
DAVID C. WILLIAMS ..... Wilmington
THOMAS MILES WILLIAMS ..... Raleigh
RANDALL DEWITT WILLIAMS ..... Saluda, South Carolina
JAMES WADSWORTH WILLIAMS III ..... Raleigh
JAMES VARNADO WILLIAMS III ..... New Bern
CHARLES MCMURRY WILLIAMSON ..... Mt. Holly
MICHAEL SHAYNE WILLIAMSON ..... Goldsboro
TIMOTHY WOOD WILSON ..... Raleigh
ST. CLAIR F. (RICK) WINIKER III ..... Charlotte
BENJAMIN S. WITHROW ..... Greensboro
BRADLEY OWEN WOOD ..... Raleigh
BRIAN W. WOOD ..... Raleigh
CAROL DILLON WOOTEN ..... Goldsboro
JEFFREY THOMAS WORKMAN ..... Greensboro
FORD S. WORTHY ..... Chapel Hill
ANTOINETTE WRIGHT ..... Fayetteville
THOMAS R. YOUNG ..... Hendersonville

MARK DAVID ZINN . . . . . Raleigh
MATTHEW DAVID ZULLO . . . . . Raleigh
MAUD ALEXANDRA VAN ZANTEN-GOTE . . . . . Arlington, Virginia

Given over my hand and seal of the Board of Law Examiners this the 5th day of September, 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 were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 4th day of August, 1995 and said persons have been issued certificates of this Board:

CARMEN JEAN BATTLE . . . . . Fayetteville
Applied from the District of Columbia
J. MICHAEL BEERY . . . . . Chapel Hill
Applied from the State of Colorado
CHRISTOPHER ALAN BENSON . . . . . Charlotte
Applied from the State of New York
TONY BISGYER BERK . . . . . South Salem, New York
Applied from the State of New York
JAMES ORLANDA BROCCOLETTI . . . . . Norfolk, Virginia
Applied from the State of Virginia
ALBERT DIAZ . . . . . Raleigh
Applied from the State of New York
KATHRYN P. FAGAN . . . . . Chapel Hill
Applied from the State of Texas
DAVID ANTHONY FRANCHINA . . . . . Charlotte
Applied from the District of Columbia
SUSAN V HOAG . . . . . Greenwich, Connecticut
Applied from the State of Connecticut
MICHAEL P. HUGO . . . . . Raleigh
Applied from the State of Virginia
ANDREW CHARLES KARP . . . . . Charlotte
Applied from the State of New York
MARSHA CARTY KENNEDY . . . . . Charlotte
Applied from the State of Illinois
JAMES CHARLES KEIDEL . . . . . Malverne, New York
Applied from the State of New York
LEE M. KIRBY . . . . . Raleigh
Applied from the State of New York
EDWARD ANTHONY KURENT . . . . . Arlington, Virginia
Applied from the District of Columbia
ADRIAN C. MADURO . . . . . Charlotte
Applied from the State of New York
KENNETH ALAN MALLERNEE . . . . . Charlotte
Applied from the State of Ohio

JAMES L. MCINERNEY ..... Pinehurst
Applied from the State of Michigan
JOHN P. MCMAHON ..... Port Washington, New York
Applied from the State of New York
SAMUEL MEROVITZ ..... Philadelphia, Pennsylvania
Applied from the State of Pennsylvania
JERRY LYNN METCALFE ..... Durham
Applied from the State of Oklahoma
MARK KENNEDY METZ ..... Charlotte
Applied from the State of New York
ELAINE MOORER ..... Charlotte
Applied from the State of Missouri
ROBERT DALE PALMER ..... Lima, Ohio
Applied from the State of Ohio
DENNIS P. PORTARARO ..... Chester, New York
Applied from the State of New York
CYNTHIA J. ROBINSON ..... Charlotte
Applied from the State of New York
KATHRYN EVE MATTICE RUBI ..... Rochester, New York
Applied from the State of New York
EDWARD PALMER TEWKESBURY ..... Greensboro
Applied from the District of Columbia
JAMES BENTON WRIGHT ..... Raleigh
Applied from the State of Tennessee
ANTHONY G. YOUNG ..... Rosedale, New York
Applied from the State of New York
FRANK JOSEPH ZECCOLA ..... Goshen, New York
Applied from the State of New York
JOHN EDWARD ZYDRON ..... Virginia Beach, Virginia
Applied from the State of Virginia

Given over my hand and seal of the Board of Law Examiners this the 23rd day of August, 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. MARVIN EARL WILLIAMS, JR.

No. 264A90-2

(Filed 30 December 1994)

1. Criminal Law § 762 (NCI4th)— first-degree murder—instructions—reasonable doubt—moral certainty—no error

The trial court did not err in a prosecution for first-degree murder, burglary with explosives, breaking and entering, armed robbery, and attempted safecracking by giving an instruction on reasonable doubt which included moral certainty. The instructions were practically identical to those in *State v. Bryant*, 337 N.C. 298 (*Bryant II*), which now controls this issue.

Am Jur 2d, Trial § 1385.

2. Jury § 256 (NCI4th)— first-degree murder—jury selection—peremptory challenges—racial discrimination—prima facie showing—moot

The trial court did not err during jury selection in a first-degree murder prosecution where defendant contended that the prosecutor exercised peremptory challenges in a racially discriminatory manner in that counsel examined seventy jurors during jury selection; the State peremptorily challenged eight whites, five blacks, and one Asian; the State accepted two blacks and did not exhaust its peremptory challenges; the jury was ultimately composed of eleven whites and one black with two white alternates; defendant made *Batson* objections to three of the

State's strikes against blacks; the prosecutor volunteered an explanation after each of those objections without waiting for the court to determine prima facie discrimination; and the court overruled the objection in each case. Since the prosecutor volunteered his explanations, the preliminary issue of a *prima facie* showing becomes moot and the only issue before the Court is whether the trial court correctly determined that the prosecutor had not intentionally discriminated.

Am Jur 2d, Jury § 235.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case. 1 ALR2d 1291.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

3. Jury § 260 (NCI4th)— first-degree murder—jury selection—peremptory challenges—racial discrimination—no intentional discrimination

The trial court did not err during jury selection for a first-degree murder trial by allowing the prosecutor to exercise peremptory challenges to strike blacks where defendant argued that there was evidence that the strikes were because of race in that the defendant was black and the victim was white, so the prosecutor had incentive to keep blacks off the jury on the assumption that blacks are more likely to identify with other blacks, but the State's key witness was black, which undercuts any incentive to remove blacks; the prosecutor made numerous discriminatory comments, but that assertion is not supported by the record and the mere mention of race in a trial such as this is not evidence of racial animus; the prosecutor did not apply the same disqualifying criteria to white as to black prospective jurors, but disparate treatment of prospective jurors is not necessarily dispositive on the issue of discriminatory intent and the white jurors passed by the prosecutor did not in fact exhibit characteristics comparable to those of the black jurors peremptorily challenged; the explanation given by the prosecutor for striking one black juror was a proxy for race in that it referred to the juror's neighborhood, but the Court could not reach that conclusion without some evidence that the juror did in fact live in a black neighborhood, and the prosecutor articulated a race-neutral reason for striking the juror supported by the record in

that the juror had made misleading and inconsistent statements on voir dire and there was criminal activity in the neighborhood which concerned the prosecutor; and the prosecutor used five of fourteen, or thirty-six percent, of his peremptory challenges on blacks, whereas blacks constituted only sixteen percent, seven of forty-three, of the jurors not challenged for cause, but there was evidence that the prosecutor did not use his peremptory challenges in a discriminatory manner and the trial court's ruling was not clearly erroneous.

Am Jur 2d, Jury § 235.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case. 1 ALR2d 1291.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

4. Jury §§ 145, 262 (NCI4th)— first-degree murder—jury selection—peremptory challenges—statements to jury—choosing jury predisposed to death penalty

The trial court did not err during jury selection for a first-degree murder prosecution where defendant contended that the prosecutor engineered a jury predisposed to voting for the death penalty by peremptorily challenging six prospective jurors because of their views on the death penalty although five had been unsuccessfully challenged for cause, and by asking questions which implied that only the weak would vote for life imprisonment. The argument that the prosecutor should not be permitted to peremptorily challenge jurors not excludable for cause under *Witherspoon v. Illinois*, 391 U.S. 510, has been consistently rejected. The prosecutor's questions were clearly designed to ascertain whether prospective jurors' views on the death penalty would prevent them from faithfully following the death penalty statute, the prosecutor appears to have taken pains to avoid making any suggestion that prospective jurors would be obligated to vote for the death penalty and the prosecutor described the jurors' "duty" as rendering a verdict in accordance with the law, not to vote for the death penalty.

Am Jur 2d, Jury §§ 201, 202, 233 et seq.

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

5. Jury § 137 (NCI4th)— first-degree murder—jury selection—references to race

The trial court did not deny a first-degree murder defendant due process during jury selection by allowing the prosecutor to ask prospective jurors whether they could put the issue of race completely out of their minds. Although defendant contended that the prosecutor deliberately injected racial prejudice into the proceedings and that his comments impermissibly tainted the jury even if in good faith, the comments were nonderogatory references to race made to ensure that racially biased prospective jurors were not seated on the jury and there was no appreciable risk that the prosecutor's mere mention of the race of the parties would engender prejudice.

Am Jur 2d, Jury §§ 201, 202.

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

6. Jury § 153 (NCI4th)— first-degree murder—jury selection—death penalty—gender references

The trial court did not deny a first-degree murder defendant due process during jury selection by allowing the prosecutor to ask two prospective female jurors whether they would have any difficulty performing their duties, given that there would likely be more women on the jury than men, and to ask one of the jurors whether she felt she would be "less able to return a death sentence than say a male." These questions do not advocate the imposition of the death penalty but represent instead a legitimate inquiry into the jurors' ability to perform their duties impartially; moreover, the likelihood that these questions prejudiced the jury against defendant is almost nonexistent.

Am Jur 2d, Jury §§ 201, 202.

7. Jury § 127 (NCI4th)— first-degree murder—jury selection—questions concerning secretly taped conversation

The trial court did not deny a first-degree murder defendant due process during jury selection by allowing the prosecutor to

ask prospective jurors whether they would have trouble hearing a recording and whether they would refuse to consider such a recording as evidence "just for the fact that it was secretly recorded without the knowledge of one of the parties." Although defendant maintains that there was prejudice since the questions conveyed the impression that the voice recorded was in fact the defendant's voice, a fact that would be in issue at trial, the record reveals that the prosecutor scrupulously avoided such an insinuation, stating in each instance that the recording was "allegedly" of defendant's voice.

Am Jur 2d, Jury §§ 201, 202.

8. Jury § 139 (NCI4th)— first-degree murder—jury selection—questions concerning arrest and indictment

The trial court did not deny a first-degree murder defendant due process during jury selection by allowing the prosecutor to refer to the fact that the case had arisen pursuant to an arrest and indictment. The prosecutor emphasized defendant's presumed innocence, not his guilt, in his questions and the trial court did not abuse its discretion in allowing the challenged questions.

Am Jur 2d, Jury §§ 201, 202.

9. Jury § 94 (NCI4th)— first-degree murder—jury selection—prospective jurors—ex parte bench conferences

There was no prejudicial error in a first-degree murder prosecution where the court had seven unrecorded *ex parte* bench conferences with prospective jurors where five of the conferences were reconstructed by the court; one juror was selected to sit on the jury after further examination by the State and defendant; one was excused for manifestly unobjectionable reasons; three were deferred to another panel where they were subject to further examination by the State and defendant; another was excused with defendant's consent, although the subject of the *ex parte* communication is not in the record; and assuming that the last, referred to in the record as "DISCUSSION AT THE BENCH with a juror," was in fact an *ex parte* conversation, the record does not reveal that any action was taken as a result of that conversation.

Am Jur 2d, Jury §§ 195 et seq.

10. Constitutional Law § 342 (NCI4th)— first-degree murder—unrecorded bench conferences—no error

There was no prejudicial error in a first-degree murder prosecution where the court held unrecorded bench conferences with counsel but defendant seriously challenges only one, which occurred during a hearing to decide whether defendant would proceed *pro se*. Assuming it was error to exclude defendant from this conference, the error was harmless because the judge did not decide the motion at the in-chambers conference but explored the issue fully with defendant in open court before ruling. N.C.G.S. § 15A-1241 does not require recordation of private bench conferences between trial judges and attorneys.

Am Jur 2d, Criminal Law §§ 695, 916.

Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys, during argument on question of law. 85 ALR2d 1111.

11. Criminal Law § 461 (NCI4th)— first-degree murder—prosecutor's argument—excluded audio tape

There was no prejudicial error in a first-degree murder prosecution where the prosecutor in his closing argument used the excluded transcript of an audio tape, but the tape itself had been played for the jury and defendant did not show that the specific statements the prosecutor attributed to him were not on the tape, the statements were not without support elsewhere in the record, and the jury did not know that the prosecutor was reading from a transcript.

Am Jur 2d, Trial §§ 609 et seq.

Supreme Court's views as to what courtoom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

12. Criminal Law § 461 (NCI4th)— first-degree murder—prosecutor's argument—victim receiving blow on ground—no error

There was no error in a first-degree murder prosecution where the prosecutor argued that the victim received at least one

blow on the ground where that was a reasonable inference from the testimony.

Am Jur 2d, Trial §§ 609 et seq.

Supreme Court's views as to what courtoom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

13. Criminal Law § 468 (NCI4th)— first-degree murder—prosecutor's argument—footprint evidence—analogy to fingerprints in rape cases

There was no error in a first-degree murder prosecution where the prosecutor in his summation compared footprint evidence to fingerprint evidence in rape cases. Although defendant says this rape analogy was calculated solely to prejudice the women on the jury against him, the comment was a reasonable effort to explain the importance of the footprint evidence.

Am Jur 2d, Trial §§ 609 et seq.

Supreme Court's views as to what courtoom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

14. Jury § 268 (NCI4th)— first-degree murder—request of juror to be replaced—deliberations underway—denied

The trial court did not err in a first-degree murder prosecution by refusing to honor a juror's request to be excused after deliberations had begun where defense counsel informed the court that he was acquainted with a prospective juror as she had sought legal advice from him; the juror assured the court that her consultation with the lawyer would not enter into the case; the court accepted the juror; after the jury retired for deliberation following the guilt phase of the trial, the juror sent a note to the court asking that she be dismissed because her ability to make a fair and impartial decision could be influenced by involvement with defense lawyers; and the court refused to replace the juror. The court fully explored whether the juror's relationship with defense counsel would affect her ability to be impartial during jury selection, the juror herself assured the trial court of her impartiality, no objection was made by either party to the denial

of the juror's request to be excused, and both parties agreed that it should be denied.

Am Jur 2d, Jury § 135.

Propriety, under state statute or court rule, of substituting state trial juror with alternate after case has been submitted to jury. 88 ALR4th 711.

15. Criminal Law § 876 (NCI4th)— first-degree murder—instruction on deadlocked jury—refused—no indication of deadlock by jury—instruction given in essence

There was no error in a first-degree murder prosecution where the trial court did not give defendant's requested instruction on deadlocked juries but the jury never indicated that it was deadlocked or having trouble reaching a unanimous verdict and defendant essentially received the instruction he sought. N.C.G.S. § 15A-1235.

Am Jur 2d, Trial §§ 1448 et seq.

16. Criminal Law § 880 (NCI4th)— first-degree murder—instructions—waste of five weeks work—no plain error

There was no plain error in a first-degree murder prosecution where the court advised the jury that "five weeks of work would go down the drain" if a mistrial were declared. Considering the trial court's full instruction, which repeatedly advised the jurors that they were not to agree to a verdict that would violate any juror's individual judgment, the trial court's isolated comment had no probable impact on the jury's verdict and did not deprive defendant of due process.

Am Jur 2d, Trial §§ 1448 et seq.

17. Criminal Law § 1323 (NCI4th)— first-degree murder—sentencing instructions—nonstatutory mitigating circumstances

The trial court did not err in a first-degree murder sentencing hearing by requiring the jury to find that the proffered nonstatutory mitigating circumstances existed and had mitigating value before considering these circumstances in the final balancing process on issues three and four. A jury is not required to agree with a defendant that the evidence he proffers in mitigation is, in fact, mitigating unless the legislature has declared it mitigating as a matter of law.

Am Jur 2d, Trial §§ 1441 et seq.

18. Criminal Law § 1337 (NCI4th)— first-degree murder—sentencing hearing—aggravating circumstances—previous felony involving violence

There was no plain error in a first-degree murder sentencing hearing in the court's instruction on the aggravating circumstance of a previous conviction of a felony involving violence where, properly understood, the instruction was correct. Defendant had been charged with other crimes, including robbery, and this instruction merely told the jury that the robbery conviction, in order to be an aggravating circumstance, must have preceded the murder for which defendant had been found guilty. While not a model of clarity, the instruction did not amount to plain error.

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.

19. Criminal Law § 1360 (NCI4th)— first-degree murder—mitigating circumstances—borderline retardation—submitted as nonstatutory mitigating circumstance rather than as statutory impaired capacity—no error

There was no error in a first-degree murder sentencing hearing where the court submitted defendant's borderline retardation as a nonstatutory mitigating circumstance rather than as the statutory impaired capacity mitigating circumstance. The evidence did not mandate submission of the statutory circumstance and the mitigating circumstance as submitted by the trial court was as favorable to defendant as the evidence would permit. N.C.G.S. § 15A-2000(f)(6).

Am Jur 2d, Criminal Law §§ 598, 599.

Comment Note.—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

20. Criminal Law § 1311 (NCI4th)— first-degree murder—sentencing hearing—prior criminal misconduct—admissible

The trial court did not err in a first-degree murder sentencing hearing by admitting the testimony of the Chief of the Farmville

Police Department regarding defendant's criminal misconduct where defendant, by eliciting testimony from his mother regarding his character for nonviolence, opened the door to rebuttal testimony from the State regarding this character trait, even if such evidence would have been inadmissible in the State's case in chief.

Am Jur 2d, Criminal Law §§ 598, 599.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.

21. Criminal Law § 1343 (NCI4th)— first-degree murder—sentencing—aggravating circumstances—especially heinous, atrocious or cruel

The trial court did not err in a first-degree murder sentencing hearing by submitting the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. The N.C. Supreme Court has previously held that N.C.G.S. § 15A-2000(e)(9) is neither unconstitutionally vague nor overbroad and the evidence in this case was sufficient to warrant submission of the circumstance in that the victim was sixty-eight years old at the time of the murder; the evidence revealed defensive wounds on the victim's hands and seven areas of injuries to the victim's head; four of these head injuries would have been sufficient to disorient or confuse the victim, cause moderate pain, but not render him unconscious; the three remaining head injuries, each of which alone could have caused death, exceeded the normal brutality found in first-degree murder cases; and the victim could have remained conscious throughout all seven blows and been aware of, while incapable of preventing, his impending death.

Am Jur 2d, Criminal Law §§ 598, 599.

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

22. Criminal Law § 1334 (NCI4th)— first-degree murder—sentencing hearing—bill of particulars—no constitutional right

A first-degree murder defendant's federal and state constitutional rights to notice of the charges against him and adequate

time to prepare his defense were not violated by the denial of his motion for a bill of particulars on the aggravating circumstances to be relied upon by the State.

Am Jur 2d, Continuance § 27.

23. Constitutional Law § 371 (NCI4th)— first-degree murder—death penalty—constitutional

The North Carolina death penalty statute is constitutional. N.C.G.S. § 15A-2000.

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.

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

A death sentence for a first-degree murder was not disproportionate where the evidence supports the jury's finding of aggravating circumstances, the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor, and the case had similarities to cases in which the death penalty was upheld and is dissimilar to cases in which the death penalty was held to be disproportionate.

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.

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

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).

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda Anne Morris, Assistant Attorney General, for the State.

William F.W. Massengale and Marilyn G. Ozer for defendant-appellant.

EXUM, Chief Justice.

Defendant was tried on indictments charging him with first-degree murder of Theron Price, and burglary with explosives, breaking and entering, armed robbery and attempted safecracking at the premises of Dewey Brothers, Inc. At the close of the State's evidence, the trial court dismissed the armed robbery charge and held the breaking and entering charge merged into that of burglary with explosives. The jury convicted defendant of first-degree murder on theories of felony murder, the underlying felony being burglary with explosives, and premeditation and deliberation. The jury also convicted defendant of burglary with explosives and attempted safecracking.

At the capital sentencing proceeding on the murder charge, the trial court, upon recommendation of the jury, imposed a sentence of death. The trial court also sentenced defendant to thirty-years imprisonment on the burglary conviction, but arrested judgment on the attempted safecracking conviction.

I.

[1] On the Court's first consideration of defendant's appeal, we granted a new trial, concluding the trial court's instruction on reasonable doubt denied defendant due process.[1] *State v. Williams*, 334 N.C. 440,

1. The challenged instruction, given midway through the jury's deliberations in response to a juror's request for clarification, was taken almost verbatim from *State v. Hammonds*, 241 N.C. 226, 232, 85 S.E.2d 133, 138 (1954). The instruction stated:

> When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or to put it another way, satisfied to a moral certainty of the truth of the charge. If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt, otherwise not. A reasonable doubt as that term is employed in the administration of criminal law, is a[n] honest substantial misgiving generated by the insufficiency of the proof, an insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused.

434 S.E.2d 588 (1993) (*Williams I*). This decision was based entirely on *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993) (*Bryant I*). In *Bryant I*, the Court held that, under *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990), and *Sullivan v. Louisiana*, 508 U.S. —, 124 L. Ed. 2d 182 (1993), an essentially identical instruction violated the Due Process Clause of the Fourteenth Amendment.

After our decision in *Bryant I*, the United States Supreme Court decided *Victor v. Nebraska*, — U.S. —, 127 L. Ed. 2d 583 (1994), in which it clarified its holdings in *Cage* and *Sullivan* and held that certain reasonable doubt instructions similar to those we considered in *Bryant I* and *Williams I* did not violate the Due Process Clause. Thereafter, the United States Supreme Court vacated this Court's decisions in *Bryant I* and *Williams I* and remanded these cases to us for consideration in light of *Victor*. *North Carolina v. Bryant*, 337 U.S. 298, 128 L. Ed. 2d 42 (1994); *North Carolina v. Williams*, — U.S. —, 128 L. Ed. 2d 42 (1994).

On remand, we concluded in *State v. Bryant*, 337 N.C. 298, 446 S.E.2d 71 (1994) (*Bryant II*), that, in light of *Victor*, there was no reversible error in the reasonable doubt instruction. Since the instructions here are practically identical to those in *Bryant I* and *II*, *Bryant II* now controls this issue. We now hold on the authority of *Bryant II* that the reasonable doubt instruction given in defendant Williams' trial was free from error.

Our opinion in *Williams I* also addressed several assignments of error we thought likely to arise at a new trial; the Court concluded none of them amounted to prejudicial error.[2]

We reaffirm our earlier resolutions of these assignments of error. We now discuss defendant's remaining assignments of error.

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2. The several issues determined in *Williams I* concerned whether: the evidence was sufficient to support submitting the first-degree murder charge on a theory of premeditation and deliberation; the felony of burglary with explosives could support a first-degree felony murder conviction; defendant should have been permitted to proceed *pro se*; a tape recording allegedly containing admissions by defendant, various photographs, evidence seized upon a search of defendant's residence, certain out-of-court statements made by defendant after his arrest and certain physical evidence seized during a search incident to his arrest should have been admitted into evidence.

II.

Briefly summarized,[3] the State's evidence at the guilt-innocence proceeding of defendant's trial tended to show as follows:

On the morning of 12 February 1989, Lewis Rich, a security guard for Dewey Brothers, Inc., arrived at the company's premises and found the guardhouse gate locked. Unable to gain entry or locate Theron Price, the guard he was scheduled to relieve, Rich telephoned Richard Helms, the company president. Shortly thereafter, Helms arrived, opened the gate, and discovered the door to the payroll office partially open and a light emanating from within. Next to the door, Helms observed an acetylene torch and a cart carrying oxygen and acetylene tanks. Helms summoned the police who discovered a floor safe with evidence of carbon on its hinges left by an improperly adjusted acetylene torch.

The body of Theron Price was found in a steel shed next to the payroll office. Price's face and head were covered in blood. An autopsy revealed several wounds on the face and head caused by blunt-force trauma. The wounds on the head resulted in skull fractures and could have caused death. Two of these wounds would have required the force of a five-pound steel ball dropped from seven to twelve feet. The victim may have been conscious during the infliction of all the wounds, and for two to five minutes thereafter, and may have been hit while lying on the ground. The victim probably lived for five to ten minutes after the fatal blows were struck.

At trial the State's principal witness was Angelo Farmer, a Dewey Brother's employee. Several days following the discovery of Price's body, Farmer reported to his supervisors that he knew the identity of the killer. According to Farmer, he and defendant discussed breaking into Dewey Brothers and robbing its safe in the early part of February. On 11 February, when defendant asked Farmer if he was "ready to move," Farmer indicated that he was not. Defendant said: "I'm gone. I'm on my move." The following day, Farmer, upon learning of Price's death, confronted defendant and said: "Damn man. You killed a man." Defendant stated he did not intend to do it. When Farmer remarked that defendant could have tied up the victim, defendant responded that he wanted to but "the man kept coming."

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3. For a more complete summary of the evidence at trial, see this Court's prior opinion, *Williams*, 334 N.C. at 444-46, 432 S.E.2d at 590-91.

After revealing this information, Farmer agreed to cooperate with the police. Wearing a tape recorder furnished by the police, Farmer engaged defendant in a conversation about the crimes. During the conversation, defendant said he had tried to break into the safe using an acetylene torch he found on the premises. When the watchman surprised him, defendant pulled a knife, but the guard "kept coming." Defendant then took the guard's time clock and hit him with it "two or three times." Defendant stated: "I got scared then, but then I thought about the money. I kept checking on him and he had not come back to. I knew I had done killed the m----- f----- then." Defendant said he continued to work on the safe and checked the guard once more. Upon hearing a truck approach the building, he attempted to wipe away his fingerprints and hide some of the evidence. He then fled.

Guilt-Innocence Proceeding

III.

We first discuss defendant's assignments of error pertaining to the jury selection process. Defendant argues the trial court erred in permitting the prosecutor to exercise peremptory challenges in an unconstitutional manner. According to defendant, the prosecutor exercised his peremptory challenges to exclude black jurors and jurors who did not embrace the death penalty. Defendant also contends the trial court erroneously permitted the prosecutor to raise various matters on *voir dire* that may have prejudiced the jury. Finally, defendant argues that the trial court erred in holding *ex parte* conferences with prospective jurors and other conferences with counsel at which defendant was not present.

A.

[2] Defendant first contends the prosecutor violated his federal and state constitutional rights by using peremptory challenges to exclude black prospective jurors on the basis of their race and the trial court erred in overruling his objections to these challenges. The Equal Protection Clause of the Fourteenth Amendment and Article 1, § 26 of the North Carolina Constitution forbid the use of peremptory challenges in a racially discriminatory manner. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986); *State v. Crandell*, 322 N.C. 487, 501, 369 S.E.2d 579, 587 (1988). Having carefully reviewed the record, and according the requisite deference to the trial court's rulings, we find this argument to be unpersuasive.

Counsel examined seventy jurors during jury selection including the selection of two alternates. Of the forty-three jurors not excused for cause or by consent, thirty-five were white, seven were black and one was Asian. The State peremptorily challenged eight whites, five blacks and the Asian. The State accepted two blacks and did not exhaust its peremptory challenges. Defendant struck fourteen whites and one black, leaving a jury composed of eleven whites and one black with two white alternates. Defendant interposed *Batson* objections to three of the State's five strikes against blacks. After each of these objections, the prosecutor volunteered an explanation for the strike in question without waiting for the trial judge to determine whether defendant had made out a *prima facie* case of purposeful discrimination. In each instance the trial judge overruled defendant's objection.

The prosecutor explained that he challenged one of the jurors because her "family's criminal involvement gives me some problems." He struck another, after having unsuccessfully lodged a challenge for cause, because of the juror's "answers to the capital punishment questions." The prosecutor struck the last juror because of inconsistencies between her answers on a written questionnaire and her answers on *voir dire*. He also explained that he thought her neighborhood had "a lot of drug activity," and that one of her previous residences, Alfa Arms, "for a long period of time has been a problem with the police."

The Court in *Batson* established a three-step process for evaluating claims of racial discrimination in the prosecutor's use of peremptory strikes. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991). First, the defendant must establish a *prima facie* case that the prosecutor has peremptorily challenged prospective jurors on the basis of race. *Id.* Second, if such a showing is made, the burden shifts to the prosecutor to offer a racially-neutral explanation for each challenged strike. *Id.* To rebut the defendant's *prima facie* case, this neutral explanation must be " 'clear and reasonably specific' " and "related to the particular case to be tried." *Batson*, 476 U.S. at 98, n.20, 90 L. Ed. 2d at 88-89, n.20. Third, the trial court must determine whether the defendant has proven purposeful discrimination. *Id.* In North Carolina, the defendant may put on additional evidence before the trial court's final ruling to prove that the prosecutor's explanations are pretextual. *State v. Green*, 324 N.C. 238, 240, 376 S.E.2d 727, 728 (1989).

In the case at bar the prosecutor volunteered his explanations, and the trial court ruled that there was no purposeful discrimination. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a *prima facie* showing becomes moot." *Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405. Thus, there is but one issue before us: Whether the trial court correctly determined that the prosecutor had not intentionally discriminated. *State v. Thomas*, 329 N.C. 423, 430-31, 407 S.E.2d 141, 147 (1991). Because the trial court was in the best position to assess the prosecutor's credibility, we will not overturn its determination absent clear error. *Hernandez*, 500 U.S. at 369, 114 L. Ed. 2d at 412; *see also Thomas*, 329 N.C. at 433, 407 S.E.2d at 148 (clear error standard applicable to both federal and state constitutional claims).

[3] That the prosecutor struck blacks because of their race is proved, defendant argues, by the following: (1) Since defendant is black and the victim was white, the prosecutor had incentive to keep blacks off the jury, (2) the prosecutor demonstrated racial animus by making numerous discriminatory comments, (3) the prosecutor did not apply the same disqualifying criteria to white as he did to black prospective jurors, (4) the explanation given by the prosecutor for striking one black juror was a proxy for race, and (5) the prosecutor used five of fourteen, or thirty-six percent, of his peremptory challenges on blacks, whereas blacks constituted only sixteen percent, seven of forty-three, of the jurors not challenged for cause. Of these arguments, only the last is supported by the record.

Defendant's argument that the prosecutor had incentive to strike blacks is self-defeating. The argument proceeds from the assumption that the prosecutor thought blacks more likely to identify with other blacks. Supposing this assumption to be true, it would have been illogical for the prosecutor to remove blacks as such inasmuch as the State's key witness, Angelo Farmer, was black. Farmer testified that he originally conspired with defendant to break into Dewey Brothers to rob the company safe but that he backed out when he was later approached by defendant. Upon learning of the break-in and of Price's death, Farmer informed his supervisors and the police of his withdrawal from the plan with defendant and agreed to cooperate with the police investigation by wearing a hidden tape recorder during a conversation with defendant in order to obtain inculpatory statements. That a black witness played such a key role in defendant's

prosecution substantially undercuts any incentive on the prosecutor's part to remove blacks on the basis of their race.

Defendant's assertion that the prosecutor made numerous discriminatory comments is unsupported by the record. During *voir dire*, the prosecutor routinely asked prospective jurors whether, given the "mixed racial composition" of the case to be tried, they could "put the issue of race completely out of [their minds]." According to defendant, that the prosecutor evidenced an awareness of the "racially-charged character of the case" raises an inference of discriminatory intent and suggests racial animus. Contrary to defendant's assertion, the record speaks for itself that the prosecutor asked this question, of both blacks and whites, to ensure that racially biased jurors would not be seated on the jury. The mere mention of race in a trial such as this is not evidence of racial animus.

Defendant also asserts that the prosecutor passed white prospective jurors who exhibited the same characteristics as blacks whom the prosecutor peremptorily challenged. The prosecutor struck one of the black jurors because of her family's involvement with crime, another because of inconsistent statements and a third because of the juror's views on the death penalty. According to defendant, the prosecutor passed two white jurors with criminal backgrounds, one white juror who made inconsistent statements and another who expressed reservations about imposing the death penalty.

Disparate treatment of prospective jurors is not necessarily dispositive on the issue of discriminatory intent. As the Court stated in *State v. Porter*:

> Choosing jurors, more art than science, involves a complex weighing of factors. Rarely will a single factor control the decision-making process. . . . "A characteristic deemed to be unfavorable in one prospective juror, and hence grounds for a peremptory challenge, may, in a second prospective juror, be outweighed by other, favorable characteristics."

326 N.C. 489, 501, 391 S.E.2d 144, 152-53 (1990) (quoting *People v. Mack*, 128 Ill. 2d 231, 239, 538 N.E.2d 1107, 1111 (1989), *cert. denied*, 493 U.S. 1093, 107 L. Ed. 2d 1072, *reh'g denied*, 494 U.S 1092, 108 L. Ed. 2d 969 (1990)). Because the ultimate decision to accept or reject a given juror depends on consideration of many relevant characteristics, one or two characteristics between jurors will rarely be directly comparable.

Indeed, the white jurors passed by the prosecutor did not in fact exhibit characteristics comparable to those of the black jurors peremptorily challenged. Though it is true that two white jurors had been connected with crime—one had a brother in prison for child abuse, the other had pled guilty to misdemeanor drug charges—neither was as likely to harbor bias against the State as the black juror peremptorily challenged. That juror had one brother who had been charged with rape and convicted of a lesser charge, another brother who had been convicted of murder, and a son who had been convicted of assault. Though neither of the white jurors had ever sat through a criminal trial, the black juror had attended the trials of both her son and her brother convicted of murder. One of the white jurors recognized a police officer scheduled to testify against defendant as the same officer who had arrested her on drug charges. The black juror recognized the prosecutor; he had prosecuted her brother for murder. Thus, the prosecutor could reasonably have concluded that the black juror was more likely to be biased against the State than the white jurors in question.

One white juror indicated on his questionnaire that none of his immediate family was involved in law enforcement. On *voir dire* he explained that some more distant relatives were involved in law enforcement. These answers were not inconsistent. The black juror peremptorily challenged for inconsistent statements failed on *voir dire* to mention two of her jobs and incorrectly indicated that she owned her house.

Lastly, one white juror balked temporarily at the idea of pronouncing the death penalty in the presence of defendant, though she professed a belief that the death sentence should be imposed in appropriate cases. The black juror peremptorily challenged for his views on capital punishment opposed the death penalty and expressed doubt in his ability to vote for it even if it were merited by the evidence. Again, the prosecutor could reasonably have distinguished the black juror in question on the grounds he stated.

Defendant argues further that the prosecutor demonstrated a discriminatory intent when he struck one black juror in part because she lived in a "not very good neighborhood." Defendant contends this phrase was used as a euphemism for predominantly black, proving that the prosecutor did not want blacks on the jury. Though we recognize the potential for abuse inherent in the use of discriminatory

strikes based upon residential address, the record here does not support such use.

When challenged by defendant at trial, the prosecutor explained his strike by alluding to the juror's inconsistent and misleading answers. According to the prosecutor, the juror had falsely indicated on her questionnaire that she owned her house and had failed on *voir dire* to mention two of her recent employment positions. The prosecutor then stated that these discrepancies caused him concern, "particularly in light of the fact that . . . South Virginia Avenue where she lives is just not [sic] very good neighborhood. That they have a lot of drug activity in that neighborhood and, of course, Alfa Arms is, for a long period of time has been a problem with the police." In rebuttal, defendant's counsel argued that inconsistent statements by other jurors had not been disqualifying. He also took issue with the prosecutor's reference to the juror's neighborhood, "particularly due to the fact that I live on Virginia Street in that very same neighborhood."

Relying on the above, defendant urges us to find that the prosecutor struck this juror because she lived in a predominantly black neighborhood. We cannot, of course, reach this conclusion without some evidence that the juror did in fact live in a black neighborhood. Though defendant's counsel appears to have thought she did, he did not specifically so state. Nor did he attempt to prove it, though he might easily have done so through testimonial or documentary evidence. The record shows only that two black people, the juror in question and one of defendant's attorneys, lived in the South Virginia Avenue area. We are left to speculate as to the race of other residents. Not knowing the racial composition of the juror's neighborhood, we cannot infer a discriminatory intent from the prosecutor's comment.

Assuming arguendo the juror in question did live in a black neighborhood, the prosecutor's explanation gives us no cause to doubt his motives. First, he articulated a reasonable, race-neutral reason for striking this juror, one supported by the record: That she had made misleading and inconsistent statements on *voir dire*. Second, his stated concern about her neighborhood was not its racial composition but rather its criminal activity. The record does not support the argument that the prosecutor's hunch about this juror was based on impermissible racial stereotypes.

We conclude, then, that the record supports only one fact in this case which may be considered evidence of defendant's claim of purposeful racial discrimination: The prosecutor's disproportionate use

of peremptory strikes on blacks. *See Hernandez*, 500 U.S. at 363, 114 L. Ed. 2d at 408 (disproportionate exclusion of members of given race may be considered evidence of discriminatory intent); *see also Thomas*, 329 N.C. at 431, 407 S.E.2d at 147. The prosecutor used thirty-six percent of his peremptory challenges on blacks, who made up only sixteen percent of the jury venire not challenged for cause. Notwithstanding, the trial court ruled the prosecutor had not peremptorily challenged blacks because of their race. In so ruling, the court could have considered that: The prosecutor's key witness was black, *State v. Jackson*, 322 N.C. 251, 255, 368 S.E.2d 838, 840 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989); the first juror accepted by the prosecutor was black, *Thomas*, 329 N.C. at 431, 407 S.E.2d at 147; the prosecutor accepted two black jurors when he still had peremptory challenges available, *Jackson*, 322 N.C. at 255, 368 S.E.2d at 840; the prosecutor made no discriminatory comments, *State v. Robbins*, 319 N.C. 465, 493, 356 S.E.2d 279, 296, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987); and the prosecutor volunteered his explanations when defendant raised *Batson* objections, *Hernandez*, 500 U.S. at 369, 114 L. Ed. 2d at 412. Thus, though there is some evidence that the prosecutor exercised his peremptory challenges in a racially discriminatory manner, there is also substantial evidence to the contrary. We hold, therefore, that the trial court's ruling was not clearly erroneous. As we have stated: "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Thomas*, 329 N.C. at 433, 407 S.E.2d at 148 (quoting *Hernandez*, 500 U.S. at 369, 114 L. Ed. 2d at 412).

B.

[4] In his next assignment of error, defendant contends the trial court erred in permitting the prosecutor to engineer a jury predisposed to voting for the death penalty. According to defendant, the prosecutor exercised peremptory challenges to exclude prospective jurors who expressed any reservation about imposing the death penalty and also indoctrinated prospective jurors by suggesting they would have a duty to vote for the death penalty, all in violation of defendant's rights under the North Carolina Constitution and under the Sixth and Fourteenth Amendments. Defendant's arguments are again unpersuasive.

The prosecutor peremptorily challenged six prospective jurors because of their views on the death penalty, five of whom he had unsuccessfully challenged for cause under *Witherspoon v. Illinois*,

391 U.S. 510, 20 L. Ed. 2d 776, *reh'g denied*, 393 U.S. 898, 21 L. Ed. 2d 186 (1968), and its progeny. Defendant contends the prosecutor should not have been permitted to peremptorily challenge jurors not excludable for cause under *Witherspoon*. We consistently have rejected this argument, holding that a prosecutor may exercise peremptory challenges to exclude jurors who express qualms about the death penalty, even though those jurors are not excludable for cause, without violating either the North Carolina or the United States Constitutions. *State v. Brogden*, 329 N.C. 534, 547, 407 S.E.2d 158, 166 (1991); *see also State v. Allen*, 323 N.C. 208, 222, 372 S.E.2d 855, 863 (1988), *judgment vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990). We decline to reconsider these holdings.

Defendant also contends the prosecutor attempted on *voir dire* to "stack the deck" against him by influencing prospective jurors to vote for the death penalty. According to defendant, questions of the following type were intended to make prospective jurors believe they had a duty to return the death penalty: "So you are telling me that if you were convinced beyond a reasonable doubt that [the death penalty] was the proper punishment, that you . . . could do your duty and do that very thing?" Defendant also points to questions by the prosecutor as to whether jurors were "strong enough" to vote for the death penalty. By such questions, defendant contends, the prosecutor implied that only the weak would vote for life imprisonment.

While it is true that counsel may not argue their cases on *voir dire*, *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), or attempt to indoctrinate prospective jurors, *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980), the prosecutor cannot be said to have done either. First, his questions were clearly designed to ascertain whether prospective jurors' views on the death penalty would prevent them from faithfully following the death penalty statute, thus making them excludable for cause. Under N.C.G.S. § 15A-1212(8), a juror who is "unable to render a verdict with respect to the charge in accordance with the law" may be challenged for cause. Thus, the prosecutor's questions were appropriate. *See State v. Smith*, 328 N.C. 99, 130, 400 S.E.2d 712, 729 (1991) (questions whether jurors were "strong enough to recommend the death penalty" proper since intended to determine whether challenge for cause appropriate under N.C.G.S. § 15A-1212(8)).

Second, contrary to defendant's contentions, the prosecutor appears to have taken pains to avoid making any suggestion that prospective jurors would be obligated to vote for the death penalty. In death-qualifying prospective jurors, the prosecutor consistently asked whether they would be willing to vote for the death penalty *if* they found the punishment warranted by the evidence and the law, the conditional phrasing of the question clearly indicating that the jury might find the death penalty not to be so warranted. Indeed, in most instances the prosecutor candidly emphasized that the defendant must be considered innocent until proven guilty, that the State would have the burden of proving the defendant's guilt and that, in the sentencing phase, "if it ever comes and it may not," the jurors could not even consider the death penalty unless they found that there were aggravating factors not outweighed by mitigating factors. Furthermore, as the prosecutor described the jurors' "duty" it was to render a verdict in accordance with the law, not to vote for the death penalty. For these reasons, we hold that the trial court did not abuse its discretion in allowing the prosecutor's questions.

C.

[5] Defendant next argues that the trial court erred in allowing the prosecutor to comment during *voir dire* on several "prejudicial" issues, thereby denying him due process.[4] *See Spencer v. Texas*, 385 U.S. 554, 564, 17 L. Ed. 2d 606, 614, *reh'g denied*, 386 U.S. 969, 18 L. Ed. 2d 125 (1967). The manner and extent of *voir dire* examination is within the discretion of the trial court. *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). To establish reversible error, the defendant must show not only an abuse of discretion by the trial court but also prejudice. *Id.* Defendant has not carried his burden.

Defendant first takes issue with the prosecutor's many references to race. According to defendant, the prosecutor deliberately injected racial prejudice into the proceedings by asking prospective jurors, over defendant's objection, whether they could "put the issue of race completely out of [their minds]," given the defendant was black and the victim white. Defendant argues that these questions drew

4. Defendant argues merely that the prosecutor's comments were "prejudicial," without stating the legal basis of his request for a new trial. We have inferred, from the cases he cites, that he grounds his claim in the due process right to a fair trial. In this connection, we refer defendant to Rule 28(a) of the Rules of Appellate Procedure (1993): "The function of all briefs . . . is to define clearly the questions presented to the reviewing court . . . ."

attention to race for no justifiable purpose and therefore must have been intended to foment racial prejudice. Defendant argues in the alternative that, even if the prosecutor acted in good faith, his comments nevertheless impermissibly tainted the jury. We believe the questions were proper.

As an officer of the court, obligated to refrain from conduct which may deprive the defendant of a fair trial, the prosecutor may not make "statements calculated to engender prejudice or incite passion against the defendant." *State v. Stamps*, 569 S.W.2d 762, 767 (Mo. App. 1978); *see also Miller v. North Carolina*, 583 F.2d 701, 707 (4th Cir. 1978). Thus, overt appeals to racial prejudice, such as the use of racial slurs, are clearly impermissible. *See United States ex rel. Haynes v. McKendrick*, 481 F.2d 152 (2nd Cir. 1973); *State v. Wilson*, 404 So. 2d 968 (1981). Nor may a prosecuting attorney emphasize race, even in neutral terms, gratuitously. *See People v. Springs*, 101 Mich. App. 118, 125, 300 N.W.2d 315, 318 (1980) (prosecutor's many references to the race of the parties and persons associated with them held prejudicial); *People v. Brown*, 170 Ill. App. 3d 273, 283-84, 524 N.E.2d 742, 749 (1988) (prosecutor's reference to victim as "this little black woman" improper since "there was no reason . . . to refer in any way to the alleged victim's race").

Nonderogatory references to race are permissible, however, if material to issues in the trial and sufficiently justified to warrant "the risks inevitably taken when racial matters are injected into any important decision-making." *McFarland v. Smith*, 611 F.2d 414, 419 (2nd Cir. 1979). In *Haynes*, for instance, the Court condoned an argument by defense counsel attacking the eyewitness testimony of white witnesses on the ground that whites may have difficulty identifying with blacks. 481 F.2d at 160. Similarly, in *State v. Chavis*, 24 N.C. App. 148, 164-65, 210 S.E.2d 555, 567 (1974), *appeal dismissed and disc. rev. denied*, 287 N.C. 261, 214 S.E.2d 434 (1975), *cert. denied*, 423 U.S. 1080, 47 L. Ed. 2d 91 (1976), our Court of Appeals approved a prosecutor's reference to race for purposes of identification.

The prosecutor's questions in the case at bar clearly satisfy the test outlined above. They were nonderogatory references to race made for a legitimate reason: To ensure that racially biased prospective jurors were not seated on the jury. As the U.S. Supreme Court noted in *Turner v. Murray*, 476 U.S. 28, 35, 90 L. Ed. 2d 27, 35 (1986), inquiring into racial bias is especially important in capital trials: "Because of the range of discretion entrusted to a jury in a capital

sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Nor was there an appreciable risk that the prosecutor's mere mention of the race of the parties would engender prejudice. The prosecutor did not harp on race with any individual juror, nor is it alleged that he appealed to prejudice by his tone of voice or demeanor. Rather, in every instance he made a straightforward inquiry whether prospective jurors could judge defendant without bias, and he followed with an admonition that it was their duty to do so. We conclude his questions did not violate defendant's right to a fair trial and were properly permitted by the trial court.

[6] Defendant next takes issue with the prosecutor's questioning of two female prospective jurors. The prosecutor asked both jurors whether they would have any difficulty performing their duties, given that there would likely be more women on the jury than men. In addition, the prosecutor asked one of these jurors whether she felt she would be "less able to return a death sentence than say a male." Defendant characterizes these questions as an attempt to "freeze the females (prospective jurors) against . . . a female predilection against a death verdict." We do not agree with defendant's characterization. These questions do not advocate the imposition of the death penalty. They represent instead a legitimate inquiry into the jurors' ability to perform their duties impartially. Moreover, the likelihood that these questions prejudiced the jury against defendant is almost nonexistent. This argument is without merit.

[7] Defendant next challenges the prosecutor's references on *voir dire* to the taped confession that would be introduced at trial. The State's key witness secretly recorded a conversation with defendant in which defendant admitted to having killed Theron Price. On *voir dire*, the prosecutor routinely informed prospective jurors that a secretly made recording, allegedly of defendant's voice, would likely be introduced at trial. He then asked whether jurors would have trouble hearing a recording and whether they would refuse to consider such a recording as evidence "just for the fact that it was secretly recorded without the knowledge of one of the parties." Defendant maintains that he was prejudiced by these questions since they conveyed the impression that the voice recorded was in fact the defendant's voice, a fact that would be in issue at trial. We do not agree. The record reveals that the prosecutor scrupulously avoided such an insinuation, stating in each instance that the recording was "allegedly" of defendant's voice.

[8] Finally, defendant argues that he was prejudiced by the prosecutor's many references on *voir dire* to the fact that the case had arisen pursuant to an arrest and indictment. Defendant contends that, by emphasizing this fact to the jurors, the prosecutor gave the impression that defendant's guilt had already been established. There is no more eloquent response to this argument than the prosecutor's own words, in a representative interchange:

> Q. Now there are things that have gone on in the past procedural in nature that brings it to this point in time, that gets it ready for a jury trial; do you understand that?
>
> MR. JORDAN: Objection.
>
> THE COURT: Overruled.
>
> Q. (Mr. Jacobs) There are procedural matters that have gone on, for instance, arrests?
>
> A. The arrest.
>
> Q. Return of bill of indictment, piece of paper, all of that.
>
> MR. JORDAN: Objection.
>
> THE COURT: Overruled.
>
> Q. (Mr. Jacobs) Do you understand it?
>
> A. Well, I know that obviously he has been arrested, yes.
>
> Q. But that has absolutely no bearing on the issues in this case and it is to be disregarded by the jury; do you understand that?
>
> A. Yes.
>
> Q. Because that's not any evidence at all of his guilt; do you understand that?
>
> A. Yes.
>
> Q. That the mere fact that he is here is no evidence of his guilt. Do you have any difficulty accepting that proposition.
>
> A. No.

Thus, the prosecutor emphasized defendant's presumed innocence, not his guilt. The trial court did not abuse its discretion in allowing the challenged questions.

D.

Defendant next assigns error to seven unrecorded, *ex parte* conferences held between the trial judge and prospective jurors, and to some fifty unrecorded, *ex parte* conferences held between the trial judge and counsel. Defendant argues that these conferences violated his right under Article I, § 23 of the North Carolina Constitution to be present at all stages of trial. He also argues that the trial court violated N.C.G.S. § 15A-1241 by failing to have the conferences recorded and that this failure, in turn, deprived him of the right to due process of law under the Fourteenth Amendment. We are not persuaded that prejudicial error occurred.

1.

[9] Defendant first assigns error to seven alleged unrecorded, *ex parte* bench conferences, each with a different prospective juror.

One prospective juror, juror Best, communicated with the trial court *ex parte* regarding her "knowledge of the victim." In the presence of defendant and for the record, the trial court requested juror Best to "tell me in open Court what you told me here at the bench." After juror Best restated on the record what she had told the trial court privately, she was examined extensively by both the State and defendant and was ultimately empaneled to sit on the jury.

As a result of two other *ex parte* conferences with two prospective jurors, Mathis and Holmes, the trial court excused both jurors. Juror Holmes was excused after the trial court had discussed the juror's request with both the State and defendant and obtained both parties' consent. Juror Mathis was excused without consent for medical reasons. On the record, the trial court informed the parties it had received from juror Mathis' physician a written statement indicating the juror was an "insulin dependent diabetic" who suffered from "episodes of low blood sugar." The trial court stated it was the opinion of the juror's physician that she should not serve as a juror. Based on this information, the trial court excused the juror.

Three other *ex parte* conferences with prospective jurors Mitchell, Potter, and Patterson resulted in their being referred to a later *voir dire* session. The transcript affirmatively reveals these prospective jurors moved to different panels in the jury selection process. With regard to juror Mitchell, the trial court stated: "I understand one juror wants to talk to the Court. All right. Come forward. I am excusing Mr. Mitchell until Thursday morning at 9:30." As for juror

Potter, the trial court stated, "Let the record show the Court has talked with Mrs. Peggy Potter this morning who is a juror on panel E and she will be reassigned to panel F . . . because of a meeting she has tomorrow." With regard to juror Patterson, the trial court stated:

> THE COURT: All right. Let the record show that this is juror Willa Patterson who is on Panel E. She has demonstrated just cause for reassignment to another panel because she needs to be off this afternoon and tomorrow. In the court's discretion I will reassign her to panel F and she shall follow the instructions for panel F from this point forward.

One other unrecorded, *ex parte* conference is referenced in the trial transcript only by the following: "DISCUSSION AT THE BENCH with a juror." This incident occurred immediately after court opened on 14 May 1990, the ninth day of jury selection. Immediately after it occurred, the trial court greeted everyone, and the *voir dire* examination of jurors from panel F commenced.

The Confrontation Clause of the North Carolina Constitution, Article I, section 23, has been interpreted as "guaranteeing the right of every accused to be present at *every stage* of his trial." *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 651 (1989) (emphasis in original), *sentence vacated*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990), *on remand*, 327 N.C. 475, 397 S.E.2d 228 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991). In *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990), we stated:

> This state constitutional protection afforded to the defendant imposes on the trial court the affirmative duty to insure the defendant's presence at every stage of a capital trial. The defendant's right to be present at every stage of the trial "ought to be kept forever sacred and inviolate." *State v. Blackwelder*, 61 N.C. 38, 40 (1866). In fact, the defendant's right to be present at every stage of his capital trial is not waiveable. *State v. Artis*, 325 N.C. 278, 297, 384 S.E.2d 470, 480 (1989); *State v. Huff*, 325 N.C. at 31, 381 S.E.2d at 652.

This broad right to presence helps to ensure the integrity of the judicial system "by preserving the appearance of fairness and by optimizing the conditions for finding truth." *Huff*, 325 N.C. at 30, 381 S.E.2d at 651.

The selection of the jury is a stage of a capital trial at which defendant must be present, *id.*, and it is "error for the trial court to

exclude the defendant, counsel, and the court reporter from its private communications with the prospective jurors at the bench *prior to excusing them.*" *Smith*, 326 N.C. at 794, 392 S.E.2d at 363; *see also State v. Payne*, 328 N.C. 377, 402 S.E.2d 582; *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991); *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992); *State v. Johnston*, 331 N.C. 680, 417 S.E.2d 228 (1992); *State v. Moss*, 332 N.C. 65, 418 S.E.2d 213 (1992) and *Boyd*, 332 N.C. 101, 418 S.E.2d 471. The rationale for this rule was well stated in *State v. Buchanan*, 330 N.C. 202, 222-23, 410 S.E.2d 832, 844 (1991).

> In [the *Smith* line of] cases the fact of defendant's actual presence in the courtroom essentially was negated by the court's cloistered conversations with prospective jurors. The court's actions effectively prevented defendant's participation in the proceeding, either personally or through counsel, and they deprived him of any real knowledge of what transpired. Further, the public interest in ensuring the appearance of fairness in capital trials was implicated by private discussions between the trial court and individual jurors which, without explanation, resulted in the excusal of jurors.

This kind of error, however, is subject to harmless error analysis, the burden being upon the State to demonstrate the harmlessness beyond a reasonable doubt. *Huff*, 325 N.C. at 30, 318 S.E.2d at 651. Where " 'the transcript reveals the substance of the [*ex parte*] conversations, or the substance is adequately reconstructed by the trial judge at trial,' " *State v. Adams*, 335 N.C. 401, 409, 439 S.E.2d 760, 763 (1994) (quoting *State v. Boyd*, 332 N.C. 101, 106, 418 S.E.2d 471, 474 (1992)), and it is manifest from the transcript that defendant was not harmed because his presence would have made no difference in the outcome of the conversation, the error has been held harmless beyond a reasonable doubt. *State v. Payne*, 328 N.C. 377, 389, 402 S.E.2d 582, 589 (1991); see also *State v. Gay*, 334 N.C. 467, 482, 434 S.E.2d 840, 848 (1993). We said in *Payne*, regarding *ex parte* communications by the trial court with prospective jurors during the jury selection process:

> Whether this kind of error is harmless depends, we conclude, on whether the questioning of prospective jurors in defendant's absence might have resulted in a jury composed differently from one which defendant might have obtained had he been present and participated in the process. We are satisfied here beyond a reasonable doubt that defendant's absence during the preliminary

> questioning of prospective jurors did not result in the rejection of any juror whom defendant was entitled to have on the panel or the seating of any juror whom defendant was entitled to reject either for cause or peremptorily. Those potential jurors who were excused because of their responses to questions about statutory qualifications, physical infirmities, and personal hardships were either ineligible to serve or excused for manifestly unobjectionable reasons regardless of what defendant might have observed or desired. The remaining prospective jurors were available during selection of the petit jury, and defendant had sufficient opportunity to observe their demeanor and behavior in considering whether to accept or reject them.

328 N.C. at 389-90, 402 S.E.2d at 589.

In the instant case, the trial court violated defendant's constitutional right to be present by conducting *ex parte* conferences with prospective jurors in at least the first six instances recited above. The question is whether the State has demonstrated the error to be harmless beyond a reasonable doubt.

We conclude that it has under the rationale of our decision in *Payne*. With regard to prospective jurors Best, Mathis, Mitchell, Potter and Patterson the subject matter of the *ex parte* communications were reconstructed in open court in defendant's presence. After further *voir dire* examination by both the State and defendant, juror Best was selected to sit on the jury. Juror Mathis was excused for manifestly unobjectionable reasons. Prospective jurors Mitchell, Potter and Patterson were simply deferred to another panel where they were subject to further examination by the State and defendant. While the subject of the *ex parte* communication with prospective juror Holmes is not on the record, this juror was excused with defendant's consent after consultation with the trial court.

With respect to the reference in the transcript to a "DISCUSSION AT THE BENCH with a juror," it is not clear whether this was, in fact, an *ex parte* communication. It is defendant's burden on appeal to demonstrate in the first place that error occurred. *Adams*, 335 N.C. at 409, 439 S.E.2d at 764. Arguably, defendant has not met that burden because he has not shown definitively that the "discussion" complained of occurred in his absence.

Assuming arguendo the discussion was *ex parte* and therefore error, it is clear the error was harmless beyond a reasonable doubt.

The record does not reveal that any action was taken as a result of the communication. The next thing to occur was the trial court's greeting to those in attendance, which was immediately followed by the resumption of the jury *voir dire*. We can safely assume that this juror was thereafter subject to questioning by both the State and defendant, and was either seated or excused on the basis of this examination and not the discussion at the bench. The discussion, therefore, did not deprive defendant of a juror to whom he would otherwise have been entitled, nor did it result in the seating of a juror whom he might otherwise have rejected. It was, therefore, harmless under the rationale of *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582.

Defendant correctly points out that N.C.G.S. § 15A-1241 requires complete recordation of jury selection in capital proceedings. Thus, the trial court erred in failing to have its *ex parte* conferences with prospective jurors recorded. *Smith*, 326 N.C. at 794-95, 392 S.E.2d at 364. We conclude, however, that this failure was harmless for the reasons stated above. Because defendant was not harmed by the violation of N.C.G.S. § 15A-1241, his due process rights were not implicated. *State v. Hudson*, 331 N.C. 122, 138, 415 S.E.2d 732, 740 (1992), *cert. denied*, —— U.S. ——, 122 L. Ed. 2d 136, *reh'g denied*, —— U.S. ——, 122 L. Ed. 2d 776 (1993).

2.

[10] We now turn to defendant's argument that the trial court committed reversible error in holding some fifty unrecorded bench conferences with counsel. Of these, defendant seriously challenges only the one that occurred during the hearing to determine whether he would proceed *pro se* pursuant to *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975). This five-minute, in-chambers conference took place immediately after defendant had first stated his desire to proceed *pro se*. The subject of the conference appears to have been this motion, for when the judge returned to the courtroom he said: "[T]he Court has taken very seriously the statements that you made a few moments ago. I have been thinking about it and talked briefly with the attorneys in my chambers." The judge did not immediately rule on the motion but rather recessed the court until the next day, at which time he questioned defendant at great length before denying the motion.[5]

5. We concluded in *Williams I* the trial court ruled correctly. 334 N.C. at 456, 434 S.E.2d at 598.

Under *Buchanan*, an unrecorded bench conference between the trial judge and counsel will not be considered violative of the defendant's right to presence unless "the subject matter of 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." 330 N.C. at 223-24, 410 S.E.2d at 845. Thus, the defendant must show the "usefulness" of his presence in order to prove error. If he can sustain this burden, the State may still show that the error was harmless beyond a reasonable doubt. *Id.* Defendant has attempted to sustain his burden of proof with respect to only one of the challenged conferences. His allegation of error regarding the others must necessarily fail.

As to the conference which occurred during his *Faretta* motion, it is at least arguable that his presence could have been useful given his peculiar knowledge of the manner in which defense counsel had handled his case. Assuming *arguendo* that it was error to exclude defendant from this conference, we believe the error was harmless beyond a reasonable doubt. The trial judge did not decide on defendant's motion at the in-chambers conference but rather explored the issue fully with defendant in open court before ruling. Thus, defendant had ample opportunity to convey whatever knowledge he had to the judge.

Finally, in *State v. Cummings*, 332 N.C. 487, 497, 422 S.E.2d 692, 697 (1992), we held that N.C.G.S. § 15A-1241 does not require recordation of "private bench conferences between trial judges and attorneys." Thus, the trial court did not err in failing to record its bench conferences with counsel. For this reason, defendant's due process argument must also fail.

IV.

Defendant next assigns error to the prosecutor's closing argument. Defendant asserts the prosecutor exceeded the bounds of proper argument by reading to the jury from excluded evidence, by making assertions of fact not justified by the record and by making arguments designed solely to prejudice the jury against him. We cannot agree.

Counsel is generally permitted "wide latitude in the argument of hotly contested cases." *State v. Britt*, 288 N.C. 699, 711, 220 S.E.2d 283, 291 (1975). He may argue "the facts in evidence and all reasonable inferences to be drawn therefrom and the law relevant thereto."

Id. His argument is not, however, free of limitations. Of relevance to the case at bar, he may not " 'travel outside the record' by injecting into his argument facts of his own knowledge or other facts not included in the evidence." *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975) (quoting *State v. Westbrook*, 279 N.C. 18, 39, 181 S.E.2d 572, 584 (1971), *sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761, *on remand*, 281 N.C. 748, 191 S.E.2d 68 (1972)). Nor may he make remarks "calculated to mislead or prejudice the jury." *Monk*, 286 N.C. at 516, 212 S.E.2d at 131.[6] Upon review, a new trial will not be granted absent a finding of prejudicial error. *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977).

[11] Defendant first takes issue with the prosecutor's reading to the jury from what defendant contends was excluded evidence. During trial, the prosecution introduced over defendant's objection an audio tape allegedly containing incriminating statements by defendant. Because defendant's statements were difficult to hear, the prosecution also sought to introduce an allegedly verbatim transcript of the tape prepared by police officers. Finding the transcript inadmissible, the trial court noted: "There are things that appear on this transcript that I simply did not hear on the tape." The tape itself was introduced and played to the jury. When arguing in his summation the State's contentions concerning the contents of the tape, the prosecutor used the transcript to refresh his recollection and, apparently, quoted extensively from it. The trial court overruled defendant's objection to this, explaining that "at no time during the trial was a reference made to the alleged verbatim transcript," and the transcript was "merely a part of the prosecutor's work product and did not . . . and will not influence the jury." Subsequently, defendant cautioned the jury in his own closing argument that the prosecutor's recital of the statements on the tape had been made from his own notes and that it would therefore be "improper for you to disregard your own recollection."

Defendant's objection is well taken. The prosecutor should not have read from the excluded transcript, especially in light of the trial court's finding that the transcript contained statements not discernable on the tape. In doing so he risked putting before the jury facts not in evidence. We conclude, nevertheless, that defendant was not prejudiced by this error and we decline to grant him a new trial on its account.

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6 . The case law holdings defining the permissible scope of closing argument have been codified in part at N.C.G.S. § 15A-1230 (1988).

We are not persuaded that defendant was prejudiced for three reasons. First, he has not shown that the *specific* statements the prosecutor attributed to him were not in fact audible on the tape. Thus, we cannot hold with any certainty that the prosecutor in fact traveled outside the record. Second, even if the statements quoted by the prosecutor were not in fact audible on the tape, they were not without support in the record. Angelo Farmer, the prosecution's lead witness and the one who secretly recorded the conversation at issue, testified from his own knowledge to the substance of every statement later attributed to defendant by the prosecutor. Third, the jury did not know that the prosecutor was reading from a transcript; indeed, it did not know that such a transcript existed. It could not, therefore, have been unfairly influenced by believing the prosecutor's recital of defendant's statements came from the proposed transcript. Defendant's caution that the prosecutor had quoted from his own notes further protected against this possibility.

Our holding is analogous to that of *State v. Paul*, 58 N.C. App. 723, 294 S.E.2d 762, *disc. rev. denied*, 307 N.C. 128, 297 S.E.2d 402 (1982). In *Paul*, the prosecutor in closing argument quoted one of his witnesses, Ms. Perry, as having seen defendant sell marijuana, a statement previously excluded by the trial court. Following an objection, the trial court cautioned the prosecutor and the prosecutor himself asked the jury to banish his last argument from their minds. In rejecting defendant's request for a new trial, the Court of Appeals noted that though Ms. Perry's statement had been excluded, another witness, Ms. Best, had testified without objection that *she* saw defendant sell marijuana. The court concluded that, "in light of this testimony, coupled with the court's cautionary instruction and the district attorney's own curative remarks, we find that the defendant has not shown sufficient prejudice to warrant awarding him a new trial." 58 N.C. App. at 725-26, 294 S.E.2d at 763. *See also State v. Oxendine*, 330 N.C. 419, 423, 410 S.E.2d 884, 886 (1991) (no new trial for prosecutor's argument quoting excluded testimony where substance of statement quoted could reasonably be inferred from other evidence on record).

[12] Defendant next takes issue with the prosecutor's argument that the victim received at least one of seven blows while on the ground. According to defendant, there was no evidence to this effect. The following is testimony of the medical examiner:

> Q. Doctor, if [the victim] was rendered unconscious . . . at any time during the seven blows, do you have an opinion . . . whether or not he was hit while on the ground?

A. If he became unconscious during the course of these 7 blows, prior to the last blow, yes, he would have fallen down and one of them would have necessarily been inflicted while he was down.

Q. Could it have been more than one blow that inflicted to his skull while in a prone position . . . ?

A. Yes, since there are three groups of injuries which have the potential to cause loss of consciousness, it is possible that consciousness was lost following the first and that the two others were inflicted subsequent to that.

That one of the blows was inflicted while the victim was on the ground was a reasonable inference from this testimony.

[13] Finally, defendant takes issue with an analogy drawn by the prosecutor during his summation. In arguing that the footprints found on the scene, and shown to belong to defendant, by themselves were sufficient to identify defendant as the perpetrator, the prosecutor made the following statement:

Now the law is that if we could show that those footprints were impressed . . . at the time of the crime just like a fingerprint in a window, imagine somebody's house broken into. Often times in the cases that I read, it is a woman that has been assaulted in her house. They come through the window and there is a fingerprint pressed inside the window pane . . . and the woman cannot identify the person but she can say that man has never been in my apartment. . . . [T]he fingerprint in the window under those circumstances would identify the perpetrator and the jury could consider whether or not they find from that evidence alone beyond a reasonable doubt that offense was committed by that individual who pressed the fingerprint.

Defendant says this "rape" analogy was calculated solely to prejudice the women on the jury against him and that it in fact did so. We cannot agree. Far from an attempt to equate defendant with a rapist, the prosecutor's comment was a reasonable effort to explain the importance of the footprint evidence.

V.

[14] By another assignment of error, defendant contends the trial court erred where, upon refusing to honor a juror's request to be excused after deliberation had begun, it denied defendant's request

for a deadlocked jury charge and commented on the likely effect of the juror's excusal. We do not agree.

During jury selection, Mr. Braswell, counsel for defendant, informed the trial court that he was acquainted with prospective juror Teresa Smith as she had sought legal advice from him. The prosecution then examined Ms. Smith concerning her relationship with Mr. Braswell. Ms. Smith informed the court that she recently had visited Mr. Braswell for legal assistance in regard to a domestic problem. When asked whether she could decide the present case without regard to her consultation with Mr. Braswell, she answered affirmatively, assuring the court that it would not enter into her deliberations as a juror. The trial court accepted Ms. Smith as a juror and advised her not to contact Mr. Braswell during the trial.

Following the guilt phase of the trial, upon being fully instructed by the trial court, the jury retired to the jury room for deliberation. Shortly thereafter, the following transpired:

THE COURT: Bring the defendant in please.

The jury has not reached a verdict; however, I have received another written communication from this time an individual juror, that being juror number 2, Teresa Grady Smith. I will read her communication verbatim and I will quote what she is saying. ["]I, Teresa Smith, ask to be dismissed on the fact that my ability to make a fair and impartial decision on the guilt or innocence of Marvin E. Williams may be influenced by personal involvement with one of the defense lawyers[.] Teresa Smith[."] That concludes this written statement and that she has addressed to the Court. I don't quite know how to handle this. I am certainly open to suggestions. Do either one of you have any knowledge of what she is talking about? I suppose she means legal involvement. I think this is the lady that mentioned you had done some work for her in the past, Mr. Braswell. I think this is the juror. Is it?

MR. BRASWELL: I think that's the juror.

THE COURT: All right. I'm open to suggestions from counsel. First, counsel for the State as to how you think I should handle this.

MR. JACOBS: Deny it.

THE COURT: Deny it?

MR. JACOBS: Yes, sir. They have started deliberating. I think she has got to finish this stage. I don't think you can substitute one of the alternate jurors for her in this stage. I think she should have made that known to the Court before she went out.

THE COURT: Mr. Jordan [counsel for defendant], do you have any words of wisdom?

MR. JORDAN: Your honor, I tend to concur with the State in that matter since she has deliberated for a substantial period of time. I don't think an alternate now could replace and fairly consider the other jurors' views unless they are willing to go through entire—

. . . .

THE COURT: Mr. Braswell, anything you would like to say for the record?

MR. BRASWELL: Your Honor, to clarify her comment, I am assuming she says personal involvement what she is actually referring to is the matter she disclosed on voir dire. That is she had consulted with me regarding a domestic problem that she had experienced and for the record, she has never retained me as an attorney but simply consulted with me about a week or so prior to the jury selection process.

MR. JACOBS: Now she is saying something different than what she said on voir dire.

THE COURT: All right. I will ask the clerk to include this communication in the record of this case. . . .

All right. We are back in session. It appears to the Court that I have two choices. First choice, which I am not going to exercise, is to declare a mistrial. To be sure, I am not going to do that. My second choice is to force the jurist [sic] to continue with the case and to bring her and the other jurors into the courtroom and give them some further instructions on the need to be fair and impartial and to base the decision in this case purely on the evidence in the case and on nothing else. That appears to be the only viable choice available to the Court. All right. Like to be heard?

MR. BRASWELL: Yes, Sir. We certainly ask the Court to include in that instruction that the language to the effect that the juror, of course, does not have to abandon his or her own individual conscience if it does violence to it.

THE COURT: I'm not sure the case has developed to the point where that instruction would be warranted. It may be if it appears to be a deadlocked jury, but that has not developed as far as I know.

All right. Bring the jury in, Mr. McDaniel.

Jury brought in at 3:45 p.m.

MR. BRASWELL: Your Honor, if the Court would note an exception.

. . . .

THE COURT: All right. . . . I believe I have received a note here from Mrs. Teresa Smith. You are juror No. 2?

MRS. SMITH: Yes, sir.

THE COURT: I have read your note and I have talked with the attorneys about this. I have placed the contents of your note into the court record and I have considered it and feel that it would be impractical to discharge you from the case at this point. I cannot substitute an alternate juror in your stead at this point in time. It is rather late in the process for me to be discharging jurors. If I discharge you as a juror, then five weeks of work would go down the drain. I would have to declare a mistrial in this case and I am not prepared to do that. And so I am going to require you to stay on the case and to deliberate with other jurors with a view towards reaching a verdict in this if one can be reached without doing violence to your individual judgment. I will say to you, as well as to other jurors, that you have a duty to consult with one another, to debate your views and your contentions and your disagreements and attempt, as best you can, to reach a verdict in the case without doing violence to your individual judgment. You should not base your verdict in this case on anything but the evidence and the law. You have heard the evidence, as I have, for the past few days. You have heard the Court's instructions on the law and if you are not clear on those instructions, I will be delighted to reinstruct you on any particular instruction that you may not be clear on but you have a duty to decide this case purely on the evidence and the law of this State and to set aside any knowledge that you may have of any persons associated with the trial or any other information that may tend to influence your decision in this case. And so, to sum it all up, I have considered your request but your request regretfully will be denied. All right.

It was not error for the trial court to let the jury continue its deliberations with juror Smith remaining on the jury. During jury selection the trial court fully explored whether juror Smith's relationship with Mr. Braswell would affect her ability to act as an impartial juror. Juror Smith, herself, assured the trial court of her impartiality. No objection was made by either party to the trial court's denial of this juror's subsequent request for excusal; indeed, both the State and defendant agreed that this request should be denied.

[15] Relying on *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986), and *State v. Logan*, 79 N.C. App. 420, 339 S.E.2d 449, *disc. rev. denied*, 316 N.C. 383, 342 S.E.2d 903 (1986), defendant contends the trial court erred by not giving his requested jury instruction for deadlocked juries, N.C.G.S. § 15A-1235 (1988). We conclude no such instruction was required. Both *Logan* and *Williams* are distinguishable.

Enacted for the purpose of avoiding coerced verdicts from jurors having difficulty reaching a unanimous decision, N.C.G.S. § 15A-1235 provides:

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

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

N.C.G.S. § 15A-1235.

In both *Logan* and *Williams*, the jury specifically announced to the trial court that the jury was unable to reach a verdict. Under such circumstances, it was error not to give the full instruction set out in N.C.G.S. § 15A-1235. *Williams*, 315 N.C. at 327, 338 S.E.2d at 85; *Logan*, 79 N.C. App. at 424, 339 S.E.2d at 452. Here, the jury never indicated it was deadlocked or that it was having difficulty reaching a unanimous verdict. Further, defendant essentially received the instruction he sought at trial. Defendant requested the trial court instruct the jurors they "[do] not have to abandon [their] own individual conscience if it does violence to it." The trial court honored defendant's request, charging:

> And so I am going to require you to stay on the case and to deliberate with other jurors with a view towards reaching a verdict in this if one can be reached without doing violence to your individual judgments. I will say to you, as well as to other jurors, that you have a duty to consult with one another, to debate your views and your contentions and your disagreements and attempt, as best you can, to reach a verdict in the case without doing violence to your individual judgment.

[16] Defendant next contends the trial court, upon denying Ms. Smith's request for excusal, committed prejudicial error when it advised the jury that "five weeks of work would go down the drain" if a mistrial were declared. Inasmuch as no objection to this portion of the charge was lodged at trial, the issue, assuming error, is whether there is "plain error." *See State v. Syriani*, 333 N.C. 350, 400, 428 S.E.2d 118, 146, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 341 (1993), *reh'g denied*, —— U.S. ——, 126 L. Ed. 2d 707 (1994).

In *State v. Barton*, 335 N.C. 696, 702-03, 441 S.E.2d 295, 298 (1994), we held:

> [T]o rise to the level of plain error, the error in the instructions must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). Stated another way, the error must be one "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

We need not therefore determine whether the trial court's comment offended the prohibition against advising juries of wasted judicial resources arising from mistrials in criminal cases, *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980). Considering the trial court's full instruction, which repeatedly advised the jurors that, while deliberating, they were not to agree to a verdict that would violate any juror's individual judgment, we are confident the trial court's isolated comment had no probable impact on the jury's verdict and did not deprive defendant of due process.

This assignment of error is, therefore, overruled.

Sentencing Proceeding

VI.

Defendant brings forward five assignments of error, relating to his capital sentencing proceeding.

At the sentencing hearing, the State relied on evidence submitted in the guilt-innocence proceeding. In addition, the State offered evidence that defendant had been convicted in 1983, on a plea of guilty, of the kidnapping and robbery of Hensley Ross and had been imprisoned until July 1987. Ross testified describing the incident.

Defendant's evidence consisted primarily of the testimony of his mother. According to her, defendant was the third of six children. His father drank, was a poor provider and left the home when defendant was four years old. Defendant grew up in a run-down farmhouse with no running water and no bathroom. At the age of fifteen, defendant attended Farmville Central High School where he made barely passing grades. In the ninth grade he was sent to a sheltered workshop for the handicapped and retarded. He dropped out after nine months and took odd jobs on a farm. He left home at around age seventeen. Defendant had never exhibited any violence toward his family mem-

bers, his girlfriends or the other children at the sheltered workshop. School records indicated defendant had an overall IQ of 71 in 1974, and 60 in 1979. A vocational rehabilitation evaluation performed in 1985 showed an overall IQ of 70 and a verbal IQ in the mild retardation range.

In rebuttal the State offered the testimony of Chief William Waters of the Farmville Police Department: He had observed violent behavior by defendant. On one occasion, he had answered a call and found defendant holding a long-bladed knife in front of another officer. At the time, defendant was not yet sixteen years old. Defendant had been implicated in cases involving stealing and forgery and had a reputation in Farmville for violence.

In surrebuttal, defendant offered the testimony of the jail supervisor in Wayne County that defendant had been a model prisoner while awaiting trial and had never caused problems.

The trial court submitted and the jury found three aggravating circumstances: "Defendant had been previously convicted of a felony involving the use of violence to the person," N.C.G.S. § 15A-2000(e)(3) (1988); the murder "was committed for pecuniary gain," N.C.G.S. § 15A-2000(e)(6); and the murder "was especially heinous, atrocious, or cruel," N.C.G.S. § 15A-2000(e)(9). The trial court submitted and the jury found the "catch-all" mitigating circumstance, that there exists "any other circumstance arising from the evidence which the jury deems to have mitigating value," N.C.G.S. § 15A-2000(f)(9). The trial court also submitted and the jury rejected the following eight nonstatutory mitigating circumstances:

> Defendant was reared by a hard-working mother as one of six children and worked to help out the family while at home;
>
> Defendant has adjusted well to confinement and has been a model detainee at the Wayne County Jail;
>
> Defendant pled guilty to the crimes he committed in Pitt County in 1983;
>
> Defendant had been previously diagnosed as having a mild range of mental retardation, is on the borderline range of intelligence and the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law may have been impaired;

Defendant was removed from the public school system and placed in a Sheltered Workshop in Pitt County because of his learning disabilities;

Defendant is the product of a broken home and was never able to establish a relationship with his father;

Defendant is considerate and loving to his mother and siblings; and

Defendant cooperated with law enforcement officials in the acquisition of his personal property used as evidence.

The jury found unanimously beyond a reasonable doubt that the mitigating circumstance found was insufficient to outweigh the aggravating circumstances found and that the aggravating circumstances found were sufficiently substantial, when considered with the mitigating circumstances, to call for imposition of the death penalty.

A.

[17] Defendant first contends the trial court's sentencing instructions were erroneous because they required the jury to find both that the proffered nonstatutory mitigating circumstances existed and had mitigating value before considering these circumstances in the final balancing process on issues three and four.[7]

Defendant's contention is contrary to law. While a juror may not be precluded from considering evidence proffered by defendant as a

7. The four issues submitted to the jury were as follows:

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

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 circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found?

Issue Four:

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?

basis for a sentence less than death, *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978); *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1983); *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), a jury is not required to agree with a defendant that the evidence he proffers in mitigation is, in fact, mitigating, *Raulerson v. Wainwright*, 732 F.2d 803, 807, *reh'g denied*, 736 F.2d 1528 (11th Cir.), *cert. denied*, 469 U.S. 966, 83 L. Ed. 2d 302 (1984), unless the legislature has declared it to be mitigating as a matter of law. *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988), *sentence vacated*, 494 U.S. 433, 108 L. Ed. 2d 602 (1990), *on remand*, 327 N.C. 473, 397 S.E.2d 226 (1990), *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991). In *Fullwood*, we stated:

> It is, however, for the jury to determine whether submitted non-statutory mitigating circumstances have mitigating value. The "catch-all" provision for mitigating circumstances includes those circumstances which are not listed as statutory mitigating circumstances—"[a]ny other circumstance[s] arising from the evidence *which the jury deems to have mitigating value.*" N.C.G.S. § 15A-2000(f)(9) (1988) (emphasis added). The court must submit to the jury the non-statutory mitigating circumstances which the defendant requests if they are "supported by the evidence, and . . . are such that the jury could *reasonably* deem them to have mitigating value." *State v. Pinch*, 306 N.C. [1,] 26, 292 S.E.2d [203,] 223 [1982] (quoting *State v. Johnson*, 298 N.C. 47, 72-74, 257 S.E.2d 597, 616-17 (1979)) [,*cert. denied*, *Smith v. North Carolina*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *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).] The jury only "finds" a non-statutory mitigating circumstance if it finds that the evidence supports the existence of the circumstance *and* if it deems it to have mitigating value. . . . Although evidence may support the existence of the non-statutory circumstance, the jury may decide that it is not mitigating. Therefore, the court did not err in denying defendant's requested instruction that if the jury found any nonstatutory mitigating circumstances, it must give them some mitigating value.

Id. at 396-97, 373 S.E.2d at 533-34 . *See also State v. Huff*, 325 N.C. 1, 59, 381 S.E.2d 635, 669 (1989) ("before the jury 'finds' a nonstatutory mitigating circumstance, it must make two preliminary determinations: (1) That the evidence supports the existence of the circum-

stance and (2) that the circumstance has mitigating value."). Significantly, in *McKoy v. North Carolina*, which held North Carolina's unanimity requirement for finding a mitigating circumstance unconstitutional, the Court recognized without criticism the following statutory procedure:

> In North Carolina's capital sentencing scheme, if the jury finds a statutory mitigating circumstance to be present, that circumstance is deemed to have mitigating value as a matter of law. *State v. Stokes*, 308 N.C. 634, 653, 304 S.E.2d 184, 195 (1983). For nonstatutory mitigating circumstances, the jury must decide both whether the circumstance has been proved and whether it has mitigating value. *See State v. Pinch*, 306 N.C. 1, 26, 292 S.E.2d 203, 223, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622, 103 S.Ct 474 (1982), citing *State v. Johnson*, 298 N.C. 47, 72-74, 257 S.E.2d 597, 616-617 (1979).

McKoy v. North Carolina, 494 U.S. 433, 441 n.7, 108 L. Ed. 2d 369, 379 n.7, *on remand*, 326 N.C. 592, 391 S.E.2d 815 (1990), *subsequent opinion*, 327 N.C. 31, 394 S.E.2d 426 (1990).

The trial court's instructions regarding the nonstatutory mitigating circumstances were proper, and defendant's assignment of error is overruled.

B.

[18] By his next assignment of error, defendant contends the trial court committed prejudicial error in its instructions to the jury relating to the aggravating circumstance that defendant had previously been convicted of a felony involving the use of violence to the person. N.C.G.S. § 15A-2000(e)(3) (1988). The trial court's instructions were as follows:

> Number one, had defendant been previously convicted of a felony involving the use of violence to the person?
>
> I instruct you, ladies and gentlemen, that robbery is by definition a felony involving the use of violence to the person. A person has been previously convicted if he has been convicted and not merely charged and if his conviction is based on conduct which occurred before the evidence out of which this murder arose. If you find from the evidence, beyond a reasonable doubt, that on or about the alleged date the defendant had been convicted of robbery and that the defendant acted in order to accom-

> plish his criminal purpose *and that the defendant killed the victim after he committed the robbery*, you would find this aggravating factor and would so indicate by having your Foreman write, yes, in the space after this aggravating circumstance on the Issues and Recommendation Form.
>
> If you do not so find or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance and will so indicate by having your foreman write, no, in that space.

(Emphasis added). Defendant contends the jury could have misconstrued the italicized portion of the instruction as being an instruction on the course-of-conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11), which was not submitted.[8] Defendant cites no authority and makes no argument in his brief on this point other than to state his contention and assert that the jury could have been confused by the instruction.

There was no objection to this instruction at trial and we are confident no plain error was committed. Indeed, properly understood, the instruction is correct. It merely tells the jury that the robbery conviction, in order to be an aggravating circumstance, must have preceded the murder for which defendant had been found guilty. *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979). Since the trial court dismissed the armed robbery charge, originally joined with the murder and other felony charges, and did not submit it to the jury as a separate offense, the jury most probably understood the reference to the robbery to mean the robbery of Hensley Ross. While the instruction is not a model of clarity, we believe it did not amount to plain error, *i.e.*, error which probably affected the outcome and which denied defendant due process.

C.

[19] Defendant next contends the trial court erred in submitting defendant's borderline retardation as a nonstatutory mitigating circumstance rather than the statutory impaired capacity mitigating circumstance, N.C.G.S. § 15A-2000(f)(6).

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8. This aggravating circumstance is as follows: "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." N.C.G.S. § 15A-2000(e)(11).

Defendant submitted a written request for mitigating circumstances which included the following: "The Defendant is in the borderline range of intelligence." No request was made for an instruction on the statutory 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 the law was impaired." N.C.G.S. § 15A-2000(f)6) (1988). Counsel for the State informed the trial court it had no objection to any of the requested instructions, but stated, "I think that one about mental state, I think you may need to satisfy yourself about whether or not you want to consider that, the border range of intelligence, considered that with maybe one of the statutory mitigating circumstances . . . ." The trial court submitted the following mitigating circumstance:

> (4) The Defendant has been previously diagnosed as having a mild range of mental retardation, is on the borderline range of intelligence and the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law may have been impaired.

We perceive no error prejudicial to defendant in the submission of this circumstance.

Whether requested or not, the trial court is required to instruct the jury on statutory mitigating circumstances supported by the evidence. N.C.G.S. § 15A-2000(b) (1988); *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 327 N.C. 470, 397 S.E.2d 223 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). The burden of persuading the jury on the issue of the existence of a mitigating circumstance is on the defendant and the standard of proof is by a preponderance of the evidence. *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979).

In *Artis*, the Court held the evidence before the trial court was insufficient to mandate submission of mitigating circumstance (f)(6) even though defendant had presented evidence showing he had a full-scale IQ of 67, indicating upper-range mild mental retardation, and was intoxicated at the time of the murder. *Id.* at 312, 384 S.E.2d at 489. In *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983), where the defendant presented evidence of his retardation, an IQ of 63 and a long history of psychiatric treatment for mental disorder, including a diagnosis of antisocial personality disorder, the Court held the evi-

dence sufficient to mandate instruction on mitigating circumstance (f)(6). *Id.* at 654-55, 304 S.E.2d at 197.

Here, as in *Artis*, the evidence did not mandate submission of the statutory circumstance. The evidence was that defendant was a fair student with average grades until age fifteen, after which he barely passed his classes in school. His mother's instructions to defendant had to be repeated before he would understand her. Defendant's ninth-grade school year at Farmville Central High School was interrupted so that he could attend a sheltered workshop in Greenville for the handicapped and retarded. Defendant remained at the workshop in Greenville for nine months when he dropped out and began working on a farm. Defendant's public school and vocational rehabilitation records indicated "a Verbal IQ of 69 (mild range of mental retardation), a Performance IQ of 71 (borderline range of intelligence) and a Full Scale IQ of 70 (borderline range of intelligence)," thus placing defendant "in the borderline range of intelligence." Overall, defendant possessed a higher IQ than both defendants Artis and Stokes. Here, unlike *Stokes*, there was no evidence of any treatable mental disorder. We therefore hold the trial court did not err in failing to submit the statutory mitigating circumstance defined by N.C.G.S. § 15A-2000(f)(6).

We are also satisfied that this mitigating circumstance as submitted by the trial court was as favorable to defendant as the evidence would permit. It required the jury to find that defendant's mental condition "may have" impaired his capacity. This placed less of a burden of persuasion on defendant than the statutory version of this mitigating circumstance, which would have required the jury to find that defendant's capacity *was* impaired.

D.

[20] Defendant also contends the testimony of William Waters, Chief of the Farmville Police Department, regarding defendant's criminal misconduct was inadmissible. Chief Waters was called as a rebuttal witness for the State. He testified that while defendant was a juvenile he observed defendant at the police station holding a long-bladed knife in front of another officer, that defendant had been implicated in stealing and forgery, and had a reputation in his community for violence. Defendant objected to Waters' testimony regarding defendant's actions before Waters arrived at the station; the objection was sustained and the testimony struck. There was no objection, however, to

Waters' testimony regarding defendant's brandishing the knife and defendant's other misconduct and reputation.

Failure to object to the introduction of evidence normally waives the right to challenge its admission on appeal. *State v. Lucas*, 302 N.C. 342, 275 S.E.2d 525 (1987). In every case where a death sentence has been pronounced, however, it is the practice of this Court to review carefully the entire record to determine if error appears which might have influenced the outcome and unfairly prejudiced defendant. *State v. Warren*, 289 N.C. 551, 223 S.E.2d 317 (1976).

We conclude the admission of Water's testimony was not error. Where a defendant in a capital sentencing proceeding has placed his character at issue by having witnesses testify favorably with regard to it, the State may offer evidence to rebut this testimony. *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981). During direct examination, defendant's mother was asked the following:

> Q. Did Marvin ever get into fights with his brothers and sisters around the house?
>
> A. No, he didn't.
>
> Q. Was he, was he the kind of child who was abusive toward you in terms of talking back to you?
>
> A. No, Marvin never has been abusive to me. He never talked back to me. He always minded me, did what I asked of him.
>
> . . . .
>
> Q. (Mr. Jordan) And based on that are you saying then that based on the time that he lived in your household, his relationship with his friends and other persons in the community did he ever exhibit any violence towards them?
>
> A. No, he didn't. He, he wasn't a violent child. I never had no problem with him fighting or nothing like that. He always got along with all his friends.
>
> . . . .
>
> Q. Has anyone accused him of assaulting his girlfriends?
>
> A. No.
>
> . . . .

Q. And when he would come home to visit with you, did he act differently than he, as a person than he was when he was living with you?

A. No, he didn't.

Q. He was, he was not abusive or did he show signs of using drugs or anything of that nature?

A. No.

Defendant, by eliciting testimony from his mother regarding his character for nonviolence, opened the door to rebuttal testimony from the State regarding this character trait, even if such evidence would have been inadmissible in the State's case in chief. In *Silhan*, we stated:

> Our capital sentencing statute not only permits but requires juries to determine the sentence guided "by a carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused." *State v. Johnson*, supra, 298 N.C. at 63, 257 S.E.2d at 610. This statute, however, limits the state in its case in chief to proving only those aggravating circumstances listed in section (e). Bad reputation or bad character is not listed as an aggravating circumstance. Therefore the state may not in its case in chief offer evidence of defendant's bad character. A defendant, however, may offer evidence of whatever circumstances may reasonably be deemed to have mitigating value, whether or not they are listed in section (f) of the statute. *State v. Johnson*, [] 298 N.C. at 72-74, 257 S.E.2d at 616-617. Often this may be evidence of his good character. *Id.* The state should be able to, and we hold it may, offer evidence tending to rebut the truth of any mitigating circumstance upon which defendant relies and which is supported by the evidence, including defendant's good character. Here, despite defendant's contentions to the contrary, he did offer evidence of his good character. It is true that the evidence was not cast in terms of defendant's reputation in his community. Nevertheless it was evidence tending to show defendant to be, generally, a good person by those most intimately acquainted with him. In face of this evidence, the state was entitled to show *in rebuttal* that defendant's reputation among others familiar with it was not good. Both the state and defendant are entitled to a fair sentencing hearing, and the jury is entitled to have as full a picture of a defendant's char-

> acter as our capital sentencing statute and constitutional limitations will permit.

Id. at 273, 275 S.E.2d at 484.

Evidence Rule 609, relied on by defendant, is inapplicable. Rule 609 governs the use of juvenile adjudications for purposes of impeaching the credibility of a witness. N.C.G.S. § 8C-1, Rule 609(d) (1992); *State v. Whiteside*, 325 N.C. 389, 383 S.E.2d 911 (1989). Here, the testimony of Waters was not offered to impeach the credibility of a witness; it was offered to rebut defendant's evidence that he was not a violent person. It was, therefore, admissible under the rationale of *Silhan*. *See also* N.C.G.S. § 8C-1, Rule 405(b). Defendant's assignment of error is overruled.

E.

[21] Defendant next contends the trial court erred in submitting the statutory aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9). Defendant argues (1) the aggravating circumstance is unconstitutionally vague, and (2) it is not supported by the evidence. We disagree.

This Court previously has held that N.C.G.S. § 15A-2000(e)(9) is neither unconstitutionally vague nor overbroad. *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (1988), *judgment vacated and remanded on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988), *on remand*, 323 N.C. 622, 374 S.E.2d 277 (1988), *judgment vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 329 N.C. 662, 407 S.E.2d 218 (1991).

Furthermore, the evidence in the instant case was sufficient to warrant its submission. In *State v. Artis*, 325 N.C. at 316-17, 384 S.E.2d at 492, we held:

> [T]his aggravating circumstance is appropriate when the level of brutality involved exceeds that normally found in first-degree murders or when the murder in question is conscienceless, pitiless or unnecessarily torturous to the victim. *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984); *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979). It also arises when the killing demonstrates an unusual depravity of mind on the part of the defendant. *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984). We have identified two of the types of murders which meet the above criteria: (1) those that are physically agonizing or otherwise dehumanizing to

the victim, and (2) those that are less violent but involve the infliction of psychological torture. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 [(1983)].

When determining whether the evidence is sufficient to submit an aggravating circumstance, the evidence must be considered in the light most favorable to the State. *State v. Huff*, 325 N.C. at 55, 381 S.E.2d at 666. Here, the victim was sixty-eight years old at the time of the murder. Age is a factor to be considered in determining whether to submit this aggravating circumstance. *Id.* at 56, 381 S.E.2d at 667. The evidence revealed defensive wounds on the victim's hands and seven areas of injuries to the victim's head. Four of these head injuries would have been sufficient to disorient or confuse the victim, cause moderate pain, but not render him unconscious. The three remaining head injuries, each of which alone could have caused death, exceeded the normal brutality found in first-degree murder cases. The victim could have remained conscious throughout all seven blows and been aware of, while incapable of preventing, his impending death. *See Artis*, 325 N.C. at 318, 384 S.E.2d at 493 (evidence creating inference that victim remained conscious during violent, dehumanizing attack sufficient to support submission of aggravating circumstance (e)(9)); *compare State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984) (multiple gunshots occurred after victim had been rendered unconscious by single gunshot wound; evidence insufficient to support aggravating circumstance (e)(9)).

Defendant's assignment of error is overruled.

Preservation Issues

VII.

[22, 23] Defendant raises two additional issues which he concedes have been recently decided against him by this Court: (1) The trial court erred in denying defendant's motion for a bill of particulars on the aggravating circumstances to be relied on by the State on the grounds this deprived defendant of his federal and state constitutional right to notice of the charges against him and adequate time to prepare his defense; and (2) the North Carolina Death Penalty Statute, N.C.G.S. § 15A-2000, and consequently the death sentence in this case, is unconstitutional, is imposed in a discriminatory manner, is vague and overbroad, and involves subjective discretion, all in violation of the Eighth and Fourteenth amendments to the United States

Constitution and Article I, sections 19 and 27 of the North Carolina Constitution.

As defendant concedes, we have considered and rejected these arguments in earlier cases. *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981) (no constitutional right to bill of particulars on aggravating circumstances upon which State intends to rely), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983); *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600 (1991) (death penalty statute neither unconstitutionally vague nor overbroad and not applied in discriminatory and discretionary manner), *cert. denied*, —— U.S. ——, 116 L. Ed. 2d 232 (1991). We decline to depart from these prior holdings. Therefore, we overrule these assignments of error.

Proportionality Review

VIII.

[24] Having found no error in the guilt and sentencing phases of defendant's trial, we next are required by statute to review the entire record and determine: (1) Whether the evidence supports the aggravating circumstances found by the jury; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. Moore*, 335 N.C. 567, 614, 440 S.E.2d 797, 824 (1994), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 63 USLW 3265, *reh'g denied*, —— U.S. ——, —— L. Ed. 2d ——, 63 USLW 3422 (1994); *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 29 895, *reh'g denied*, —— U.S. ——, 129 L. Ed. 2d 924 (1994).

Defendant was convicted of first-degree murder under the theories of felony murder and premeditation and deliberation. The jury found in aggravation the following circumstances: (1) Defendant previously had been convicted of a felony involving the use of violence to the person; (2) the murder was committed for pecuniary gain; (3) and the murder was especially heinous, atrocious or cruel. The jury considered nine mitigating circumstances and rejected eight. One or more jurors did find the existence of unspecified mitigating circumstances.

We hold the evidence supports the jury's finding of these three aggravating circumstances. On the basis of the record, transcript and

briefs submitted by the parties, we are not able to conclude the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor.

As our final statutory duty of proportionality review, we must determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant. *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). In conducting this proportionality review, we compare similar cases in a pool consisting of

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

Id. 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 *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994), this Court clarified the composition of the pool so as to account for post-conviction relief awarded to death-sentenced defendants:

> 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 107, 446 S.E.2d at 564. "[A] conviction and death sentence affirmed on direct appeal is presumed to be without error, and . . . a post-conviction decision granting relief to a convicted first-degree murderer is not final until the State has exhausted all available appellate remedies." *Id.* at 107 n.6, 446 S.E.2d at 564 n.6.

We have described our general methodology on proportionality review as follows:

> 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).

> 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 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), *on remand*, 330 N.C. 66, 408 S.E.2d 732 (1991); *see also State v. Roper*, 328 N.C. 337, 371-73, 402 S.E.2d 600, 620-21 (discussing process of proportionality review), *cert. denied*, —— U.S. ——, 116 L. Ed. 2d 232 (1991); *State v. Artis*, 325 N.C. at 337-38, 384 S.E.2d at 505 (1989) (same).

While only cases found to be free of error in both the guilt-innocence and penalty phases are included in the pool, the Court is not bound to give citation to every case in the pool of similar cases. *State v. Syriani*, 333 N.C. at 400, 428 S.E.2d at 146.

This Court has held the death penalty to be disproportionate in only seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653; *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). In only two of these, *Stokes* and *Bondurant*, did the juries find the "especially heinous, atrocious, or cruel" aggravating circumstance. That the jury found this circumstance in the instant case distinguishes it from all other cases in which this circumstance was not involved.

There are significant dissimilarities between the present case and *Stokes*. First, Stokes was convicted of first-degree murder solely on the theory of felony murder, whereas here defendant was convicted on theories of both felony murder and premeditation and deliberation. Second, in *Stokes* the jury found only one aggravating circumstance, whereas the jury here found three aggravating circumstances. Third, Stokes's accomplice, who a majority of this Court believed equally culpable, was sentenced to life imprisonment; whereas in the present case defendant acted alone.

There are also significant dissimilarities between the present case and *Bondurant*. In *Bondurant*, the defendant promptly exhibited signs of remorse and concern by seeking medical treatment for the victim immediately after shooting him, whereas here defendant repeatedly and fatally struck the victim with a blunt object and left him helpless and dying on the ground while he resumed efforts at cracking the safe. Also the *Bondurant* jury found only one aggravating circumstance, that the crime was especially heinous, atrocious, or cruel; whereas three aggravating circumstances were found in the present case.

As for the remaining five cases,

> in only one, *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), did the jury find multiple aggravating circumstances. In finding the death sentence in *Young* to be disproportionate, this Court focused on the jury's failure to find either that the murder was committed as part of a course of conduct which included the commission of violence against another person or persons or that the crime was especially heinous, atrocious, or cruel. *McCollum*, 334 N.C. at 241, 433 S.E.2d at 162.

Moore, 335 N.C. at 616, 440 S.E.2d at 825 (1994). In this case the jury found the especially heinous, atrocious or cruel aggravating circumstance, the absence of which the Court noted in *Young*. Although the course of conduct aggravating circumstance was not present here as it was not in *Young*, the jury did find here the prior violent felony aggravating circumstance. In *Young*, the jury found the mitigating circumstance that defendant had no significant history of prior criminal activity.

In comparing the present case to similar cases in the pool, we recognize that

> the factors to be considered and their relevance during proportionality review in a given capital case "will be as numerous and as varied as the cases coming before us on appeal." *Williams*, 308 N.C. at 80, 301 S.E.2d at 355. Therefore, the fact that in one or more cases factually similar to the one under review a jury or juries have recommended life imprisonment is not determinative, standing alone, on the issue of whether the death penalty is disproportionate in the case under review. Early in the process of developing our methods for proportionality review, we indicated that similarity of cases, no matter how many factors are compared, will not be allowed to "become the last word on the subject of proportionality rather than serving as an initial point of inquiry." *Id.* at 80-81, 301 S.E.2d at 356. Instead, we stated plainly that the constitutional requirement of "individualized consideration" as to proportionality could only be served if the issue of whether the death penalty was disproportionate in a particular case ultimately rested upon the "experienced judgments" of the members of the Court, rather than upon mere numerical comparisons of aggravators, mitigators and other circumstances.

State v. Green, 336 N.C. 142, 198, 443 S.E.2d 14, 46-47 (1994), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 63 USLW 3437 (1994). Merely because juries in the past "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.' " *Id.* at 198, 443 S.E.2d at 47 (quoting *McCollum*, 334 N.C. at 242, 433 S.E.2d at 163).

Having reviewed all the cases in the proportionality pool, we find that no case is factually identical to the present case. We conclude, however, that the present case is most analogous to cases in which this Court has held the death penalty to be proportionate. In *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), the defendant killed a convenience store clerk during the commission of a robbery. The defendant shot the clerk six times and discarded the body on a single-lane logging path five miles outside of town. The jury convicted the defendant of first-degree murder and robbery with a dangerous weapon. At sentencing the defendant presented evidence of his close relationship with his mother and of his poor scholastic record. The jury recommended a sentence of death after finding the following aggravating circumstances: Defendant previously had been convicted of a felony involving use or threat of violence to the person; the murder was committed while the defendant was engaged in homicide, rape, robbery, etc.; and the murder was especially heinous, atrocious, or cruel. *Id.* at 71, 337 S.E.2d at 830. *See also State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984) (burglary-murder in which jury found existence of two aggravating circumstances and one or more mitigating circumstances; death sentence proportionate), and *State v. Craig*, 308 N.C. 446, 302 S.E.2d 740 (1983) (robbery-murder in which jury found existence of one mitigating circumstance and three aggravating circumstances—the murder was committed for pecuniary gain, was especially heinous, atrocious, or cruel, and was part of course of conduct including other crimes of violence against other persons; death sentence proportionate), *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983).

Thus the present case has similarities to cases in which we previously have upheld the death penalty, and is dissimilar to cases in which we have held the death penalty disproportionate. Our review of other cases in the proportionality pool does not reveal that jurors have consistently returned life sentences in cases like this one. We conclude, therefore, that the sentence of death is not disproportionate.

We hold defendant received a fair trial free from prejudicial error and that the resulting death sentence was not disproportionate and should be left undisturbed.

NO ERROR.

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

STATE OF NORTH CAROLINA v. KENNETH BERNARD ROUSE

No. 120A92

(Filed 30 December 1994)

1. Jury §§ 223, 226 (NCI4th)— capital trial—propriety of excusing juror for capital punishment views—refusal to permit questioning by defendant

The trial court did not abuse its discretion in determining that a prospective juror's death penalty views would prevent or substantially impair her from performing her duties as a juror in a capital trial where the juror's entire voir testimony reveals that she had religious beliefs or scruples against capital punishment which caused her to "lean toward not believing in the death penalty"; she responded "I think I would" when asked whether she would automatically vote against the death penalty; she later stated that she didn't believe she "could vote for the death penalty"; and when asked whether her feelings toward the death penalty would "prohibit or foreclose" her from considering the death penalty, she responded, "I think it would." Furthermore, the trial court did not err by excusing the juror for cause without permitting defendant to question her about her ability to impose the death penalty where the record does not indicate that the juror would have responded differently to the dispositive questions had defendant questioned her.

Am Jur 2d, Jury § 290.

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

2. Jury § 261 (NCI4th)— capital case—peremptory challenge—death penalty reservations—no racial motivation

The trial court's finding that the prosecutor's peremptory challenge of a black prospective juror in a capital trial was not racially motivated was not clearly erroneous where the prosecutor stated that the juror was challenged because she had reservations about imposing the death penalty; the juror's responses to the prosecutor's questions show that she may have had some reservations about capital punishment which could have affected her decision whether to recommend a sentence of death; even though some of the juror's answers indicated that she could vote

for imposition of the death penalty depending on the evidence, the prosecutor, based on the entire voir dire of the juror, may have had a legitimate "hunch" that her reservations toward the death penalty would affect her sentencing decision; and the record shows that the prosecutor's peremptory challenge of this juror was not inconsistent with his other peremptory challenges.

Am Jur 2d, Jury §§ 233 et seq.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case. 1 ALR2d 1291.

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

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

3. Evidence and Witnesses § 1728 (NCI4th)— exclusion of portion of videotape—failure to object—no plain error

The trial court did not commit plain error in the exclusion without objection of a portion of a police videotape depicting a box behind the door of a convenience store storage room where defendant and the victim's body were found, although defendant contended that this evidence rebutted the State's evidence that defendant was found hiding behind the door and thus acknowledged wrongdoing, where defendant failed to show that the exclusion of this evidence likely affected the outcome of his trial.

Am Jur 2d, Evidence §§ 981 et seq.

Admissibility of videotape film in evidence in criminal trial. 60 ALR3d 333.

4. Criminal Law § 1314 (NCI4th)— capital sentencing—expert testimony—ability to adjust to prison life—mitigating evidence

The trial court erred by refusing to permit a forensic psychiatrist who had conducted an intense investigation into defendant's mental health to state his opinion in a capital sentencing hearing that defendant would adjust well to prison life since such testimony was proper evidence in mitigation. However, this error was harmless beyond a reasonable doubt where (1) this witness was

thereafter permitted to state his opinion that defendant makes his best adjustments in structured and supervised situations, and (2) defendant's other mental health expert was permitted to state his opinion that defendant will adjust well to the discipline and regulation of prison life.

Am Jur 2d, Criminal Law §§ 598, 599.

5. Criminal Law § 172 (NCI4th)— capital sentencing—suicide gesture by defendant—denial of mental exam—hearing on capacity to proceed—substantial compliance with statute

The trial court acted within its discretion under N.C.G.S. § 15A-1002(b)(1) in denying defense counsel's request for a psychological examination of defendant after defendant broke the glass in the door of his holding cell and cut his wrists during a recess in his capital sentencing proceeding where defendant's own expert witness had previously testified that he was competent to stand trial, and the only additional evidence before the court was defendant's suicide gesture. Nor did the court violate N.C.G.S. § 15A-1002(b)(3) by failing to conduct a hearing on defendant's capacity to proceed where defendant never requested a hearing to determine capacity but merely requested that defendant be examined, and there were no new circumstances before the court genuinely calling into question defendant's capacity to proceed. Even if a hearing were required, the trial court substantially complied with N.C.G.S. § 15A-1002(b)(3) where the court called two witnesses to testify to their knowledge of defendant's actions in the holding cell and his physical condition prior to ruling that defendant was competent to proceed; the court had heard considerable testimony by defendant's two mental health experts relating to defendant's mental condition; one expert had testified that defendant was competent to stand trial and that defendant had in the past engaged in suicide gestures aimed at diverting attention or eliciting sympathy; and the court asked whether defendant wanted to introduce evidence but defendant declined.

Am Jur 2d, Criminal Law §§ 95 et seq.

6. Criminal Law § 1349 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances submitted—waiver of error

Defendant waived any error with respect to the nonstatutory mitigating circumstances submitted by the trial court in a capital

sentencing proceeding by expressing approval to the trial court of the nonstatutory mitigating circumstances submitted and failing to express any objection to those circumstances upon invitation by the trial court. N.C.G.S. § 15A-1443(c).

Am Jur 2d, Criminal Law §§ 598, 599.

7. Criminal Law § 454 (NCI4th)— capital sentencing—jury arguments about death penalty—no impropriety

The prosecutor did not improperly express his opinion in a capital sentencing proceeding that defendant should receive the death penalty, did not improperly argue matters outside the record, and did not improperly suggest that the jury was an instrument of the State when he argued that defendant was one of the most brutal, vicious murderers in Randolph County, asked whether any murder was ever sufficient to call for the death penalty "if this isn't one," and stated that the victim's family, a detective and the prosecution had "put faith in you" and "believe you'll do the right thing."

Am Jur 2d, Trial §§ 567 et seq., 572 et seq., 648 et seq., 664 et seq.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

8. Criminal Law §§ 433, 455 (NCI4th)— capital sentencing—jury argument—death penalty as deterrence—characterizations of defendant

It was not improper for the prosecutor to urge the jury to recommend the death penalty in order to deter the defendant from killing again, and the prosecutor's statements that "it's not too late in saving some officers from seeing any other person in this condition" and that the crime was not a "one-shot deal" or a "one-shot robbery" were permissible. Furthermore, the prosecutor's statements describing defendant as a "maniac," a "mean, cold-blooded killer" and a "violent murderer" were not grossly improper as they were fair characterizations of defendant based on the brutality of the crime and were aimed at the penalty sought by the State.

Am Jur 2d, Trial §§ 572 et seq., 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.

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

9. **Criminal Law § 454 (NCI4th)— capital sentencing—jury argument—mere sympathy**

The prosecutor could properly discourage the jury in a capital sentencing proceeding from having its decision affected by mere sympathy not related to the evidence in the case.

Am Jur 2d, Trial §§ 572 et seq.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or consitute denial of fair trial. 40 L. Ed. 2d 886.

10. **Criminal Law § 452 (NCI4th)— capital sentencing—jury argument—mitigating circumstances—no impropriety**

The prosecutor's arguments in a capital sentencing proceeding that certain mitigating circumstances do not "lessen this" communicated to the jury only that the mitigating circumstances did not exist or that the jury should not give those circumstances any mitigating value and could not have caused the jury mistakenly to believe that mitigating circumstances reduced the conviction to second-degree murder. Furthermore, the prosecutor's statement that the mitigating circumstance that "defendant was under the influence of a mental or emotional disturbance" was the same as the circumstance that defendant's capacity "to appreciate the criminality of his conduct [or] to conform his conduct to the requirements of the law was impaired" could not have confused the jury where the jury found one circumstance and rejected the other.

Am Jur 2d, Trial §§ 572 et seq.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or consitute denial of fair trial. 40 L. Ed. 2d 886.

11. Criminal Law § 454 (NCI4th)— capital sentencing—jury argument—Biblical references—no gross impropriety

There was no gross impropriety in the prosecutor's brief Biblical references in his jury argument in a capital sentencing proceeding where his statements were to the effect that the Bible contained arguably conflicting provisions regarding capital punishment and that it was the jury's role to determine defendant's fate depending solely on the law.

Am Jur 2d, Trial §§ 572 et seq.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or consitute denial of fair trial. 40 L. Ed. 2d 886.

12. Criminal Law § 426 (NCI4th)— capital sentencing—jury argument—defendant falling asleep after arrest—no comment on defendant's silence

The prosecutor's statements in his jury argument in a capital sentencing proceeding about defendant's lack of remorse shown by his falling asleep after his arrest were not improper comments on defendant's silence after being given the *Miranda* warnings but were clearly directed toward showing the jury a broader picture of what defendant did after his arrest in order to convince the jury that it should afford no mitigating value to the submitted mitigating circumstance that defendant "cooperated with law enforcement officers to the extent of physically responding to the directions of law enforcement officers."

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.

13. Criminal Law § 427 (NCI4th)— capital sentencing—jury argument—avoidance of responsibility—no comment on assertion of silence at trial

The prosecutor's statements in his jury argument in a capital sentencing proceeding to the effect that defendant had a pattern of denying and avoiding responsibility and that "We're here today, the same situation. Only this time he's not doing it, he's got every-

body else to do it for him" was not an improper comment on defendant's assertion of his right to silence at trial since the overall gist of the prosecutor's comments was that defendant was trying to avoid responsibility for his actions by means of his psychiatric experts. To the extent that the prosecutor's statements could have been interpreted as comments on defendant's silence, they were not grossly improper since there was no "extended reference" to defendant's silence.

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.

14. Criminal Law §§ 1339, 1345 (NCI4th)— capital sentencing—two aggravating circumstances—submission of both not based on same evidence

The trial court did not improperly submit two aggravating circumstances based on the same evidence in a capital sentencing hearing when it submitted the circumstance that the murder was especially heinous, atrocious, or cruel and the circumstance that the murder was committed during the course of the felonies of armed robbery and attempted first-degree rape since the evidence establishing the first circumstance concerned the brutality of the murder, none of this evidence was necessary to establish the felonies used for the circumstance that the murder was committed during the course of another felony, and there was substantial other evidence supporting that circumstance.

Am Jur 2d, Criminal Law §§ 598, 599.

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

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

15. Criminal Law § 1320 (NCI4th)— capital sentencing—submission of two mitigating circumstances—failure to instruct not to consider same evidence—no plain error

The trial court did not commit plain error by failing to instruct the jury in a capital sentencing proceeding *ex mero motu* that it should not consider the same evidence for both the heinous, atrocious, or cruel and commission of the murder during the course of other felonies aggravating circumstances because defendant failed to show that any error in the trial court's failure to so instruct likely affected the outcome of the trial in light of the severity of the murder, including the multiple stab wounds and the victim's suffering, and the fact that there was independent evidence supporting each aggravating circumstance.

Am Jur 2d. Trial §§ 1441 et seq.

16. Criminal Law § 1355 (NCI4th)— capital sentencing—mitigating circumstance—no significant criminal history—insufficient evidence

Evidence that defendant's blood alcohol level was .19 at the time of an accident, that he lost his driver's license, that defendant resisted arrest after a suicide attempt, and that defendant used illegal drugs over a number of years did not require the trial court to submit the mitigating circumstance of "no significant history of prior criminal activity" where the references to prior criminal activity were cursory and unsubstantiated and were elicited in contexts which the jury would not have considered as bearing on this mitigating circumstance or on defendant's character.

Am Jur 2d, Criminal Law §§ 598, 599.

17. Criminal Law § 1325 (NCI4th)— capital sentencing—consideration of mitigating circumstances—instructions using "may"

The jury in a capital sentencing proceeding was not given the discretion to disregard mitigating circumstances found in Issue Two by the trial court's pattern instruction on Issue Three, whether the mitigating circumstances found by one or more of the jurors are insufficient to outweigh the aggravating circumstances found, and its instruction on Issue Four, whether the aggravating circumstances found are sufficiently substantial to call for imposition of the death penalty when considered with the

mitigating circumstances, that each juror "may consider any mitigating circumstance or circumstances that the juror determines exists by a preponderance of the evidence in Issue Two" where other provisions of the pattern jury instructions made it clear that a juror was required to consider any mitigating circumstance that juror found to exist in Issue Two.

Am Jur 2d, Trial §§ 1441 et seq.

18. Criminal Law § 1325 (NCI4th)— capital sentencing—consideration of mitigating circumstances—instructions—use of "should" and "would"

The trial court did not err by instructing the jury on Issue Two in a capital sentencing proceeding, whether certain submitted mitigating circumstances existed, that the jury "should" consider whether a circumstance existed and that it "would" find that circumstance if the evidence supported it and if, with respect to nonstatutory circumstances, it had mitigating value, rather than instructing that it "must" give such consideration, since the clear import of the court's instruction was that the jury had a duty to consider each mitigating circumstance submitted.

Am Jur 2d, Trial §§ 1441 et seq.

19. Criminal Law § 1363 (NCI4th)— capital sentencing—consideration of other mitigating circumstances—instructions—use of "may"

The trial court did not err by instructing the jury in a capital sentencing proceeding that it "*may* consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value."

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

20. Criminal Law § 1360 (NCI4th)— capital sentencing—impaired capacity mitigating circumstance—instructions — erroneous statement—no plain error

Although the trial court's statement in its instructions on the impaired capacity mitigating circumstance that the jury would have to find that defendant suffered from a personality disorder and had consumed alcohol and cocaine before the killing in order to find the existence of this circumstance may have been misleading when considered in isolation, this statement was not

plain error in light of the trial court's entire impaired capacity instruction which did not require defendant to establish both a personality disorder and intoxication in order for the jury to find this circumstance, the jury's finding that defendant was under the influence of an emotional disturbance, and the brutality of the killing, since any error in this one statement of the instruction had no probable effect on the outcome of the sentencing proceeding.

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.

21. Criminal Law § 1362 (NCI4th)— capital sentencing—age of defendant—conflicting evidence—determination of mitigating value—proper instruction

Unless a defendant's age has mitigating value as a matter of law, a juror need consider defendant's age as mitigating only if that juror finds by a preponderance of the evidence that defendant's age has mitigating value. Thus, where the evidence was contradictory as to whether defendant's age had mitigating value, the trial court properly instructed the jurors that it was within their province to determine whether defendant's age had mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

22. Criminal Law § 1354 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—uncontradicted evidence—finding of mitigating value not required

Since the jury could reject any of the submitted nonstatutory mitigating circumstances on the basis that they had no mitigating value, defendant is not entitled to a new capital sentencing proceeding on the basis of the jury's rejection of certain nonstatutory mitigating circumstances even if those circumstances were supported by substantial, credible, and uncontradicted evidence.

Am Jur 2d, Criminal Law §§ 598, 599.

23. Criminal Law § 1360 (NCI4th)— capital sentencing—impaired capacity mitigating circumstance—uncontradicted evidence—rejection by jury

Although testimony by defendant's two mental health experts in support of the impaired capacity mitigating circumstance was uncontradicted and would have supported a finding by the jury that the circumstance existed, the jury could reject this circumstance on the ground that it did not find the evidence of the mental health experts credible or convincing. A capital sentencing jury is not required to accept the existence of any particular statutory or nonstatutory mitigating circumstance because the evidence of that circumstance is uncontradicted.

Am Jur 2d, Criminal Law §§ 598, 599.

Comment Note.—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

24. Criminal Law § 1349 (NCI4th)— capital sentencing—statutory mitigating circumstances—directed verdict

A defendant may be entitled to a directed verdict on the existence of a statutory mitigating circumstance if the evidence in support of the circumstance is substantial, manifestly credible and uncontradicted.

Am Jur 2d, Criminal Law §§ 598, 599.

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

A sentence of death imposed upon defendant for first-degree murder was not disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, where the jury found as aggravating circumstances that the murder was heinous, atrocious or cruel and that it was committed during the commission of the felonies of attempted rape and attempted armed robbery; the jury found defendant guilty based on felony murder and premeditation and deliberation; and the evidence showed that defendant stabbed the victim at least seventeen times with a butcher knife; the butcher knife remained in the victim's neck up to the handle; the victim had numerous bruises and several veins and arteries were severed; the victim suffered some fifteen minutes in this condition; and the victim was found lying in a pool of her own blood.

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 MEYER concurs in the result.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment sentencing defendant to death entered by Johnson (E. Lynn), J., at the 9 March 1992 Criminal Session of Superior Court, Randolph County. Motion to bypass Court of Appeals as to defendant's non-capital convictions allowed 16 March 1993. Heard in the Supreme Court 7 December 1993.

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

Andrew O. Whiteman, Robin Adams Anderson, and John R. Rittelmeyer for defendant-appellant.

EXUM, Chief Justice.

On 22 April 1991 defendant was indicted for first-degree murder and armed robbery of Hazel Colleen Broadway; on 6 January 1992 he was indicted for first-degree rape of Broadway. He was tried on all charges on 9 March 1992. On 23 March 1992 a jury found him guilty of first-degree murder on theories of premeditation and deliberation and felony murder. It also found him guilty of robbery with a dangerous weapon and attempted first-degree rape. At the sentencing proceeding the jury, after hearing additional evidence, recommended the death penalty. Defendant was then sentenced to death for first-degree murder, forty years imprisonment for armed robbery, and twenty years for attempted first-degree rape.

I.

The State's evidence at the guilt-innocence proceeding showed as follows:

On 16 March 1991, a Saturday, at 10:30 p.m. Andrew Surratt entered a convenience store, The Pantry, in Asheboro, and noticed that a cigarette stand was knocked over and that cigarettes were scattered about the floor. He called out for the clerk but heard no response. He left and called the police from a pay phone nearby.

Several officers soon arrived at The Pantry. Officer Mark Hinshaw of the Asheboro Police Department responded to the call and arrived at The Pantry at 10:39 p.m. He checked the aisles and found nothing suspicious. He heard a muffled sound coming from a storage room. He and Sergeant York, who had arrived at the scene, entered the room where they found defendant against a wall. Hinshaw aimed his gun at defendant, and defendant said, "I ain't got nothing, man."

Defendant had blood on him, especially on the front of his shirt, his pants, his hands, his waist, his legs and his underwear. There were abrasions on his knees. His pants were unzipped but fastened at the top. His belt was hanging off. Hinshaw ordered defendant to freeze and pinned him behind the door. Defendant was then handcuffed and taken out of the room. Lieutenant Charles Bulla searched defendant in the store and found in defendant's pocket three rolls of pennies in a plastic container. Defendant was then taken away. Defendant did not resist the officers at this or any time. No odor of alcohol was found on defendant's breath.

On the floor of the storage room was Hazel Colleen Broadway, lying in a pool of blood. She tried to tell Hinshaw something but soon died. Broadway was covered in blood. There were handprints on her body. She was wearing a blouse, and her pants had been pulled down to her feet. Paramedics who had arrived at the scene removed her smock in an attempt to apply cardioelectrodes to her body, at which time they noticed a knife in Broadway's neck. The blade part of the knife was bent in a ninety-degree angle just below the handle.

More officers soon arrived at the scene who surveyed the store and collected evidence. The store was in disarray. A cigarette stand was overturned, and cigarettes were strewn about the floor. The cash register was turned sideways. Two empty rolls for pennies were on the floor. There was some other debris on the floor beside a trash can and some other penny rolls which seemed to have been knocked out of the safe. The bar stool behind the cash register had some blood on it. There were also spots of blood near the cash register.

Forensic serologist Lucy Milks concluded that the blood on defendant's hands, shirt and underwear was consistent with samples of blood taken from the victim. The blood on his pants was not. She found no spermatozoa in the vaginal, rectal or oral smears of the victim. She also did not find semen on the victim's clothing. Forensic chemist Glenn Parham tested defendant for the presence of drugs but found none.

Debra L. Radisch, Associate Chief Medical Examiner of North Carolina, concluded that the victim died as a result of blood loss caused by a stab wound to the left neck, severing the carotid artery and jugular vein. A person could live ten to fifteen minutes after being stabbed in that location. In addition to the lethal knife wound, there were numerous other wounds to the victim including bruises, stab wounds and abrasions to her neck, chest, stomach, arms, shoulders, thighs, knee, palm, thumb, back, and elbow. Many of these were consistent with a sharp cutting instrument. Other injuries were consistent with a blunt instrument. No injuries were found on the victim's genital and rectal areas.

Robert E. Neill of the SBI crime laboratory, an expert in hair examinations, found one pubic hair from a black person in the pubic combings taken from the victim. This hair was microscopically consistent with a sample taken from defendant. A pubic hair found on defendant's undershorts and a pubic hair found on defendant's pants originated from a white person and was microscopically consistent with the victim's hair. Five head hair fragments were found on the victim's thighs and six on her buttocks that originated from a black person. Defendant's pubic hairs were unique when compared to those of other black persons.

Defendant entered evidence relating to his mental condition. Defendant used his school records and testimony from his mother to show the following: Defendant had difficulty in school and was described as being slow. At age fourteen he was struck by a truck and sustained a head injury. Defendant failed the ninth grade and never returned to school. Tests showed his IQ to range between 59 and 80. He often became confused when his mother gave him various tasks, and he was often depressed. In 1983 he was admitted to a hospital for an overdose of Phenergan with Codeine; he was then referred to a mental health clinic. Later he was admitted to the hospital when he slashed his wrists.

Forensic psychiatrist Dr. Robert Rollins, Jr., testified that he diagnosed defendant as having organic personality disorder, which is denoted by impaired brain functioning. This disorder is associated with mood changes, poor impulse control, poor social relationships, suspiciousness and paranoia. Defendant has a history of substance abuse, especially crack cocaine and alcohol. He also diagnosed defendant with mixed personality disorder. As a result of defendant's disorders, he had impaired functioning, such as poor planning and judgment. On 16 March 1991, defendant's ability to make and carry

out plans was impaired. Defendant's IQ tests show that he is between mentally retarded and low average.

On cross-examination it was revealed that Dr. Rollins spoke to defendant on two occasions for a total of 130 minutes. Defendant told Dr. Rollins that on the evening of 16 March 1991 he was using crack cocaine and alcohol. In a report from 1987 defendant indicated that he could make his own decisions and that he was working full time. Rollins characterized defendant's suicide incidents as "gestures," noting that they occurred after family arguments and that the wounds to the wrists were only superficial. Defendant was employed from 1989 to the date of the crime. Defendant was competent to stand trial; he was able to help his attorneys, and he understood what his case was about.

The State then presented several witnesses in rebuttal. A former co-worker testified that defendant performed his job well and that he had no trouble conversing with defendant. A cellmate testified that defendant played chess, talked with other inmates, exercised and read; he acknowledged, however, that defendant "wasn't dealing with a full deck." A former supervisor testified that defendant was a diligent and efficient worker.

Jury Selection Issues

II.

A.

Defendant first argues that the trial court erred in excusing for cause three jurors, each of whom expressed some doubt in his or her ability to recommend the death penalty. In a related argument, he contends the trial court should have permitted him to question each of these jurors further regarding his or her ability to impose the death penalty.

Defendant's strongest argument lies with respect to prospective juror Patricia Allred.[1] On voir dire by the prosecution the following transpired:

1. Defendant also makes reference to the voir dire of prospective jurors Gretna Bonkemeyer and Ronald Griffin. We find, however, that those jurors clearly expressed that they could not impose the death penalty. When asked if they would vote against the imposition of the death penalty without regard to the evidence, they both responded, "yes." Further, the entire exchange with them makes it clear that they were strongly opposed to the death penalty and that those beliefs would have substantially impaired their ability to apply the law. Defendant apparently recognizes the weakness of his argument as to Bonkemeyer and Griffin as he did not include any of their statements in his brief nor does he direct us to their location in the record.

MR. YATES [District Attorney]: . . . The two possible punishments are life imprisonment and the death penalty. Because it is a possible punishment in the case I need to know your viewpoints on the death penalty, if you have ever thought about it. Basically, I need to know, do you have any moral or religious scruples against capital punishment?

MS. ALLRED: That's a tough question. I have thought about it a lot. I lean toward not believing in the death penalty. I don't know that I can say absolutely I don't. I'm not—But I lean toward not.

MR. YATES: At this point I guess it's one of those times in life when you're going to have to answer my question whether you want to or not. So, you would say you have some religious beliefs or scruples against capital punishment?

MS. ALLRED: Yes.

MR. YATES: On account of those scruples or beliefs, would it be impossible under any circumstances or any events for you to return a verdict of guilty as charged without a recommendation of life, imprisonment, [sic] even though the State proved the Defendant's guilt beyond a reasonable doubt? In other words, would you automatically vote against the death penalty?

MS. ALLRED: I think I would.

. . . .

MR. YATES: Would you automatically vote against capital punishment which is the death penalty, despite what the evidence of aggravating factors might be at trial?

MS. ALLRED: I'm not sure.

MR. YATES: Okay. I just sort of need a—I'm not sure—That kind of puts me in a worse position than if you answered yes or no.

MS. ALLRED: I'm just trying to be honest.

MR. YATES: That's fine. We—Some people believe in it and some people don't. At this point it is a possible punishment and only if a juror is willing to consider that punishment are they qualified to serve on the jury involving this.

MS. ALLRED: I don't believe I could vote for the death penalty.

MR. YATES: Are you saying that you would not be in favor of the death penalty under any facts or circumstances, no matter what the facts of the case are?

MS. ALLRED: No, sir.

MR. YATES: State will challenge for cause.

THE COURT: Ms. Allred, let me see if I understand your position. You have indicated to the District Attorney that you have substantial reservations about the death penalty. In the State of North Carolina in a first-degree murder case, as Mr. Yates has previously indicated, if in fact you arrive at the sentencing stage which depends on whether the Defendant is found guilty of first-degree murder or not, our present statutory scheme of things is that in a first-degree murder case it provides that a jury may consider aggravating circumstances and mitigating circumstances that will be offered by the parties in the jury's consideration as to which is the appropriate punishment in this case. As the Trial Judge I will be responsible for giving you certain guidelines to go by in evaluating the evidence. There are only two possible options for the jury to consider, and that will be the death penalty or life imprisonment. I need to determine at this stage whether or not your substantial reservations which you have indicated to Mr. Yates would prohibit or foreclose you considering the death penalty in this case?

MS. ALLRED: I think it would.

At this time the trial court excused Allred for cause. Defense counsel then requested to be allowed to question the juror, which the trial judge denied.

[1] Defendant first argues that the trial court erred in granting the State's request to dismiss Allred for cause. Based on a defendant's right to an impartial jury, a juror may not be excused for cause simply because he "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 784-85, *reh'g denied*, 393 U.S. 898, 21 L. Ed. 2d 186 (1986). A juror may be excused for cause, however, when his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985).

The difficulty of distinguishing between a juror who merely has misgivings against the death penalty and a juror who would be substantially impaired in performing his duties by those misgivings was recognized in *Witt*, in which the Supreme Court stated:

> [M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

Witt, 469 U.S. at 424-26, 83 L. Ed. 2d at 852. Based on the superior vantage point of the trial judge, his decision as to whether a juror's views would substantially impair the performance of his duties is to be afforded deference; and unless a decision one way or the other is required by law, it lies within the ambit of the trial court's discretion. *Id.*; *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 908 (1993); *State v. Cunningham*, 333 N.C. 744, 753, 429 S.E.2d 718, 723 (1993); *State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992).

Considering the exchange among the prosecutor, the trial judge, and prospective juror Allred we find the trial judge did not abuse his discretion in determining that Allred's views would prevent or substantially impair her from performing her duties as a juror. On voir dire she stated, "I don't believe I could vote for the death penalty," and "I think I would [automatically vote against the death penalty]." After the State challenged Allred for cause the judge asked Allred "whether or not your substantial reservations which you have indicated to Mr. Yates would prohibit or foreclose you considering the death penalty in this case." Allred responded, "I think it would."

This voir dire exchange is similar to the one at issue in *Brogden*. In *Brogden* the prospective juror at times indicated that he could vote for imposition of the death penalty where supported by the evidence. *Id.* at 48, 430 S.E.2d at 910-11. He also stated, however, that his feelings toward the death penalty would "partially" impair his performance as a juror and later stated, "To some extent I think I probably won't be [qualified]." *Id.* at 50-51, 430 S.E.2d at 911. We held on those facts the trial judge did not abuse his discretion in removing the juror for cause. *Id.*; *see also id.* at 51-52, 430 S.E.2d at 911-12 (citing cases

affirming trial court's excusal for cause). We therefore reject defendant's argument on this point.

Defendant next argues that Allred's responses were not unequivocal and clear and that he therefore should have been permitted to question Allred further, which would have resulted in Allred answering the dispositive questions differently. Where questioning by the defendant regarding the prospective juror's ability to impose the death penalty likely would have resulted in different responses to the dispositive questions, it is reversible error for the trial court to deny a request for such further questioning. *Brogden*, 334 N.C. at 52, 430 S.E.2d at 912. In the case at hand, however, the record does not indicate that Allred would likely have responded differently had defendant questioned her.

Allred's entire voir dire testimony reveals that she had "religious beliefs or scruples against capital punishment" which caused her to "lean toward not believing in the death penalty." When asked whether she "would . . . automatically vote against the death penalty" she responded, "I think I would." She later stated, "I don't believe I could vote for the death penalty." And finally, when asked whether her feelings toward the death penalty would "prohibit or foreclose" her from considering the death penalty she responded, "I think it would."

We stated in *State v. Oliver*, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981), *appeal after remand*, 309 N.C. 326, 307 S.E.2d 304 (1983):

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

We conclude, in light of Allred's strong responses, defendant has failed to show that further questioning would likely have resulted in different responses. We acknowledge that Allred on occasion vacillated in her responses, but the clear import of her entire testimony was that her reservations about the death penalty would substantially impair her ability to fulfill her duties as a juror. *Compare Brogden*, 334 N.C. at 52, 430 S.E.2d at 912-13 (where prospective juror's responses indicated confusion over prosecutor's questions, and where some of his responses clearly indicated that he could impose

the death penalty depending on the evidence, it was error to deny defendant's request to question juror further).

Defendant's contentions on this assignment are, therefore, without merit.

B.

[2] Defendant next argues the trial court erred in overruling his objections to the State's use of a peremptory challenge on the ground that it was racially motivated.

Eighty-two jurors were excused during jury voir dire. The State and defendant each exercised sixteen peremptory challenges. All but three of the excused jurors were white. Two of these three were excused for cause at the State's request. The third, Sandra Mason, who is black, was peremptorily challenged by the State on the ground that she had reservations about imposing the death penalty.[2] The eventual composition of the jury was all white.

Defendant argues that the State's peremptory challenge of prospective juror Mason violated *Batson v. Kentucky*, 476 U.S. 90, 90 L. Ed. 2d 69 (1986), which holds that it is constitutional error to exclude a juror on the basis of race. Where "a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination," the issue is whether the reason given by the prosecutor was legitimate or merely pretextual. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991); *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991). "Unless a discriminatory intent is inherent in the prosecutor's explanation the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360, 114 L. Ed. 2d at 406. As this determination is essentially a question of fact, the trial court's decision of whether the prosecutor had a discriminatory intent will be upheld unless that finding is clearly erroneous. *Id.* at 369, 114 L. Ed. 2d at 412; *State v. Thomas*, 329 N.C. 423, 432, 407 S.E.2d 141, 148 (1991). In this case the prosecutor offered a race-neutral reason for his challenge; thus the issue is whether the trial court's determination that that reason was legitimate and not pretextual is clearly erroneous.

2. Defendant asserts in his brief that the State also challenged Mason on the basis of her having read about the murder in the newspaper. We believe, however, that although the State made one reference to Mason's having read about the case, a fair reading of the transcript indicates the State challenged Mason exclusively on the basis of her responses regarding the death penalty.

The transcript reveals the reason given by the prosecutor was supported by Mason's responses to his questions. The following exchange occurred on voir dire between the prosecutor and Mason:

> Mr. Yates: First of all, do you have any strong moral or religious scruples or beliefs against capital punishment?
>
> Ms. Mason: Not strong.
>
> Mr. Yates: Not Strong? But you have some beliefs against it?
>
> Ms. Mason: Yes.

In response to further questions Mason indicated that "depend[ing] on the evidence" death was a "possible punishment" and that she would not automatically vote against it. She also indicated that she "could go with the law." After further questioning regarding an article Mason had read on the case and other issues, the trial judge received a phone call. Upon his return, the prosecutor asked Mason:

> Mr. Yates: . . . Did you say you had some problems with the death penalty?
>
> Ms. Mason: You mean voting for it; yes, sir.
>
> Mr. Yates: But you won't say you would rule it out in every case?
>
> Ms. Mason: No.
>
> Mr. Yates: There may be some cases out there in the sun that you would vote for it, but on most cases you would have a problem?
>
> Ms. Mason: Yes.

Regardless of whether these responses are enough to justify a challenge for cause, they clearly show that Mason may have had some reservations about capital punishment which could have affected her decision whether to recommend a sentence of death. *See Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88 (prosecutor's reasons for peremptory challenge need not justify a challenge for cause). Even though some of Mason's answers indicated that she could vote for imposition of the death penalty depending on the evidence, the prosecutor, based on the entire voir dire with Mason, may have had a legitimate "hunch" that her reservations toward the death penalty would affect her decision making. *See Thomas*, 329 N.C. at 432, 407 S.E.2d at 147 (prosecutor may exercise peremptory challenges based on legitimate "hunches" and his past experience).

Despite the testimony in the record supporting the reason given by the prosecutor, defendant attempts to show that the prosecutor did not challenge Mason based on her views about the death penalty by referring to eleven prospective jurors, some of whom were eventually seated, who were not challenged by the prosecutor but expressed some reservation about the death penalty. First, we find that none of these jurors expressed to the same degree as Mason that their feelings about the death penalty would affect their decision whether to recommend that sentence: Ruby Priddy would not "object" to the death penalty if the evidence were there and she "felt real well about it"; Kathryn Byrd "could consider" the death penalty; Randall McGee thought the death penalty was a "just cause" but "only if the party's proven guilty without question about it"; Gladys Fox "believe[d] in the death penalty . . . on occasions." The other jurors expressed even less difficulty in recommending a sentence of death. Thus, defendant has not shown that the prosecutor failed to challenge any juror whose responses were similar to or stronger than those of Mason.

Even if the responses of these eleven jurors were similar to those of Mason, however, that would not in this case demonstrate that the reason given by the prosecutor for challenge was merely pretext. It bears emphasis that in addition to peremptorily excusing Mason the prosecutor also peremptorily challenged fifteen white jurors and challenged for cause several other white jurors.[3] Moreover, several of the white jurors peremptorily challenged by the prosecutor gave responses similar to those of Mason.[4] The Constitution does not require the prosecutor to exercise his peremptory challenges with precise consistency. Moreover, jury selection is "more art than science" and only "[r]arely will a single factor control the decision-making process." *State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990).

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3. We emphasize that exercising some peremptory challenges in a manner which does not discriminate on the basis of race does not correct, or erase, a constitutional violation as to an individual juror. *See Batson*, 476 U.S. at 95, 90 L. Ed. 2d at 87. Those peremptory challenges which are clearly exercised in a non-discriminatory fashion, however, may be some evidence that other challenges were exercised in a non-discriminatory fashion.

4. Prospective juror Siebenhaar, for example, stated, "I believe that the death penalty is needed in some cases, but I'm not really a believer of it." Juror Lucas stated, "I have never really given it a whole lot of thought. I suppose, you know, I could, depending on the circumstances, you know, and how heinous the crime was and so on. I suppose I could do that." The prosecutor expressly stated that Siebenhaar was challenged for his views on the death penalty and while the prosecutor did not give his rea-

Based on the reasons given by the prosecutor, which are supported by the record and not inconsistent with his other peremptory challenges, and based on the entire jury selection process, we conclude the trial court's finding that the prosecutor's challenge of prospective juror Mason was not racially motivated is not clearly erroneous.

Guilt Phase Issue

III.

[3] Defendant argues the trial court erred in excluding a portion of police video tape depicting a box behind the door of the storage room where he and the body of Hazel Broadway were found. He contends the exclusion of this evidence prejudiced his case since it would have tended to rebut the State's evidence that he was found hiding behind the door. Defendant asserts the evidence showing that he was hiding when found was harmful because it indicated an acknowledgment of wrongdoing which negatively affected his defense that he was mentally impaired at the time of the killing.

The record, however, reveals that defendant failed to object to the exclusion of this portion of the videotape and in fact objected to the portion of the videotape showing the storage room. During the *in camera* hearing to determine the admissibility of the videotape, defense counsel objected to the portion of the videotape which began at the storage room, stating, "Your Honor, we object here again for the redundancy and prejudicial and inflaming. The pool of blood there is much larger than it was in the photograph. Obviously, she's still bleeding." During that same portion of the tape, which continued to show the storage room, defense counsel again stated, "Same objection, Your Honor." The transcript reveals no request by defendant to show the portion of the tape depicting the box and no objection to the exclusion of that portion. While it is arguable that any error in the exclusion of the evidence of which defendant now complains was invited error, *see* N.C.G.S. § 15A-1443(c), it is clear that defendant failed properly to object to its exclusion, and thus he must show plain error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Since defendant has not shown that the exclusion of this evidence likely affected the outcome of his trial, his assignment is overruled.

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sons for peremptorily challenging juror Lucas and others, their responses regarding the death penalty, in addition to their other responses, leads to the inference that the prosecutor challenged them based on their tentative responses regarding capital punishment. This is some indication that the prosecutor challenged Mason based on her responses to his questions about the death penalty and not based on Mason's race.

Sentencing Phase Issues

At the sentencing phase the State introduced no evidence. The defendant entered the following evidence:

Dr. Robert Lee Conder, Jr., a clinical neuropsychologist, diagnosed defendant as suffering from organic personalities syndrome, which is characterized by variations in behavioral functioning as a result of a brain malfunction. He also diagnosed defendant with recurrent major depression. His final diagnoses were organic personality disorder or major depression, substance abuse disorder, and mixed personality disorder. On 16 March 1991 defendant had a long-standing mental disease, and he did not understand the nature of his behavior.

Dr. Condor's diagnoses were based on tests and interviews with defendant. He also used defendant's school, hospital and mental health records. Those records reflected that defendant's academic performance was at the lower end of the average to low average, and his verbal intelligence was in the borderline intellectual function. In Asheboro defendant had been found to be learning disabled. Tests revealed defendant's IQ to be 80. In 1985 defendant sustained a head injury. In 1986 he was admitted to the hospital due to an overdose of pills. In 1986 defendant also cut his wrists. At that time he was diagnosed as having recurrent major depression.

On cross-examination it was revealed that defendant stated he used marijuana because it made him feel good. Defendant had been released from out-patient treatment in 1988 because it was felt that his psychological condition had improved. Defendant told Dr. Conder that he used alcohol and cocaine on the evening of 16 March 1991.

Dr. Rollins, who also testified in the guilt phase, testified that on 16 March 1991 defendant had the mental disorders of organic personality disorder, which affects brain function and impairs judgment; mixed substance abuse based on his chronic use of cocaine, marijuana and alcohol; mixed personality disorder reflected by his unstable lifestyle; and borderline intellectual functioning reflected by his low IQ, which is between 70 and 80. On 16 March 1991, defendant's ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was impaired.

On cross-examination Dr. Rollins testified that defendant's suicide incidents were gestures. In school in Asheboro defendant was

performing within normal range in some areas. Between 1989 and 16 March 1991, defendant was working regularly at a job.

Croft Waylon Mangum, director of the Randolph Fellowship Home, Inc., testified that while defendant lived at the House, Mangum observed inconsistent behavioral patterns. Sometimes defendant would follow directions and sometimes he would not; sometimes he would interact with others and sometimes he would not. Defendant preferred to shoot pool and play his guitar rather than do his chores.

Annie Utley Rouse, defendant's mother, testified about defendant's life, focusing on his childhood. Defendant was born in Augusta, Georgia. He was quiet. Defendant's father was abusive toward Annie Rouse. They moved to North Carolina and defendant's parents divorced. Defendant dropped out of school and took a job washing dishes. Defendant's father later shot his mother, for which defendant blamed himself. Defendant once took an overdose of pills and once cut his wrists. Defendant started using marijuana. Defendant got a job and a place to live, but he often lost his wallet and keys. Defendant's friends were younger and used drugs and alcohol. On cross-examination Annie Rouse testified that defendant was never physically abused by his father. In 1988 defendant was doing well and did not need further out-patient treatment. Defendant began a course at a community college and wanted to get his GED.

The court submitted to the jury the following aggravating circumstances:

(1) Was this murder committed by the defendant while the defendant was engaged in the commission of or attempting to commit Robbery With A Dangerous Weapon and attempting to commit First Degree Rape?

ANSWER: _____

(2) Was this murder especially heinous, atrocious or cruel.

ANSWER: _____

The jury answered both questions affirmatively. One or more jurors found the following mitigating circumstances: "This murder was committed while the defendant was under the influence of a mental or emotional disturbance"; "That the Defendant has suffered from a history of depression"; "That upon his arrest, the Defendant cooperated with law enforcement officers to the extent of physically responding to the directives of law enforcement officers"; "That the Defendant was identified

as 'different' by his classmates and co-workers and was often the object of much teasing and joking"; "Any other circumstance or circumstances arising from the evidence which one or more of you deems to have mitigating value." The jury unanimously rejected the following mitigating circumstances: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired"; "The age of the defendant at the time of this murder is a mitigating circumstance"; "That the Defendant suffers from a learning disability"; "That the Defendant has a borderline intellectual function"; "That the Defendant suffers from substance abuse"; "That the Defendant suffered head injuries from various accidents"; "That the Defendant was gainfully employed at the time of the commission of the crimes and has been so employed in the past"; "That the Defendant, as a child, observed verbal and physical abuse of his mother by his father"; "That the Defendant is a child of an alcoholic parent, Willie Herbert Rouse"; "That the Defendant, in the past, has sought help for his psychiatric and substance abuse problems"; "That the Defendant has love for his family"; "That the Defendant was upset when his parents separated."

The jury unanimously found beyond a reasonable doubt that the mitigating circumstances found by one or more jurors were insufficient to outweigh the aggravating circumstances found. It further unanimously found that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstances found by one or more jurors.

IV.

[4] Defendant argues the trial court erred in sustaining an objection to the testimony of Dr. Bob Rollins relating to defendant's ability to adjust to prison life.

> Q. MR. WILLIAMS [Defense Counsel]: Dr. Rollins, based upon your review of Mr. Rouse's medical, psychiatric, educational, and employment records and upon your own evaluation, do you have an opinion as to how Mr. Rouse would adjust to the discipline and regulations of prison life?
>
> A. [Mr. Rollins]: Just fine.
>
> THE COURT: That's been excluded by the Supreme Court. Sustained.

Q. MR. WILLIAMS: Dr. Rollins, based upon your review of the records and your evaluations, do you have an opinion regarding how Mr. Rouse would adjust or need a structured environment of some sort?

MR. YATES: Objection.

THE COURT: Overruled.

A. [Rollins]: Based on what we know of Mr. Rouse's history, just in the past few months, he makes his best adjustments in structured and supervised situations.

We conclude the trial court's ruling excluding Dr. Rollins opinion as to defendant's ability to adjust to prison life was error but the State has shown beyond a reasonable doubt that the error was harmless. N.C.G.S. § 15A-1443(b) (1988).

Evidence of ability to "adjust well to prison life" is proper evidence in mitigation. *State v. Ali*, 329 N.C. 394, 421, 407 S.E.2d 183, 199 (1991). Since the trial court cannot restrict the jury's consideration of "any relevant mitigating evidence," it is required to admit evidence of "defendant's disposition to make a well-behaved and peaceful adjustment to prison life." *Skipper v. South Carolina*, 476 U.S. 1, 4, 7, 90 L. Ed. 2d 1, 6, 8 (1986).

The State does not contest this principle, but instead takes issue with the way in which defendant sought to prove his ability to adjust to prison life. It contends the defendant could have introduced evidence of his past conduct to establish his ability to adjust to prison life, but that he could not offer Dr. Rollins' expert testimony to make that same point since his opinion "was based upon no foundation on the basis of which he was more qualified than the jury to make such a conclusion." The State cites dicta in a footnote in *State v. Pinch* where we said that the psychiatrist's opinion that the defendant would be able to adjust to prison life was properly excluded "because there was an insufficient foundation in the record for a conclusion that he was better qualified to have an opinion on this subject than the jury." 306 N.C. 1, 21-22 n.10, 292 S.E.2d 203, 220 n.10, *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). We question the continued validity of that dicta; and insofar as it is inconsistent with our holding here, it is disapproved. The record in this case indicates that Dr. Rollins was

highly trained and experienced in the field of forensic psychiatry and the trial court accepted Dr. Rollins as an expert in forensic psychiatry. Further, Dr. Rollins interviewed defendant twice, spoke with his family members, reviewed defendant's hospital, mental health, and employment records, and reviewed Dr. Conder's report of defendant's performance on various tests. We believe that Dr. Rollins, a qualified forensic psychiatrist, having conducted an intense investigation into defendant's mental health, could have given expert testimony that would have assisted the jury in determining whether defendant would adjust well to prison life. Thus, it was error to exclude his response to defense counsel's question.

We nevertheless conclude the error in sustaining the State's objection was harmless beyond a reasonable doubt. Immediately thereafter defendant asked Dr. Rollins whether "based on [his] review of the records and . . . evaluations," he "ha[d] an opinion regarding how Mr. Rouse would adjust or need a structured environment of some sort?" An objection to this question by the prosecutor was overruled and Dr. Rollins responded, "Based on what we know of Mr. Rouse's history, he makes his best adjustments in structured and supervised situations." Moreover, the following occurred on direct examination of defendant's other mental health expert, Dr. Robert L. Conder:

> Q. Based on your review of Mr. Rouse's medical, educational and psychiatric records and upon your testing, do you have an opinion of how he would be able to adjust to discipline and regulation of prison life?
>
> A. Yes, I do.
>
> Q. What is that opinion?
>
> A. I think he adjusts well . . . and with external structure he seems to do pretty well.

Because of the testimony of Dr. Rollins and Dr. Conder, which was admitted, we are satisfied the error complained of was harmless beyond a reasonable doubt.

V.

[5] Defendant next argues the trial court erred in denying his request for a psychiatric examination and a competency hearing.

During the sentencing phase of the trial defendant's mother, Annie Rouse, testified about how defendant considered himself a failure. After her testimony the trial court called a fifteen minute recess. During the recess defendant, while handcuffed, broke the glass on the door to his cell, placed his hands through the opening, and cut his wrists on the glass. The court was made aware of the incident, delayed the proceedings, and instructed the bailiff to have a report prepared and have someone available to testify after lunch about defendant's physical condition. The trial court then stated during the recess that defendant:

> placed one or both of his hands or arms through one of the windows located in that holding area and suffered some injury to one or both of his wrist area. For that purpose it is appropriate at this time out of the presence of the jury to make an inquiry in respect to the circumstances dealing with that, and receive any medical information that is appropriate concerning the present situation, medical situation of the Defendant.

The court then, on its own motion, called the bailiff and a nurse from the sheriff's department to testify "concerning the circumstances of the present medical condition of the Defendant." The bailiff essentially testified that when he entered defendant's holding cell he found defendant's wrists bleeding. The nurse testified that she treated defendant near the cell and observed that he had cut one of the arteries on his wrist. She summarized the report made at the hospital to which defendant was taken and described defendant's injury and the treatment given. She was then asked whether she had an opinion "as to whether or not he [defendant] is presently able to continue with the trial of the matter based upon your observations and your nursing experience." She responded, "Yes, sir."

The court then said, "The Court is satisfied with this showing, but I will give either side an opportunity to call additional witnesses if you choose to do so." Defense counsel stated:

> Your Honor's showing at this particular point pertains to the testimony of the nurse as far as his medical condition or pertaining to the physical injuries that he received as a result of placing his wrists through the window. I feel compelled at this point to request the Court to have Mr. Rouse examined from psychological viewpoint [sic] in light of the history of previous suicide attempts as has been testified during the sentencing phase at this proceeding to determine whether or not Mr. Rouse is still of com-

> petent mind to continue through the proceeding as it is now unfolding because of the nature of these proceedings are a critical stage of the proceedings for Defendant. I have not had an opportunity at this particular point to talk with Mr. Rouse or confer with Mr. Rouse. When I went to the jail he had not returned at about quarter till and when I came back up to the courtroom he was not here, and I arrived just shortly before court convened.

The trial court then conversed with defense counsel regarding whether Mrs. Rouse was the defendant's last witness, after which the trial court entered findings regarding defendant's medical condition, findings regarding the incident in the holding cell, and concluded that "as a result of Linda Parrish, Registered Nurse's observations of the Defendant, both before and after the injuries to the Defendant, the Court finds that the Defendant is competent to proceed with the trial and orders the trial to proceed at least at this stage."

We conclude the trial court acted within its discretion in denying defendant's request for a psychological examination. N.C.G.S. § 15A-1002(b)(1) provides that when "the capacity of the defendant to proceed is questioned, the trial court [m]ay appoint one or more impartial medical experts to examine the defendant." Whether the trial court appoints such an expert is within its discretion. *State v. See*, 301 N.C. 388, 394, 271 S.E.2d 282, 285 (1980). In this case, defendant's own expert witness had previously testified that he was competent to stand trial. The only additional evidence before the court at the time it denied the request for a psychological examination was a suicide attempt, or suicide gesture. That one incident, however, did not require as a matter of law that the trial court appoint an expert to evaluate defendant's mental health.

We also conclude the trial court did not violate N.C.G.S. § 15A-1002, which provides:

> When the capacity of the defendant to proceed is questioned, the court . . . [m]ust hold a hearing to determine the defendant's capacity to proceed. If [a mental health] examination is ordered . . ., the hearing must be held after the examination. Reasonable notice must be given to the defendant and to the prosecutor and the State and the defendant may introduce evidence.

Initially, we note that we are skeptical that the defendant's capacity was questioned in a manner which required a hearing. Defendant never requested a hearing to determine capacity, but merely request-

ed that the trial court have defendant examined. One of defendant's mental health experts had previously testified that defendant was competent, and there were no new circumstances before the court genuinely calling into question defendant's capacity to proceed.

Even if a hearing were required, the trial court substantially complied with the statute. Prior to ruling that defendant was competent to proceed, the trial court called two witnesses to testify to their knowledge of defendant's actions in the holding cell and his physical condition. At this time the court had heard considerable testimony by Dr. Rollins and Dr. Condor relating to defendant's mental condition. Dr. Rollins had testified that defendant was competent to stand trial, that he was able to help his attorneys, and that he was aware of what the case was about. Dr. Rollins also testified that defendant had in the past engaged in suicide gestures aimed at diverting attention or eliciting sympathy. The trial court asked whether defendant wanted to introduce evidence, but defendant declined. Based on the trial court's prompt, diligent and thorough action, we conclude that it satisfactorily complied with the requirements of N.C.G.S. § 15A-1002. *See State v. Gates*, 65 N.C. App. 277, 283, 309 S.E.2d 498, 502 (1983) (court complied with 15A-1002 when it conducted a hearing at which defendant was permitted to present evidence bearing on competence; manner of conducting hearing within court's discretion).

VI.

[6] Defendant next argues the trial court erred in refusing to submit mitigating circumstances which he tendered to the court on 14 March 1992, during the sentencing phase of the trial. Specifically, the trial court did not submit: Defendant would adjust well to prison life; defendant had been non-violent since his arrest; defendant experienced academic failures; defendant blamed himself for his father shooting his mother; and defendant had been gainfully employed. Instead of the proposed instruction that defendant "has affection and respect for his mother," the trial court submitted the circumstance that defendant "has love for his family." Instead of separate instructions for defendant's past employment and for his employment at the time of the crimes, the court submitted that defendant "was gainfully employed at the time of the commission of the crimes and has been so employed in the past."

The record reveals, however, that defendant has waived any error with respect to the mitigating circumstances submitted. At the charge conference 24 March 1992, the trial judge stated that he would submit

three statutory mitigating circumstances and thirteen non-statutory mitigating circumstances. He then provided counsel for the State and for defendant with a copy of all circumstances to be submitted, at which time he said:

> THE COURT: . . . Mr. Williams [defense counsel], I'll let you and Mr. Oldham [defense counsel] confer if you wish to do so about the list which has been furnished to you and whether or not there are any other appropriate mitigating circumstances.
>
> MR. WILLIAMS: Your Honor, that looks satisfactory to us.

Administrative matters were then addressed after which the following transpired:

> THE COURT: . . . Based upon [the foregoing], are there any additional requests from the State?
>
> MR. YATES: No, sir; Your Honor.
>
> THE COURT: Mr. Williams, Mr. Oldham?
>
> MR. WILLIAMS: Could we have just a moment, Your Honor?
>
> THE COURT: Yes, we'll be at ease a moment.
>
> MR. WILLIAMS: Did I understand that you're still going to follow the Pattern Jury Instruction 150.10?
>
> THE COURT: Yes, sir.
>
> MR. WILLIAMS: And these will be inserted in the appropriate places?
>
> THE COURT: That's correct. Right. That's correct.
>
> MR. WILLIAMS: Your Honor, this looks satisfactory to the defense.
>
> . . . .
>
> THE COURT: . . . With that, are there any other matters from either side, other than just letting the attorneys review the finished Issues and Recommendations?
>
> MR. OLDHAM: I'm not aware of any, Your Honor.

By expressing approval to the trial court of the nonstatutory mitigating circumstances submitted and failing to express any objection to those mitigating circumstances upon invitation by the trial court, any error in failing to submit nonstatutory mitigating circumstances

was error "resulting from [defendant's] own conduct" and he may not assert that he was prejudiced thereby. N.C.G.S. § 15A-1443(c) (1988). This assignment of error is, therefore, overruled.

VII.

Defendant next argues the trial court erred in failing to intervene *ex mero motu* during the prosecutor's closing arguments. Since defendant made no objection during closing arguments, he must demonstrate that the prosecutor's closing arguments amounted to gross impropriety. *See State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). In making this inquiry it must be stressed that prosecutors are given wide latitude in their argument, *State v. Syriani*, 333 N.C. 350, 398, 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), and that:

> [p]rosecutorial statements are not placed in an isolated vacuum on appeal. Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred. Moreover, it must be remembered that the prosecutor of a capital case has a duty to pursue ardently the goal of persuading the jury that the facts in evidence warrant imposition of the death penalty.

State v. Pinch, 306 N.C. at 24, 292 S.E.2d at 221-22.

[7] Defendant refers to numerous statements made by the prosecutor during closing arguments. He first refers to the following set of statements made by the prosecutor: "Sitting over there is probably one of the most brutal, vicious murderers in the history of Randolph County and Asheboro"; "Is there ever a murder enough to call for the death penalty if this isn't one?"; "He's one of the more brutal murderers ever in Randolph County"; "You're going to have to come out and look at Ms. Broadway's family. They've put faith in you; I've put faith in you, and [Detective] Ricky Wilson has put the faith in you. We've decided on you as jurors. We believe you'll do the right thing."

Defendant contends that in making these statements the prosecutor improperly expressed his opinion that defendant should receive the death penalty, *see* N.C.G.S. § 15A-1230(a), improperly argued matters outside the record, *see id.*, and improperly suggested that the jury is an instrument of the State, *see State v. Brown*, 320 N.C. 179, 203, 358 S.E.2d 1, 18, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

Considering the brutality of the crime and that the State was seeking a recommendation of death, we conclude the prosecutor's statements were not grossly improper. The jury would have understood the prosecutor's remarks to address the severity of the crime before them. *See State v. Johnson*, 298 N.C. at 368, 259 S.E.2d at 761 (Prosecutor said crime was "just about as bad as anything I've ever heard all my life" and that "I think this case, and the facts that you have in front of you now, absolutely and without question call for the imposition of the death penalty"; held, statements were not grossly improper.). Considering the thorough instructions given by the trial court regarding the jury's role in determining whether defendant should be put to death, it would not have understood its function to be merely an extension of the State.

[8] Defendant next points to statements by the prosecutor relating to defendant's dangerous character. The prosecutor said, "It's too late to save Ms. Broadway today. But it's not too late in saving some officers from seeing any other person in this condition that they had to view Ms. Broadway in." He also stated that the crime was not a "one-shot deal" or a "one-shot robbery . . . [t]his is rape" and that the defendant was a "maniac," a "mean, cold-blooded killer," a "violent murderer," and a vicious murderer who "lust[ed] for blood like a jackal eating a rabbit." Defendant argues that these statements were improper because there was no evidence that he had committed any other crime of violence.

It is not improper for the prosecutor to urge the jury to recommend the death penalty in order to deter the defendant from killing again, and thus the prosecutor's statements in that vein were permissible. *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). The statements describing the defendant were not grossly improper as they were a fair characterization of defendant based on the brutality of the crime and they were aimed at the penalty sought by the State. As for the comparison of the defendant to a jackal, the trial court instructed the jury to disregard that statement, and jurors are presumed to follow the instructions given. *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 602 (1993). As for the statements that the robbery was accompanied by a rape, that was consistent with the evidence. *See State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144 (1979).

[9] Defendant next refers to statements by the prosecutor that the jury should not base its decision on mercy or sympathy. He stated, for example, "[your decision is] not based on a sympathy or mercy verdict. It's based on the law" and "[y]ou weigh [aggravating and mitigating] factors and you make a decision based on the law, not on mercy, sympathy, and whatever." While the trial court may not preclude the jury from considering "compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson v. North Carolina*, 428 U.S. 280, 304, 49 L. Ed. 2d 944, 961 (1976), the prosecutor may discourage the jury from having mere sympathy not related to the evidence in the case affect its decision, *State v. Quesinberry*, 325 N.C. 125, 141-42, 381 S.E.2d 681, 691 (1989), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *in light of McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990) (no reversible error in prosecutor telling jury that defendant should receive no mercy). Such statements are consistent with the prosecutor's role in seeking a recommendation of death. *See Pinch*, 306 N.C. at 24, 292 S.E.2d at 221-22 (prosecutor in a capital case "has a duty to pursue ardently the goal of persuading the jury that the facts in evidence warrant imposition of the ultimate penalty").

[10] Defendant next complains of statements by the prosecutor relating to certain mitigating circumstances. Defendant points to the prosecutor's statements "Does [this mitigating circumstance] lessen homicide?," "Why does that [mitigating circumstance] lessen this?," and "That's another mitigating factor? Does that lessen?" and asserts that these statements caused the jury mistakenly to believe that mitigating circumstances reduced the conviction to second-degree murder. We find, however, that the prosecutor's statements communicated to the jury only that the mitigating circumstance did not exist or that the jury should not give that circumstance any mitigating value.

In a related argument, defendant contends the prosecutor confused the jury by stating the mitigating circumstance that "defendant was under the influence of a mental or emotional disturbance" was the same as the circumstance that defendant's capacity "to appreciate the criminality of his conduct [or] to conform his conduct to the requirements of the law was impaired." We conclude the prosecutor's statements would not have caused the jury to be so confused. This conclusion is confirmed by the jury's finding one circumstance and rejecting the other. Defendant also asserts that the prosecutor's statement, "You are going to have to make a decision as to whether you feel [a mental disturbance of the defendant] is a mitigating circum-

stance" would have led the jury to believe that it did not have to give that circumstance any weight. We conclude the prosecutor's statement would have been construed in context as meaning that the jury had to determine whether that circumstance existed. In any event, the prosecutor's statements were not so grossly improper as to warrant a new sentencing proceeding.

[11] Finally, defendant contends that the prosecutor improperly made reference to the Bible. The prosecutor stated:

> The law is clear. This is a terrible, brutal, horrible, especially heinous and atrocious murder, and the law said those are the ones that get the death penalty. And Mr. Oldham [the defense attorney], as I said, may quote the scriptures. The Bible says don't take somebody's life. Well the Bible also says an eye for a eye and a tooth for a tooth. The law is clear. You weigh everything. You do your job.

This Court has disapproved Biblical references where "the arguments were to the effect that the law enforcement powers of the State came from God, and to resist those powers was to resist God." *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989) (citing *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984)), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *in light of McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). In *Laws* we did not find gross impropriety in the prosecutor's numerous references to the Bible where overall "the prosecutor pointed out that the jury's task was to do what was right by man's law." *Id.* at 120-21, 381 S.E.2d at 633. *See also 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) (no gross impropriety in prosecutor's statement that victim was denied opportunity to "get right with the Lord"). In this case, the Biblical reference by the prosecutor was similar to that in *Laws* in that he emphasized that it was the jury's role to apply the law as the court instructed. His statements were to the effect that the Bible contained arguably conflicting provisions regarding capital punishment and that it was the jury's role to determine defendant's fate depending solely on the law. We find no gross impropriety in the prosecutor's brief Biblical reference.

VIII.

[12] Defendant next argues the prosecutor improperly commented on defendant's silence and the trial court erred in failing to intervene *ex mero motu*.

The trial court submitted the mitigating circumstance "That upon his arrest, the Defendant cooperated with law enforcement officers to the extent of physically responding to the directives of law enforcement officers." The prosecutor, in closing, argued that "hold[ing] up his hands and show[ing] the blood that's all over him" was not a matter which should reduce defendant's culpability. He continued:

> And he is so helpful he falls asleep. He's just brutally, viciously killed an innocent person and he is so remorseful he falls asleep. I know it's 6:00 in the morning, but he shows no remorse, no conscience. Just cool, cold, calculated. The blood is still on his hands. All over him. And there he is, he puts his head down and goes to sleep.

Defendant argues that these comments called attention to his exercise of his right to remain silent after arrest.

A defendant's silence after receiving Miranda warnings cannot be used against him as evidence of guilt. *Doyle v. Ohio*, 426 U.S. 610, 611, 49 L. Ed. 2d 91, 94 (1976). The record in this case does not indicate whether defendant received Miranda warnings; but if he did, there was no violation of his right to silence after Miranda warnings since the comments by the prosecutor did not address defendant's silence. Those comments were clearly directed toward showing the jury a broader picture of what defendant did after his arrest in order to convince the jury that it should afford no mitigating value to the submitted circumstance that "the Defendant cooperated with law enforcement officers to the extent of physically responding to the directives of law enforcement officers."

[13] Defendant next contends the prosecutor violated his right to remain silent at trial. The prosecutor argued to the jury that defendant had a pattern of denying and avoiding responsibility. He stated:

> Another avoiding responsibility. Get sympathy. Get out of your troubles. We're here today, the same situation. Only this time he's not doing it, he's got everybody else to do it for him. Let's avoid the responsibility. Let avoid [sic] what took place on March 16th.

The prosecutor may not argue that the accused's silence at trial is evidence of guilt. *Griffin v. California*, 380 U.S. 609, 614-15, 14 L. Ed. 2d 106, 110, *reh'g denied*, 381 U.S. 957, 14 L. Ed. 2d 730 (1965). A prosecutor violates [this rule] if "the language used [was] manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the

accused to testify." *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973), *aff'd*, 417 U.S. 211, 41 L. Ed. 2d 20 (1974).

Applying this test to the prosecutor's comments, we conclude there was no gross impropriety. The overall gist of the prosecutor's comments was that defendant was trying to avoid responsibility for his actions by means of his psychiatric experts. To the extent that the prosecutor's statement could have been interpreted as a comment on defendant's silence, it was not an "extended reference." In *State v. Randolph*, 312 N.C. 198, 205, 321 S.E.2d 864, 869 (1984), the prosecutor, referring to the defendants' flight after the crime, stated, "[the defendants] have not said much more about these affairs, but that was enough. They have spoken elegantly through their flight . . . from the scene." We found no error in the prosecutor's statement as there was no "extended reference" to defendants' silence. *Id.* at 206, 321 S.E.2d at 869. *See also State v. Allen*, 323 N.C. 208, 226, 372 S.E.2d 855, 866 (1988), *sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *in light of McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990) (prosecutor's statement that "[defendant] will hide behind the Constitution of the country that protects us all" not gross impropriety requiring intervention *ex mero motu*).

With regard to this assignment of error, defendant relies heavily on *Lesko v. Lehman*, 925 F.2d 1527, 1540 (3rd Cir.), *cert. denied*, —— U.S. ——, 116 L. Ed. 2d 226 (1991), in which the court held the following language by the prosecutor to violate *Griffin*: "He didn't even have the common decency to say I'm sorry for what I did. I don't want you to put me to death, but I'm not even going to say I'm sorry." The language of *Lesko*, however, was clearly language which would have been interpreted as reflecting defendant's silence. *See also State v. McLamb*, 235 N.C. 251, 257, 69 S.E.2d 537, 541 (1952) (prosecutor's comment that defendant was "hiding behind his wife's coat tail" was improper as it commented on defendant's failure to testify).

These assignments of error are, therefore, rejected.

IX.

[14] Defendant next argues the trial court erred in submitting two aggravating circumstances which defendant contends are duplicative and the trial court erred in not instructing the jury *ex mero motu* that it should not consider the same evidence for both aggravating circumstances.

Defendant was convicted of first-degree murder based on premeditation and deliberation and on the felony-murder rule. The trial court submitted the following aggravating circumstances:

(1) Was this murder committed by the defendant while the defendant was engaged in the commission of or attempting to commit Robbery With A Dangerous Weapon and attempting to commit First Degree Rape?

ANSWER: _____

(2) Was this murder especially heinous, atrocious or cruel?

ANSWER: _____

The first circumstance referred to N.C.G.S. § 15A-2000(e)(5), relating to prior felonies.[5] The jury answered both of these questions "Yes."

It is error to submit two aggravating circumstances resting on the same evidence. *State v. Quesinberry*, 319 N.C. at 239, 354 S.E.2d at 453. Where, however, there is separate evidence supporting each aggravating circumstance, the trial court may submit both "even though the evidence supporting each may overlap." *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993).

A murder is "heinous, atrocious, or cruel" when it is a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Goodman*, 298 N.C. 1, 25, 257 S.E.2d 569, 585 (1979). It can be found where "the level of brutality involved exceeds that normally present in first-degree murder." *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570, 574, 364 S.E.2d 373, 375-76 (1988). A person is guilty of attempted first-degree rape if he attempts to engage in vaginal intercourse with another person by force and against the will of that person and employs or displays a dangerous or deadly weapon. N.C.G.S. § 14-27.2 (1993). "An attempted armed robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result." *State v. Allison*, 319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987); *see* N.C.G.S. § 14-87.

5. We note that the first circumstance submitted by the trial court referred conjunctively to two felonies. While the normal practice would be to refer to alternative felonies disjunctively, the circumstance as submitted is not improper; and we conduct our analysis as though the jury found the existence of both felonies.

We find the trial court did not err in submitting the aggravating circumstances enumerated above. Evidence establishing the circumstance that the crime was especially heinous, atrocious or cruel concerned the brutality of the murder: The defendant stabbed Hazel Broadway at least seventeen times. After the final stab the butcher knife remained in Broadway's neck up to the handle. She had numerous bruises and several veins and arteries were severed. She suffered for fifteen minutes in this condition. Hazel Broadway was found lying in a pool of her blood. She lost one-half of her blood before dying. This is clearly enough evidence to establish that the murder was especially heinous, atrocious or cruel. *See State v. Brown*, 315 N.C. 40, 66-67, 337 S.E.2d 808, 827 (1985), *cert. denied*, 476 U.S. 1185, 90 L. Ed. 2d 733 (1986) (circumstance supported where victim shot six times and suffered intense pain for up to fifteen minutes before dying).

None of this evidence, however, was necessary to establish the felonies used for the aggravating circumstance that the murder was committed during the course of a felony and there was substantial other evidence supporting that circumstance. Evidence supporting the felony of attempted rape was that: Defendant was found behind the door to the storage room with his pants unzipped and his belt hanging off; pubic hairs of Broadway were found on defendant; and pubic hairs of defendant were found on Broadway. Moreover, as rape requires only force and not that the actor actually inflict physical injuries upon the victim to effect the penetration, the mere presence of the knife without considering any physical wounds leads to an inference that defendant used the force required for rape.

Evidence supporting the felony of attempted armed robbery was that defendant was found with at least one roll of coins consistent with the type used by The Pantry and, as with the felony of attempted rape, the presence of the knife which leads to an inference that defendant intended to use force. The fact that defendant actually used the knife to inflict physical injuries was not required to prove attempted armed robbery; defendant's act of going to The Pantry armed with a knife was enough alone to support the element of intent to use force.

The facts of this case are similar to those in *State v. Jennings*, 333 N.C. 579, 430 S.E.2d 188 (1993). In *Jennings* the defendant argued the trial court erred in submitting the aggravating factors that the murder was committed during a felony, namely the sex offense of "attempting the penetration of the anus with an object," and that the

murder was especially heinous, atrocious or cruel. In rejecting this argument, we reasoned that there was "substantial evidence of the especially heinous, atrocious, or cruel nature of the killing apart from the evidence as to whether the murder was committed" during a felonious sex offense. *Id.* at 627, 430 S.E.2d at 213. That other evidence in *Jennings* consisted of the savage beating of the victim, who sustained bruises, cuts and bleeding, and who died slowly after suffering considerable pain. *Id.* at 627, 430 S.E.2d at 213. Defendant's assignment of error on this point is, therefore, rejected.

[15] Defendant also contends that the trial court erred in not instructing the jury that it could not consider the same evidence in support of both aggravating circumstances. Defendant, however, did not request such an instruction and our review is therefore limited to review for plain error, which requires defendant to show that the error was so fundamental that another result would probably have obtained absent the error. *See State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, —— (1983). In light of the severity of the murder, including the multiple stab wounds and the victim's suffering which is almost certain, and the fact that there was independent evidence supporting each aggravating circumstance, defendant has not shown that any error likely affected the outcome. This assignment is therefore without merit.

X.

[16] Defendant next argues the trial court erred in not submitting the mitigating circumstance that "defendant has no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1) (1988).

Defendant points to the following evidence adduced at trial: Defendant's mother testified that defendant sustained a head injury in an automobile accident. On cross-examination it was revealed that defendant was drinking at the time of the accident and that his blood alcohol level was .19 percent. It was also revealed that defendant's mother drove him to work because he "lost his driver's license" and defendant did not take steps to regain his license because he did not want it. Defendant's mother also testified about an attempted suicide. On cross-examination the prosecutor brought out that after the incident defendant resisted arrest, becoming "very combative" with the arresting officer. The jury also heard evidence indicating that defendant used illegal drugs over a number of years.

Defendant contends that based on this evidence the trial court should have submitted the mitigating circumstance of "no significant history of prior criminal activity." We disagree.

The defendant bears the burden of producing "substantial evidence" tending to show the existence of a mitigating circumstance before that circumstance will be submitted to the jury. *State v. Laws*, 325 N.C. 81, 112, 381 S.E.2d 609, 627 (1989), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 503 (1990), *in light of McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). In *Laws* a witness for the defendant testified that defendant had used marijuana. *Id.* at 110, 381 S.E.2d at 626. Responding to defendant's argument that he was entitled to have submitted the mitigating circumstance of no significant history of prior criminal activity, we stated that a witness's "cursory and unsubstantiated references to past marijuana use" were not substantial evidence so as to entitle defendant to an instruction on the mitigating circumstance of no significant history of prior criminal activity. *Id.* at 111, 381 S.E.2d at 627. Defendant is not entitled to have this mitigating circumstance submitted when the record is silent on the subject or when the references to criminal activity are made not with regard to this mitigating circumstance but in other contexts for other reasons.

We find that references in the instant case to defendant's criminal activity were "cursory and unsubstantiated," and, as we held in *Laws*, defendant was not entitled to the mitigating circumstance at issue. We emphasize that the testimony to which defendant refers was elicited in contexts in which the jury would not have considered it as bearing on the mitigating circumstance at issue here or on defendant's character in any other manner. Evidence pertaining to defendant's blood alcohol level, for example, was elicited by the prosecutor to establish that defendant was generally able to drive and that the accident he was in was caused mostly, if not exclusively, by his alcohol use. Similarly, evidence of defendant's other substance abuse was introduced in the context of showing that defendant would have been mentally impaired at the time of the murder. Also, there was no evidence as to how defendant "lost" his license and the evidence was sparse as to how defendant resisted Officer Wilson during an arrest.

Defendant's assignment of error on this issue is, therefore, overruled.

XI.

[17] Defendant next argues the trial court erred in its instructions to the jury regarding the process by which it was to determine whether defendant should be sentenced to death. The instructions given by the trial court were nearly identical to the pattern jury instructions.

Defendant objected to none of these instructions at trial; our review, therefore, is limited to review for plain error. N.C. R. App. Proc. 10(c)(4).

While instructing the jury on Issue Three, whether the mitigating circumstances found by one or more of the jurors are insufficient to outweigh the aggravating circumstances found, the trial court stated that each juror "may consider any mitigating circumstance or circumstances that the juror determines exists by a preponderance of the evidence in Issue Two." While instructing on Issue Four, whether the aggravating circumstances found are sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstances, the court stated that "each juror may consider any mitigating circumstance or circumstances that the juror determines exists by the preponderance of the evidence."

Defendant contends that these instructions improperly gave the jurors the discretion to disregard a mitigating circumstance found in Issue Two. We rejected this argument in *State v. Jones*, 336 N.C. 229, 250-51, 443 S.E.2d 48, 58, *cert. denied*, — U.S. —, — L. Ed. 2d — (1994) based on other provisions of the pattern jury instruction which make it clear that a juror is required to consider any mitigating circumstance that juror found to exist in Issue Two. Based on our decision in *Jones* defendant's contention is rejected.

[18] Defendant also argues that the trial court erred by instructing the jury on Issue Two, whether certain submitted mitigating circumstances existed, that the jury "should" consider whether that circumstance existed and that it "would" find that factor if the evidence supported it and if, with respect to non-statutory circumstances, they had mitigating value. Defendant complains the trial court should have instructed the jury it "must" consider the evidence. We find this complaint to be without merit. The clear import of the trial court's instruction was that the jury had a duty to consider each mitigating circumstance submitted, which is a correct statement of law and in no way limited the jury's consideration of evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 114, 71 L. Ed. 2d 1, 11 (1982) (sentencer may not exclude evidence of mitigation from consideration).

[19] Finally, defendant complains of another instruction by the trial court concerning Issue Two. After instructing the jury on each of the seventeen specific mitigating circumstances submitted, the court stated:

> Finally you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value. If one or more of you so find by a preponderance of the evidence you would so indicate by having your foreman write 'yes' in the space provided after this mitigating circumstance . . . .

We find this statement properly instructed the jury that it should consider other mitigating circumstances where a juror found such mitigators to exist by a preponderance of the evidence. Further, as we found in *Jones*, the jury instructions as a whole clearly stated that the jury had to consider all mitigating circumstances found. *See State v. McNeil*, 327 N.C. 388, 392, 395 S.E.2d 106, 109 (1990), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991) ("a single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge").

Defendant's assignments of error on this point are therefore without merit.

XII.

[20] Defendant next argues that the trial court committed plain error in its instruction on the statutory 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 trial court instructed the jury:

> Turning to mitigating circumstance Number Two. You should consider whether 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. A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as the ability to know right from wrong generally, or to know that when he was, what he was doing at the given time is killing or that such killing is wrong. A person may indeed know that a killing is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he is 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. Finally, this mitigating circumstance would exist even in [sic] 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 this 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 impairments. *You would find this mitigating circumstance if you find that the Defendant suffered from organic personality disorder and/or a mixed personality disorder and had consumed alcohol and cocaine before the killing.* And that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. 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. (emphasis added).

The jury rejected this mitigating circumstance.

Defendant contends the trial court erred in instructing the jury that it would have to find the existence of a personality disorder and the consumption of alcohol and cocaine in order to find the mitigating circumstance at issue. We agree the trial court's statement in isolation could be misleading, but it is clearly not plain error.

Where supported by the evidence, a defendant is entitled to have the jury consider the mitigating circumstance that his ability to appreciate the criminality of his conduct or his ability to conform his conduct to the requirements of the law was impaired. While consumption of alcohol or drugs may show impaired capacity, *see, e.g., State v. Johnson,* 317 N.C. 343, 391, 346 S.E.2d 596, 623 (1986), consumption of those substances is not necessary to establish this mitigating circumstance. Indeed, Dr. Rollins testified that his "diagnoses are independent of whether [defendant] was intoxicated that night or not." Thus, to the extent the trial court's statement indicated that defendant had to show both a personality disorder and intoxication to establish this circumstance, it was error.

Defendant did not object to the instruction at trial, however, and thus he was waived his right to raise this issue on appeal unless he can show "plain error." N.C. R. App. Proc. 10(c)(4). Plain error is an error so fundamental that it probably affected the outcome. Defendant cannot meet this burden.

The entire jury instruction quoted above, absent the one sentence of which defendant now complains, was an accurate and extremely thorough recitation of the law regarding the mitigating circumstance of impaired capacity. Also, the sentence at issue here from the trial court's instruction did not state that the *only* way defendant could establish the mitigator was by proving both a personality disorder and intoxication. The entire instruction was subject to the interpretation that the jury did not have to find both a personality disorder and intoxication, notwithstanding the one misleading sentence. This lessens the likelihood that the misleading sentence affected the jury's decision.

Further, one or more jurors did find the mitigating circumstance that the "murder was committed while the defendant was under the influence of a mental or emotional disturbance." While this circumstance is not the same as the mitigating circumstance relating to impaired capacity, *State v. Greene*, 329 N.C. 771, 776, 408 S.E.2d 185, 187 (1991), it nevertheless permits the jury to consider the effect of the defendant's emotional disturbances. One or more juror also found the mitigator that "Defendant has suffered from a history of depression."

In deciding the effect of the trial court's instruction on the jury we also must consider the brutality of the killing inflicted upon Hazel Broadway. The jury saw and heard evidence relating to the numerous stab wounds and bruises received by Broadway. It also heard evidence that Broadway lived for as long as fifteen minutes in severe pain. The jury found as an aggravating factor that the murder was especially heinous, atrocious or cruel.

In light of the trial court's entire instruction regarding defendant's impaired capacity, the jury's finding that defendant was under the influence of an emotional disturbance, and the brutality of the killing, we conclude the error in one sentence of the trial court's instruction had no probable effect on the outcome of the sentencing proceeding. Defendant's assignment of error is, therefore, overruled.

XIII.

[21] Defendant next argues the trial court committed plain error in instructing the jury regarding the mitigating circumstance of defendant's age. The court stated:

> Turning now to mitigating circumstance Number Three. You should consider whether the age of this 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 facts 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.

Defendant argues this instruction impermissibly allowed the jury to accord defendant's age, which is enumerated at N.C.G.S. § 15A-2000(f)(7) as a mitigating circumstance, no mitigating value.

In *State v. Kirkley*, 308 N.C. 196, 220, 302 S.E.2d 144, 158 (1983), *overruled on other grounds*, *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988), we held that a statutory mitigating circumstance, if found, must be given some weight. *See State v. Greene*, 329 N.C. 771, 776, 408 S.E.2d 185, 187 (1991). The mitigating circumstance of defendant's age is not determined by defendant's chronological age, but rather it must be determined in light of "varying conditions and circumstances." *State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986). With respect to this statutory mitigating circumstance, the defendant is not entitled to an instruction until he makes a threshhold showing that his age could have some mitigating value. *See id.* (trial court did not err in refusing to submit mitigating circumstance of age where defendant was twenty-three and his foster parents testified that he was emotionally immature). Simply being entitled to submission of the mitigating circumstance, however, does not require the jury to find that circumstance to exist. Unless a defendant's age has mitigating value as a matter of law, a juror need consider the defendant's age as mitigating only if that juror finds by a preponderance of the evidence that his age has mitigating value. It would make no sense, as defendant seems to propose, that a defendant's age is always to be afforded some mitigating value.

The evidence showed that defendant was twenty-eight. There was also substantial evidence that defendant suffered serious mental problems. Defendant's IQ was between 70 and 80 and various tests ranked defendant from the fifth to the ninth percentile as compared to those in his age group. Defendant was diagnosed with organic personality disorder, mixed personality disorder, borderline intellectual functioning, and major, recurrent depression. There was also evi-

dence, however, that while in school defendant's articulation, language, fluency and voice were within normal ranges, and overall defendant was in a "low average" group. A report relied on by Dr. Rollins revealed that in 1987 defendant "was a grown man and could make his own decisions, was working full time, was doing well, and had his own apartment." A co-worker and a supervisor testified that defendant performed well in his job as a "take-up operator." A cellmate testified that defendant exercised, played chess, and read "just like everybody else."

In light of this evidence which is contradictory as to whether defendant's age has mitigating value, the jurors were properly instructed that it was within their province to determine whether defendant's age had mitigating value. Defendant's assignment is, therefore, overruled.

XIV.

Defendant next argues that he is entitled to a new sentencing hearing because the jury failed to find certain statutory and non-statutory mitigating circumstances for which he claims there was substantial, credible, and uncontradicted evidence. In particular, defendant points to the statutory mitigating circumstances of impaired capacity and "age" and to the following non-statutory mitigating circumstances: He suffered a learning disability; he had a borderline intellectual function; he suffered various head injuries from various accidents; as a child he observed verbal and physical abuse of his mother by his father; and his father is an alcoholic.

[22] Whether the jury finds a non-statutory mitigating circumstance depends not only upon whether that circumstance is supported by the evidence, but also upon whether the jury determines that circumstance to have mitigating value. *State v. Huff*, 325 N.C. 1, 59, 381 S.E.2d 635, 669 (1989), *sentence vacated*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990), *in light of McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). Since the jury was free to reject any of the non-statutory mitigating circumstances submitted on the basis that they had no mitigating value, defendant is not entitled to a new sentencing proceeding on the basis of the jury's rejection of these mitigating circumstances. Since we have held earlier in this opinion that whether defendant's age has mitigating value is for the jury, the jury was free to reject this mitigating circumstance on that basis.

[23] The evidence supporting the impaired capacity mitigating circumstance, which consisted of the testimony of Dr. Conder and Dr. Rollins, was uncontroverted and unchallenged. This evidence, if believed, would have supported the jury's finding that the circumstance existed. We conclude, nevertheless, that the jury was free to reject this circumstance because it did not find the evidence of the mental experts credible or convincing. *See State v. Gay*, 334 N.C. 467, 492, 434 S.E.2d 840, 854 (1993) (where defendant entitled to a peremptory instruction on a mitigating circumstance because the evidence supporting it is uncontradicted, the jury "may still reject that circumstance on the basis that the supporting evidence was not convincing"); *State v. Huff*, 325 N.C. 1, 59, 381 S.E.2d 635, 669 ("peremptory instruction does not deprive jury of its right to reject the evidence in question because of a lack of faith in its credibility").

Defendant contends that where evidence of a statutory mitigating circumstance is uncontradicted and inherently credible the jury simply may not be permitted to reject it. He relies on language in *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983). There the Court said:

> allowing the jury the discretionary power to completely disregard a statutory mitigating factor proven by the evidence would return the final sentencing procedure to the realm of unguided decision making which is prohibited under *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L. Ed. 2d 346 (1972).
>
> . . . .
>
> [W]hen a mitigating factor is uncontroverted the trial judge must give a peremptory instruction to the jury on that circumstance. The effect of this type of instruction is to remove the question of whether the mitigating circumstance exists from the jury's determination and to conclusively establish the existence of that factor.

Id. at 220, 302 S.E.2d at 158.

As our later cases like *Huff* and *Gay* explain, even when the defendant is entitled to a peremptory instruction on a given mitigating circumstance because the evidence on that circumstance is uncontroverted, the jury is still free to reject the circumstance on the ground that it does not find the evidence credible or convincing. The language in *Kirkley* insofar as it applies to peremptory instructions and is inconsistent with these later rulings is disapproved. Neither do we find anything in the United States Supreme Court's or this Court's

death penalty jurisprudence which mandates that the sentencing jury accept the existence of any particular mitigating circumstance, statutory or otherwise, because the evidence in support of that circumstance is uncontradicted. The United States Supreme Court cases and our cases require merely that the sentencing jury not be precluded from considering evidence which may have mitigating value. *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1982) (capital sentencer may not refuse to consider relevant mitigating evidence); *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed 2d 973 (1978) (capital sentencer may "not be precluded from considering as a *mitigating factor* . . . [any evidence which] the defendant proffers as a basis less than death"). As to non-statutory mitigating circumstances, "neither *Lockett* nor *Eddings* requires that the sentencer must determine that the submitted mitigating circumstance has mitigating value." *State v. Fullwood*, 323 N.C. 371, 396, 373 S.E.2d 518, 533 (1988), *judgment vacated*, 494 U.S. 1022, 108 L. Ed. 2d 602, *in light of McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). As to statutory mitigating circumstances, the jury is free to disbelieve the evidence or to conclude that the evidence is not convincing. *See Gay*, 334 N.C. at 492, 434 S.E.2d at 854; *State v. Huff*, 325 N.C. at 59, 381 S.E.2d at 669.

[24] We do not mean to foreclose the possibility that a defendant may be entitled to a *directed verdict* on a given statutory mitigating circumstance if the evidence in support of the circumstance is substantial, manifestly credible and uncontradicted. Insofar as the language in *Kirkley* describes a directed verdict, *Kirkley* is correct. Suffice it to say here that defendant's evidence did not rise to that level. *See State v. McCollum*, 334 N.C. 208, 229, 433 S.E.2d 144, 155 (1993).

In *McCollum* the defendant argued that his due process rights were violated when the jury failed to find the impaired capacity mitigating circumstance. We overruled this assignment, stating:

> It is well settled that a peremptory instruction does not deprive the jury of its right to reject the evidence because of a lack of faith in its credibility. *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979). In the present case, the defendant relied upon the testimony of [his mental health expert] to support the submission of the mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time the victim was killed. Contrary to the defendant's contention, the jury was not required to accept [his expert's] testi-

mony. *See id.* Even though Dr. Sultan's testimony was uncontradicted, we cannot say, in light of the fact that she did not examine the defendant until seven years after the killing, that her testimony was manifestly credible. Accordingly, this assignment of error is without merit.

McCollum, 334 N.C. at 229, 433 S.E.2d at 155.

Thus, defendant's assignment of error is rejected.

Review Under N.C.G.S. § 15A-2000(d)(2)

XV.

Finally, we must determine whether the aggravating circumstances are supported by the record, whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the "sentence of death is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2).

The jury found as aggravating circumstances that the "murder was committed by the defendant while the defendant was engaged in the commission of or attempting to commit Robbery With A Dangerous Weapon and attempting to commit First Degree Rape" and that the murder was especially heinous, atrocious or cruel. As discussed earlier in this opinion, we find these aggravating circumstances to be supported by the record.

Also, we find nothing in the record indicating that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

[25] Our final inquiry is whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant. In making this comparison, we look at:

> 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 the Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

State v. Williams, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78

L. Ed. 2d 704 (1983). "Only cases found to be free of error in both the guilt-innocence and penalty phases are included in the pool." *State v. Moore*, 335 N.C. 567, 614, 440 S.E.2d 797, 824, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 174, *reh'g denied*, —— U.S. ——, —— L. Ed. 2d —— (1994). *See also State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994) (elaborating on composition of proportionality pool).

In making the inquiry into proportionality,

> this Court will not necessarily feel bound during its proportionality review to give a citation to every case in the pool of "similar cases" used for comparison . . . . The Bar may safely assume that we are aware of our own opinions filed in capital cases arising since the effective date of our capital punishment statute, 1 June 1977.

Williams, 308 N.C. at 81-82, 301 S.E.2d at 356.

In the case *sub judice* the jury found as aggravating circumstances warranting the imposition of death that the murder was especially heinous, atrocious or cruel and that the murder was committed during the commission of the felonies of attempted rape and attempted armed robbery. The murder of Hazel Broadway is thus especially marked by its brutality and by the intense suffering it must have caused her. It is also characterized by the attempted rape of Hazel Broadway and attempted armed robbery.

The jury found as mitigating circumstances that the murder was committed while defendant was under the influence of a mental or emotional disturbance, that defendant suffered from a history of depression, that upon arrest defendant cooperated with law enforcement officers to the extent of physically responding to their directives, that defendant was identified as "different" by acquaintances and was often the object of teasing and joking, and the catch-all circumstance of any other circumstance deemed to have mitigating value.

This Court has found the death penalty disproportionate on seven occasions.[6] None of those cases, however, are comparable to the case

6. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 25, 305 S.E.2d 703 (1983).

at hand since they did not involve the level of brutality inflicted upon Hazel Broadway. Of the seven, in only two, *Bondurant* and *Stokes*, did the jury find the aggravating circumstance that the murder was "especially heinous, atrocious or cruel." In *Bondurant*, however, the Court emphasized that the killing, which consisted of one gunshot wound to the head, was not "torturous." 309 N.C. 674, 677, 693, 309 S.E.2d 170, 173, 182 (1983). Further, there was "substantial evidence" that the defendant was intoxicated, and the defendant immediately sought medical attention for his victim. *Id.* at 693-94, 309 S.E.2d at 182. In *Stokes* the victim suffered numerous head injuries, but they do not rise to the level of injuries inflicted upon Broadway. 319 N.C. 1, 3, 352 S.E.2d 653, 654 (1987). Further, in *Stokes* the Court emphasized that the defendant was found guilty of first-degree murder only on the basis of felony murder and that the defendant was seventeen. *Id.* at 21, 24, 319 S.E.2d at 664, 666.

We find that the case at hand more closely resembles cases in which we have affirmed a sentence of death. In *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983), for example, we affirmed a sentence of death. In *McDougall*, the defendant stabbed his victim numerous times with a butcher knife and caused her several bruises. The victim lost nearly half of her blood and died. There was evidence that McDougall sexually assaulted the victim. McDougall introduced evidence that he suffered from mental problems including depression and organic brain damage and that he suffered traumatic experiences as a child. The jury found that he was under the influence of a mental or emotional disturbance at the time of the murder and that his capacity to appreciate the criminality of his conduct was impaired. It also found that the murder was especially heinous, atrocious or cruel; that McDougall had previously been convicted of a felony involving violence; and that the murder was part of a course of conduct which included a crime of violence against another person.

The killing in this case is likewise similar to other cases in the proportionality pool in which we affirmed a sentence of death. *See State v. McNeil*, 324 N.C. 33, 38, 61, 395 S.E.2d 106, 112, 125-26 (1989) (defendant stabbed victim, in addition to inflicting numerous other injuries, resulting in her death; defendant presented evidence of diminished capacity); *State v. Vereen*, 312 N.C. 499, 504, 324 S.E.2d 250, 254, *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526 (1985) (defendant stabbed seventy-two-year-old victim several times with steak knife and pocket knife, inflicted numerous bruises and fractures,

attempted to rape her, and stole her pocketbook); *State v. Rook*, 304 N.C. 201, 236, 283 S.E.2d 732, 753 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982) (defendant cut victim with knife, beat her, raped her, ran over her with his car and left victim to bleed to death; defendant introduced evidence of emotional disturbance, impaired capacity, and that he had a troubled childhood); *State v. Smith*, 305 N.C. 691, 711-12, 292 S.E.2d 264, 276-77, *cert. denied*, 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) (defendant raped victim and inflicted upon her numerous lacerations, bruises and fractured several ribs; victim died of head injuries; defendant presented evidence of emotional disturbance and impaired capacity).

Defendant refers us to the following four first-degree murder cases involving sexual assaults in which the juries returned sentences of life imprisonment: *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991); *State v. Harris*, 319 N.C. 383, 354 S.E.2d 222 (1987); *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*, *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985); *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). In each of those cases, however, the defendant was found guilty of first-degree murder on the basis of felony murder only. Defendant in this case was found guilty of first-degree murder based on felony murder and also on premeditation and deliberation.

Defendant also refers us to *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335 (1983), which was reversed on *McKoy* error in *Williams v. Dixon*, 961 F.2d 448 (4th Cir.), *cert. denied*, — U.S. —, 121 L. Ed. 2d 445 (1992). On retrial, Williams was sentenced to life imprisonment, and thus *Williams* is in the proportionality pool as a life case. *See State v. Bacon*, 337 N.C. at 107 n.6, 446 S.E.2d at 564 n.6 (1994). In *Williams*, the defendant was convicted of first-degree murder based on premeditation and deliberation and on felony murder, with the underlying felonies being first-degree burglary and first-degree sex offense. Williams had entered the home of his one-hundred-year-old victim, taken items from her house, and beaten her severely, causing multiple lacerations and fractures. The evidence also indicated that defendant had inserted a mop into her vagina, causing severe internal injuries. Finally, Williams left his victim "to die in a pool of her own blood."

This Court in *Williams* described the defendant's actions as "torture" and as a "vicious and prolonged murderous assault." 308 N.C. at 82, 301 S.E.2d at 357. We still agree with those characterizations

notwithstanding the jury's sentence of life imprisonment at retrial. Nevertheless, the presence in our proportionality pool of one vicious murder resulting in a sentence of life imprisonment does not preclude other defendants committing murders with similar levels of brutality from receiving the death penalty. Since a jury's decision whether a defendant should receive the death penalty is the product of a delicate and subjective balancing process, it is not surprising that there is some apparent inconsistency within the pool. Our task in reviewing for proportionality, however, is not to require precise consistency among jury verdicts but instead to compare the case at hand with those in the pool to determine whether the sentence of death is disproportionate looking to all cases in the pool. Making that inquiry here, we are convinced that a sentence of death is not disproportionate considering the numerous death cases in our pool involving defendants and murders similar to the defendant here and the murder he committed upon Hazel Broadway.

After comparing this case with other cases in the proportionality pool, focusing on the defendant and the crime, we conclude that the sentence of death is neither excessive nor disproportionate. N.C.G.S. § 15A-2000(d)(2).

Preservation Issues

XVI.

Defendant also raises seven issues which he concedes have previously been decided by this court against him.[7]

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

7. These issues are (i) whether it was error to deny defendant's motion for a bill of particulars to require the State to designate whether it would rely on felony murder or on premeditation and deliberation to support first-degree murder, (ii) whether it was plain error to permit the prosecutor to state that the jury had a "duty" to impose a sentence of death if it found that the evidence in mitigation was insufficient to outweigh the aggravating circumstances, (iii) whether it was error to deny defendant's motion for a mistrial on the ground that the State had peremptorily challenged jurors who expressed doubts about the death penalty but who ultimately answered that they could recommend death, (iv) whether the trial court erred in instructing the jury that its sentence was a "recommendation" of punishment, (v) whether the North Carolina Capital Sentencing Act is unconstitutional, (vi) whether the trial court committed plain error by instructing on "especially heinous, atrocious or cruel" in accord with the pattern jury instruction, and (vii) whether the trial court erred by instructing the jury that it must not consider any non-statutory mitigating circumstance unless the jury deemed that circumstance to have mitigating value.

Conclusion

We hold that defendant received a fair trial and sentencing proceeding, free from prejudicial error. The death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. The death sentence imposed is not disproportionate to the death penalty imposed in similar cases.

NO ERROR.

Justice MEYER concurs in the result.

STATE OF NORTH CAROLINA v. JOHN WESLEY JONES

No. 435A90

(Filed 30 December 1994)

1. **Jury § 131 (NCI4th)— voir dire—softness of legal system—questions properly excluded**

The trial court did not err in refusing to permit defense counsel to ask prospective jurors in a capital trial whether they felt that the legal system may be too soft on criminals.

Am Jur 2d, Jury § 202.

Voir dire examination of prospective jurors under Rule 24(a) of Federal Rules of Criminal Procedure. 28 ALR Fed. 26.

2. **Jury § 142 (NCI4th)— voir dire—vote under particular facts—questions properly excluded**

The trial court did not err in refusing to permit defense counsel to ask prospective jurors how their decision would be affected if it was shown that many people in defendant's community thought highly of him, how they would vote if they thought defendant was probably guilty of first-degree murder but were not convinced beyond a reasonable doubt, how they would react if they were the only juror on a particular side or issue, or whether they would consider life imprisonment a severe enough penalty even though a young girl was injured, since those questions were an improper attempt to elicit in advance what the jurors' decision would be under a given state of facts.

Am Jur 2d, Jury §§ 203, 205, 206.

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 § 141 (NCI4th)— voir dire—parole eligibility—questions properly excluded

The trial court did not err in refusing to permit defense counsel to ask prospective jurors in a capital trial about their understanding of the meaning of a life sentence since such questioning was an improper attempt to inject the subject of parole eligibility into the jury selection process.

Am Jur 2d, Jury § 202.

Voir dire examination of prospective jurors under Rule 24(a) of Federal Rules of Criminal Procedure. 28 ALR Fed. 26.

4. Jury § 151 (NCI4th)— capital trial—death penalty beliefs—exclusion not error

The trial court did not err in refusing to permit defendant to ask a prospective juror in a capital trial whether the juror believed "that every person convicted of murder, premeditated or intentional murder should be put to death" where the court specifically stated immediately thereafter that it would allow defendant to ask prospective jurors whether their "support for the death penalty [was] so strong that [they] would find it difficult or impossible to vote for life in prison for a person convicted of murder," since the question permitted by the court would allow defendant to determine whether prospective jurors would automatically sentence defendant to death upon his conviction for first-degree murder.

Am Jur 2d, Jury § 202.

Voir dire examination of prospective jurors under Rule 24(a) of Federal Rules of Criminal Procedure. 28 ALR Fed. 26.

5. Jury § 145 (NCI4th)— voir dire—feeling about use of mitigating circumstances—question properly excluded

The trial court did not err in refusing to allow the defendant in a capital trial to ask prospective jurors how they felt about the

concept of considering mitigating circumstances in determining an appropriate sentence.

Am Jur 2d, Jury § 202.

Voir dire examination of prospective jurors under Rule 24(a) of Federal Rules of Criminal Procedure. 28 ALR Fed. 26.

6. Jury § 102 (NCI4th)— voir dire—pretrial publicity—death penalty inappropriate—questions properly excluded

The trial court did not err in refusing to permit defense counsel to ask prospective jurors whether they had read anything which made them think that defendant should receive some sentence other than the death penalty where defendant was allowed to question jurors about their exposure to pretrial publicity and whether they had formed any opinions about the case as a result thereof.

Am Jur 2d, Criminal Law § 941; Jury § 202.

7. Jury § 123 (NCI4th)— voir dire—questions about mental illness as mitigating circumstance—proper exclusion

The trial court did not err in refusing to permit defense counsel to ask prospective jurors in a capital trial a series of questions relating to their views of mental illness as a mitigating circumstance since the questions were hypothetical in nature and an impermissible attempt to indoctrinate the prospective jurors regarding the existence of a mitigating circumstance.

Am Jur 2d, Jury § 203.

8. Jury § 138 (NCI4th)— voir dire—alcoholism as disease or illness—questions properly excluded

The trial court did not err in refusing to permit defense counsel to ask prospective jurors whether they believed that alcoholism is a disease or an illness since no reasonable basis for the exercise of a peremptory challenge would be revealed by a response to this question, and counsel was permitted to ask jurors whether they had ever thought about, seen, or talked with alcoholics.

Am Jur 2d, Jury § 202.

Voir dire examination of prospective jurors under Rule 24(a) of Federal Rules of Criminal Procedure. 28 ALR Fed. 26.

9. Jury § 145 (NCI4th)— voir dire—failure to reach unanimous sentencing verdict—life sentence—questions properly excluded

The trial court properly refused to permit defense counsel to ask prospective jurors in a capital trial whether they understood that the trial court would automatically impose a life sentence if they could not reach a unanimous sentencing verdict.

Am Jur 2d, Homicide § 548; Jury § 202.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.

10. Jury § 119 (NCI4th)— voir dire—exclusion of questions—similar questions allowed—error cured

Any error in the trial court's refusal to permit defense counsel to ask a prospective juror in a first-degree murder trial certain questions concerning his ability to consider defendant's intoxication as it related to issues in the guilt/innocence and penalty phases of the trial was harmless where the court thereafter allowed counsel to ask the witness similar questions.

Am Jur 2d, Jury § 207.

11. Jury § 145 (NCI4th)— voir dire—punishment for first-degree murder—questions properly excluded

The trial court properly refused to permit defense counsel to ask prospective jurors whether they had any problem with "the law" that "with nothing else appearing the punishment for first degree murder is life in prison" because the question constituted an incomplete and ambiguous description of this state's capital sentencing scheme. N.C.G.S. § 15A-2000.

Am Jur 2d, Jury § 202.

Voir dire examination of prospective jurors under Rule 24(a) of Federal Rules of Criminal Procedure. 28 ALR Fed 26.

12. Jury § 145 (NCI4th)— voir dire—first-degree murder—sentence—questions properly excluded

The trial court did not err in refusing to permit defense counsel to ask prospective jurors in a first-degree murder trial whether they believed the death penalty should be imposed because it is less expensive than keeping a person imprisoned for

life; whether they could impose a life sentence for "a terrible, tragic crime"; how they felt "about a person who could do such a thing"; and whether they believed that all persons convicted of first-degree murder should be treated equally.

Am Jur 2d, Jury § 202.

Voir dire examination of prospective jurors under Rule 24(a) of Federal Rules of Criminal Procedure. 28 ALR Fed 26.

13. Indigent Persons § 27 (NCI4th)— motion for funds for investigator—insufficient showing of need

The trial court did not err in denying an indigent defendant's motion for funds to hire an investigator to aid in the preparation of his defense to a charge of first-degree murder because defendant failed to make a particularized showing of need for an investigator where (1) defense counsel informed the court that he had been unable to locate certain persons with whom defendant had been associated and whom he anticipated calling as witnesses if the trial progressed to the sentencing phase, and (2) defense counsel contended that an investigator was needed to interview eyewitnesses to the killing because it would be "quite difficult" for defense counsel to do so in light of the rapidly approaching trial. Defendant's showing amounted to no more than a mere hope or suspicion that favorable evidence might be uncovered if the motion was granted.

Am Jur 2d, Criminal Law §§ 955, 1006.

Right of indigent defendant in state criminal case to assistance of investigators. 81 ALR4th 259.

14. Jury § 260 (NCI4th)— peremptory challenges of black jurors—racially neutral reasons

The State was properly permitted to exercise peremptory challenges against five black jurors in a first-degree murder trial for neutral, nonpretextual and specific reasons where the prosecutor stated the following reasons for peremptorily challenging these jurors: one juror attended school with the defendant; the second juror had been represented by defense counsel on more than one occasion; the third juror knew defendant, was acquainted with several defense witnesses, and had a relative who had been charged with murder, and defense counsel had performed

legal services for her mother; the fourth juror failed to reveal during initial questioning that his aunt and brother would be witnesses for the defense and that he knew two other defense witnesses; and the fifth juror equivocated on his ability to consider imposing the death penalty in any case and had been charged within the last several years with assault inflicting serious injury.

Am Jur 2d, Jury § 235.

Use of peremptory challenge to exclude from jury persons belonging to race or class. 79 ALR3d 14.

15. Criminal Law § 1318 (NCI4th)— capital case—preliminary instruction—pattern instruction given—refusal of requested instruction

The trial court did not abuse its discretion by refusing to give defendant's requested preliminary instruction explaining the specific procedures of a capital case and instead giving the pattern jury instruction on the bifurcated nature of a capital trial.

Am Jur 2d, Trial § 1441.

16. Jury § 223 (NCI4th)— death penalty views—excusal for cause

The trial court did not erroneously excuse a juror for cause because of her death penalty views where the juror's answers to the prosecutor's questions may well have left the trial court with the definite impression that the juror would be unable to faithfully and impartially apply the law. Furthermore, the trial court's failure to attempt to rehabilitate the juror or to allow the defendant to attempt to do so was not error.

Am Jur 2d, Jury §§ 289,290.

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

17. Evidence and Witnesses § 963 (NCI4th)— hearsay—medical diagnosis exception—preparation for trial

Statements made by defendant to a medical expert who stated an opinion that at the time of a killing defendant was so intoxicated that he was incapable of premeditation and deliberation were not admissible as substantive evidence under the medical diagnosis and treatment exception to the hearsay rule set forth in

N.C.G.S. § 8C-1, Rule 803(4) where the statements were made by defendant ten months after the killing for the purpose of preparing and presenting a defense to the crimes for which he stood accused rather than for the purpose of seeking treatment of a medical condition or a diagnosis of his condition to obtain treatment.

Am Jur 2d, Evidence §§ 683, 685; Federal Rules of Evidence § 232.

Admissibility of statements made for purposes of medical diagnosis or treatment as hearsay exception under Rule 803(4) of Federal Rules of Evidence. 55 ALR Fed. 689.

Admissibility of physician's testimony as to patient's statements or declarations, other than res gestae, during medical examination. 37 ALR3d 778.

18. Evidence and Witnesses § 964 (NCI4th)— hearsay—medical diagnosis and treatment exception—statements by mother and wife

Statements made by defendant's mother and wife to defendant's medical expert were not admissible as substantive evidence under the medical diagnosis and treatment exception to the hearsay rule set forth in Rule 803(4) because only the statements of the person being diagnosed or treated are excepted from the prohibition against hearsay.

Am Jur 2d, Evidence §§ 683, 685; Federal Rules of Evidence § 232.

Admissibility of statements made for purposes of medical diagnosis or treatment as hearsay exception under Rule 803(4) of Federal Rules of Evidence. 55 ALR Fed. 689.

Admissibility of physician's testimony as to patient's statements or declarations, other than res gestae, during medical examination. 37 ALR3d 778.

19. Evidence and Witnesses §§ 2298, 3157 (NCI4th)— expert witness—opinion on reliability of information—exclusion as harmless error

The trial court erred in refusing to permit defendant's expert medical witness, who opined that defendant was incapable of premeditation and deliberation due to extreme alcohol intoxica-

tion at the time of a killing, to state his opinion as to whether defendant was lying to him during his evaluation of defendant, since the testimony would not violate the rule prohibiting expert testimony concerning the truthfulness of a witness, and the testimony was admissible as an assessment of the reliability of the information upon which the expert based his opinion. However, the exclusion of this testimony was harmless error where defendant failed to show that there was a reasonable possibility that a different result would have been reached if the witness had been allowed to testify that he believed defendant was telling the truth.

Am Jur 2d, Expert and Opinion Evidence §§ 164, 190; Witnesses §§ 1006 et seq.

20. Assault and Battery § 82 (NCI4th); Criminal Law § 775 (NCI4th)— discharging firearm into occupied vehicle—general intent crime—intoxication no defense

The offense of discharging a firearm into an occupied vehicle is a general intent crime that does not require the State to prove any specific intent but only that the defendant performed the act which is forbidden by statute. Therefore, the trial court properly charged the jury that the law does not require any specific intent for the defendant to be guilty of the crime of discharging a firearm into occupied property and, since intoxication does not negate a general intent, also properly charged that the defendant's intoxication can have no bearing upon the determination of his guilt or innocence of this crime.

Am Jur 2d, Criminal Law § 155; Weapons and Firearms § 29.

Effect of voluntary drug intoxication upon criminal responsibility. 73 ALR3d 98.

Modern status of rules as to voluntary intoxication as defense to criminal charge. 8 ALR3d 1236.

21. Homicide § 709 (NCI4th)— instructions on first-degree and second-degree murder—verdict of first-degree murder—failure to submit involuntary manslaughter as harmless error

Where the jury was properly instructed on the elements of first-degree and second-degree murder and thereafter returned a verdict of guilty of first-degree murder based on premeditation

and deliberation, any error in the trial court's failure to instruct the jury on involuntary manslaughter is harmless even if the evidence would have supported such an instruction. The verdict of first-degree murder was not constitutionally infirm because of the failure to submit involuntary manslaughter since the submission of second-degree murder alleviated the danger that the jury would find the defendant guilty of first-degree murder rather than acquit him although it did not think he was guilty of first-degree murder.

Am Jur 2d, Homicide § 531.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4TH 118.

22. Criminal Law § 460 (NCI4th)— jury argument—comment about psychiatrist—permissible inference

Where a psychiatrist testified that he based his opinion that defendant could not have formed a specific intent to kill on interviews with defendant and defendant's wife and mother and that he did not interview anyone who witnessed the shootings, the prosecutor's jury argument that the psychiatrist "is not interested in the truth" because he did not interview witnesses to the killing was a proper inference based on the psychiatrist's testimony.

Am Jur 2d, Trial § 632.

23. Criminal Law § 433 (NCI4th)— jury argument—reference to defendant as "killer"

The prosecutor's reference to defendant as a "killer" was not improper where there was no conflict in the evidence that it was defendant who fired into a vehicle and killed the victim.

Am Jur 2d, Appeal and Error § 896; New Trial § 172; Trial § 1736.

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.

24. Criminal Law § 460 (NCI4th)— jury argument—reason psychiatrist hired—inference from evidence

The prosecutor's jury argument that a psychiatrist admitted that "he was hired for the sole purpose to form this intoxication

defense" was not improper even though the psychiatrist did not so testify where it was evident that this was the reason he was employed.

Am Jur 2d, Trial § 632.

25. Criminal Law § 1312 (NCI4th)— first-degree murder—aggravating circumstance—prior convictions—testimony by prior victims

The trial court did not abuse its discretion during the penalty phase of a first-degree murder trial by permitting the State, as a part of its proof of the aggravating circumstance that defendant had previously been convicted of three felonies involving violence against the person, to introduce extensive testimony by defendant's three prior victims describing the circumstances of defendant's prior violent felonies, especially since defendant was able to elicit testimony during cross-examination of the witnesses tending to temper the evidence of defendant's prior convictions. N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Evidence § 328.

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.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.

26. Criminal Law § 1054 (NCI4th)— capital trial—sentencing hearing—denial of continuance—no due process violation

Defendant's due process rights were not violated by the trial court's denial of defendant's motion for a one-week continuance of the sentencing hearing in a capital trial on the ground that he was surprised by and unprepared for the live testimony of the victims of defendant's three prior violent felonies where the trial court offered a one-day continuance; defendant was informed prior to the commencement of jury selection and two weeks prior to the motion that the State intended to call defendant's prior victims as witnesses; defense counsel contended that a one-week

continuance was necessary to allow them to review the transcripts of defendant's prior convictions, but defendant entered guilty pleas to lesser charges in each of the prior cases and only the transcripts of his guilty pleas were available; those transcripts, along with copies of the indictments, judgments and commitments from those cases, were furnished to defendant by the State a month prior to jury selection; and the record does not reveal with any specificity how defendant believed he would be prejudiced if his motion was denied.

Am Jur 2d, Criminal Law §§ 527 et seq., 599, 628.

27. Criminal Law § 1314 (NCI4th)— capital trial—expression of regret by defendant—hearsay—mitigating circumstance—exclusion as harmless error

Hearsay testimony that defendant told a witness that he was sorry for what he had done should have been admitted as relevant mitigating evidence in the sentencing phase of defendant's capital trial. When evidence is relevant to a critical issue in the penalty phase of a capital trial, it must be admitted notwithstanding evidentiary rules to the contrary under state law. However, the exclusion of this testimony was harmless beyond a reasonable doubt in light of other evidence before the jury suggesting remorse by defendant and the facts and circumstances of the case as a whole.

Am Jur 2d, Criminal Law §§ 598, 599.

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.

28. Criminal Law § 876 (NCI4th)— capital trial—sentencing phase—failure of jury to agree—propriety of additional instructions

The trial court did not coerce a unanimous sentencing verdict in a capital trial by instructing the jury in accordance with N.C.G.S. § 15A-1235(b) when the jury returned to the courtroom without having reached a unanimous verdict where the court's instructions were not given in response to an inquiry by the jury regarding the effect of its failure to reach unanimity, the court urged the jury to attempt to reach a unanimous decision without doing violence to each juror's individual judgment, and the court cautioned the jurors not to surrender their honest convictions

solely because of the opinions of their fellow jurors or merely for the purpose of returning a unanimous decision.

Am Jur 2d, Trial §§ 1580 et seq.

29. Criminal Law § 1322 (NCI4th)— life imprisonment—irrelevancy of possibility of parole—instruction proper

The trial court properly gave the jury the instruction approved in *State v. Robbins*, 319 N.C. 365, in response to a question from the jury regarding the length of a life sentence.

Am Jur 2d, Trial §§ 286, 1443.

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

30. Criminal Law § 1355 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—failure to submit no significant history of crime

The trial court did not err during the sentencing phase of a first-degree murder trial by refusing to submit the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where the evidence showed that defendant had three prior felony convictions which involved the use or threatened use of violence to the person of another, and the jury found as an aggravating circumstance that defendant had been previously convicted of a felony involving violence to the person. N.C.G.S. § 15A-2000(f)(1).

Am Jur 2d, Criminal Law §§ 598, 599.

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.

31. Criminal Law 1348 (NCI4th)— capital sentencing proceeding—mitigating circumstances—refusal to instruct on sympathy

The trial court properly refused to instruct the jury in a capital sentencing proceeding that it was entitled to base its recommendation on any sympathy or mercy the jury might have for the defendant that arises from the evidence presented in this case.

Am Jur 2d, Trial § 1457.

Instructions to jury: sympathy to accused as appropriate factor in jury consideration. 72 ALR3d 842.

32. Criminal Law § 455 (NCI4th)— capital sentencing proceeding—jury arguments about death penalty—no impropriety

The prosecutor's jury argument during a capital sentencing proceeding that the only way the jury could prevent the defendant from killing again was to return a recommendation that he be sentenced to death was not improper. Furthermore, the prosecutor's arguments that there had never been a more appropriate case for the death penalty and that the defendant had worked for and earned a sentence of death were reasonable arguments in light of the evidence of defendant's history of violent and deadly crimes and the circumstances of the murder for which he was being tried.

Am Jur 2d, Criminal Law § 804.

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

33. Criminal Law § 454 (NCI4th)— capital sentencing proceeding—jury argument—defendant's belief in death penalty

The prosecutor's jury argument that defendant proved that he "believed in the death penalty" was a reasonable inference from evidence of defendant's unprovoked, shotgun killing of an unarmed man.

Am Jur 2d, Criminal Law § 804.

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

34. Criminal Law § 452 (NCI4th)— capital sentencing proceeding—mitigating circumstances—jury argument about honorable discharge

It was not improper for the prosecutor to argue that defendant's honorable discharge from the military was not a circumstance which mitigated against imposition of the death penalty or to use Lee Harvey Oswald as an example of a person who also received an honorable discharge.

Am Jur 2d, Criminal Law § 599.

35. Criminal Law § 433 (NCI4th)— capital sentencing proceeding—jury argument—moral equivalent of "back shooter"

Although defendant did not shoot the victim in the back, the prosecutor could properly argue that one who, without provocation, shoots an unarmed man is the moral equivalent of a "back shooter."

Am Jur 2d, Trial § 572.

36. Criminal Law § 438 (NCI4th)— capital sentencing proceeding—jury argument—reason defendant once testified for State

The prosecutor's jury argument that the only reason the defendant had once testified for the State was to "save his own skin" was supported by evidence that in 1977 the State agreed to accept defendant's plea of guilty to common law robbery in exchange for his truthful testimony against his co-defendant.

Am Jur 2d, Trial § 572.

37. Criminal Law § 436 (NCI4th)— capital sentencing proceeding—jury argument—lack of remorse by defendant

The prosecutor's jury argument that defendant had shown no remorse for killing the victim was supported by the evidence and not otherwise improper even though defendant did not testify.

Am Jur 2d, Trial § 572.

38. Criminal Law § 454 (NCI4th)— capital sentencing proceeding—jury arguments—jury as conscience of community—defendant "gave himself the death penalty"

The prosecutor's jury argument in a capital sentencing proceeding urging the jury to act as the voice and conscience of the community was not improper. Furthermore, the prosecutor's argument that defendant "put himself in this position" and "gave himself the death penalty" did not impermissibly diminish the jury's sense of responsibility for recommending a sentence, and any impropriety in this argument was harmless.

Am Jur 2d, Trial § 572.

39. Criminal Law § 413 (NCI4th)— capital sentencing proceeding—no right to opening and closing arguments

The trial court did not err in denying defense counsel's request to make both the opening and closing arguments in a cap-

ital sentencing proceeding since N.C.G.S. § 15A-2000(a)(4) gives a capital defendant the right to make only the final argument in the penalty phase.

Am Jur 2d, Trial §§ 539, 572.

40. Criminal Law § 680 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—refusal to give peremptory instruction—harmless error

Although the trial court erred by refusing to give a requested peremptory instruction on sixteen nonstatutory mitigating circumstances where the evidence supporting those circumstances was uncontroverted and not inherently incredible, this error was harmless beyond a reasonable doubt where the jury found six of those mitigating circumstances that it believed had mitigating value; the record shows that the jury rejected the mitigating circumstances not found because they determined that those circumstances had no mitigating value, not because they rejected the factual basis for those circumstances; and it would thus have been of no consequence if the court had given a correct charge.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441, 1444.

41. Criminal Law § 1348 (NCI4th)— capital case—instructions defining mitigating circumstances

The trial court did not err during a capital sentencing proceeding by giving the jury an instruction defining "mitigating circumstance" which had been approved by prior N.C. Supreme Court decisions. Moreover, defendant waived any error by the court in also reading a dictionary definition of "mitigate" to the jury when defense counsel assented to allowing the jury to use a dictionary during its deliberations.

Am Jur 2d, Trial §§ 1444, 1446.

42. Criminal Law § 1337 (NCI4th)— capital trial—aggravating circumstance—conviction of felony involving violence—peremptory instruction on robbery

Where the State introduced the record of defendant's conviction of common law robbery as proof of the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance in a capital trial, the trial court properly instructed the jury that robbery is a felony which by definition involves the use or threatened use of violence.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1446, 1447.

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.

43. Criminal Law § 1325 (NCI4th)— capital trial—mitigating circumstances—pattern instructions—compliance with *McKoy* decision

The pattern capital sentencing instructions given by the trial court, which were adopted as a result of the decision in *McKoy v. North Carolina*, 494 U.S. 433, did not allow jurors to disregard properly found mitigating circumstances by instructing in Issue Three, the weighing issue, and Issue Four, the substantiality issue, that each juror may consider any mitigating circumstance or circumstances that the juror determines to exist by a preponderance of the evidence. *McKoy* does not require a juror to consider, at Issue Three and Issue Four, those mitigating circumstances which he or she did not find but which were found by one or more other jurors.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1446, 1447.

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.

44. Criminal Law § 1242 (NCI4th)— extenuating relationship mitigating factor—insufficient evidence to require finding

In sentencing defendant for aggravated assault and discharging a firearm into occupied property, the trial court was not required to find and consider the statutory mitigating factor that the relationship between defendant and the victim was extenuating where the only evidence which tended to show the existence of this mitigating factor was based on the self-serving statements of the defendant. N.C.G.S. § 15A-1340.4(a)(2)i.

Am Jur 2d, Criminal Law § 599.

45. Criminal Law § 1325 (NCI4th)— capital trial—aggravating circumstance—convictions of felonies involving violence—sufficient evidence

The jury's finding of the aggravating circumstance in a capital trial that defendant had previously been convicted of a felony

involving the use or threatened use of violence to the person was supported by evidence that defendant had previously been convicted of common law robbery and two counts of assault with a deadly weapon inflicting serious injury. N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Criminal Law §§ 598 et seq.; Evidence § 328.

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.

46. Criminal Law § 1346 (NCI4th)— capital trial—aggravating circumstance—creating risk of death to more than one person—sufficient evidence

The jury's finding of the aggravating circumstance in a capital trial that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person was supported by evidence that defendant, from a distance of only ten feet, fired a twelve gauge shotgun into the rear seat of the vehicle occupied by the victim and three other persons; the gun was loaded with a three-inch, double aught shotgun shell; and the blast immediately killed the victim and injured another passenger. N.C.G.S. § 15A-2000(e)(10).

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

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that in committing murder, defendant created risk of death or injury to more than one person, to many persons, and the like—post-*Gregg* cases. 64 ALR4th 837.

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

A sentence of death imposed on defendant for first-degree murder of his son was not disproportionate to the penalty imposed in similar cases considering the crime and the defendant where the evidence tended to show that defendant calmly and deliberately searched for his son, that when he encountered his

son walking along the roadway, he stopped his car, removed a shotgun therefrom, and walked toward his unarmed son and his companions, and that as the son pleaded for his life, defendant calmly approached the car which the son had entered and fired through the car's rear door, fatally wounding the son and injuring one of the children seated in the car with him; the jury found that the murder was premeditated and deliberate; the jury found as aggravating circumstances that defendant had previously been convicted of a felony involving the use or threatened use of violence and that he knowingly created a great risk of death to more than one person; the evidence showed that defendant had previously been convicted of three violent felonies involving the use of deadly force against unsuspecting and innocent victims and that two of those victims were seriously injured and maimed; defendant showed no remorse for the death of his son or for the injuries he inflicted on the child; defendant acted with total disregard for the lives of all the persons seated in the back seat of the car and was not dissuaded from action by the presence of small, innocent children; and defendant exhibited a complete absence of compassion for his son, as well as for the small children who sat beside him, as the son begged for defendant to spare his life.

Am Jur 2d, Criminal Law § 628.

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

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Strickland, J., at the 30 July 1990 Criminal Session of Superior Court, Jones County, upon a verdict of guilty of first degree murder. The defendant's motion to bypass the Court of Appeals as to his convictions of assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into occupied property was allowed by this Court on 19 October 1992. Heard in the Supreme Court 3 November 1992.

The State's evidence tended to show that the murder victim in this case was the defendant's son, Charles Meadows. On 23 September 1989, Meadows, Joyce Hill, Nancy Hill, and Nancy Hill's young

child, were walking down rural route 1100, toward Great Lake Road. As the group neared the intersection of route 1100 and Great Lake Road, they observed Queen Jones' car at the intersection. In Jones' car were Jones, her mother Rena, her sister Christine, and her two children, Marrissa and Thomas. Jones and her mother were in the front seat and her sister and two children were in the back seat.

Jones was looking for Joyce Hill to ask her if she would baby-sit Jones' sister and children. As the Meadows group neared Jones' car, Jones' sister and children began exiting the car. At that time, Nancy Hill observed the defendant driving his car along route 1100. The defendant passed through the intersection, turned his car around, and stopped near the side of the road. The defendant stepped out of his car, reached into the back seat, and removed a shotgun. Upon observing the gun, Meadows and Jones' children and sister, who were all standing outside of Jones' car, entered the back seat of the car.

The defendant then began to approach the car carrying the gun. As he approached, he opened the gun, loaded a shell into the chamber and closed the gun. The victim began making a pleading motion to the defendant not to shoot and Joyce Hill begged him not to shoot. The defendant proceeded toward the side of the car where the victim was sitting. When he reached the car he stopped, cocked the gun, and fired through the door of the car. The defendant then opened the chamber, removed the empty shell, reloaded the gun, walked back to his car, and drove away.

The shotgun blast inflicted a gaping wound in the victim's chest which caused immediate death. Marrissa Jones, who was seated beside the victim, was struck by numerous buckshot pellets in the cheek and forehead. Shortly thereafter, a search for the defendant and his car was begun.

The defendant's car was located approximately three miles from the scene of the shooting. The car was in a ditch on the side of the road. There were skid marks leading from the road to the car. A short distance from the car, approximately fifty feet along a footpath, police discovered the defendant's shotgun. The defendant was arrested shortly thereafter.

On 25 June 1990, the Jones County Grand Jury returned true bills of indictment charging the defendant with first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and discharging a firearm into an occupied vehicle. A capital

trial was commenced on 30 July 1990. The defendant was convicted of all charges. The first degree murder conviction was based on theories of premeditation and deliberation and felony murder.

The State's evidence during the sentencing phase tended to show, and the jury found, that the defendant had been previously convicted of a felony involving the use or threatened use of violence to the person, N.C.G.S. § 15A-2000(e)(3), and that he knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to more than one person. N.C.G.S. § 15A-2000(e)(10) (1988).

The defendant's penalty phase evidence tended to show, and the jury found that, at the time of the murder the defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(1), he was in need of treatment for alcoholism and emotional disturbance, he had worked his entire adult life and provided for his family, and he had done various good deeds for his community and its citizens.

The jury found that the mitigating circumstances did not outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to warrant imposition of the death penalty. Thus, the jury returned a recommendation of death and the trial court sentenced the defendant to death in accordance with that recommendation. The defendant was sentenced, in addition, to twenty years imprisonment for the assault, and ten years imprisonment for discharging a firearm into occupied property. The defendant appeals.

Lacy H. Thornburg, Attorney General, by William N. Farrell, Jr., Special Deputy Attorney General, for the State.

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

WEBB, Justice.

The defendant brings forth numerous assignments of error relating to each facet of his capital trial and sentencing proceeding. For the reasons set forth herein, we find the defendant's trial and sentencing proceeding to have been free from prejudicial error.

By his first assignments of error, the defendant contends that the trial court erred by unduly restricting his *voir dire* of prospective jurors, thereby preventing him from making effective use of his peremptory challenges and violating his constitutional rights. The defendant says that the subjects he was prevented from addressing during *voir dire* included the "defendant's use of alcohol at the time of the offense, general views about capital punishment, the appropriateness of the death penalty in tragic cases, whether the judicial system was soft on crime, and the importance of mitigating evidence to a capital sentencing decision."

It is well established that while counsel is allowed wide latitude in examining jurors on *voir dire*, the form of counsel's questions is within the sound discretion of the trial court. *State v. Parks*, 324 N.C. 420, 378 S.E.2d 785 (1989). Likewise, the manner and extent of trial counsel's inquiries rest largely in the discretion of the trial judge. *State v. Bryant*, 282 N.C. 92, 191 S.E.2d 745 (1972), *cert. denied*, 410 U.S. 958, 35 L. Ed. 2d 691, *cert. denied*, 410 U.S. 987, 36 L. Ed. 2d 184 (1973).

Counsel may not pose hypothetical questions which are designed to elicit from prospective jurors what their decision might be under a given state of facts. Such questions are improper because they tend to "stake out" a juror and cause him to pledge himself to a decision in advance of the evidence to be presented. *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 order for the defendant to show reversible error, he must show that the trial court abused its discretion and that he was prejudiced thereby. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985). We will address *seriatim* the defendant's proffered inquiries which the trial court ruled improper.

[1] First, the court prevented the defendant from asking prospective jurors whether they felt that the legal system may be too soft on criminals. This Court, in *State v. Hopper*, 292 N.C. 580, 234 S.E.2d 580 (1977), considered the propriety of a similar question. In *Hopper*, defense counsel attempted to ask a prospective juror "what is your opinion of our court system in North Carolina today, do you think that justice is done?" *Hopper*, 292 N.C. at 588, 234 S.E.2d at 584. This Court found defense counsel's question to be clearly improper. Thus, we find no error in the trial court's ruling in this case.

[2] Second, defendant says that he should have been allowed to ask prospective jurors how they would vote under certain given circum-

stances. The trial court did not allow the defendant to ask jurors how their decision would be affected if it was shown that many people in the defendant's community thought highly of him; how they would vote if they thought the defendant was probably guilty of first degree murder but had not been convinced beyond a reasonable doubt; how they would react if, during deliberations, they were the only juror on a particular side of an issue, or; whether they would consider life imprisonment a severe enough penalty even though a young girl was injured.

These questions were intended to elicit from the jurors how they would vote under a particular set of given facts. Such questions tend to cause jurors to pledge themselves to a decision in advance of the evidence to be presented and are therefore improper. The trial court's rulings were proper. *State v. Vinson*; *State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981).

[3] Nor did the trial court err by preventing the defendant from questioning jurors about their understanding of the meaning of a life sentence. This Court has repeatedly held that because the subject of parole eligibility is irrelevant to the issues to be determined during sentencing, it should not be injected during the jury selection process. *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989), *sentence vacated*, 494 U.S. 1050, 108 L. Ed. 2d 756, *on remand*, 326 N.C. 593, 391 S.E.2d 816, *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987); *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982).

[4] Next, the defendant complains that he was not allowed to ask jurors whether they believed "that every person convicted of murder, premeditated or intentional murder should be put to death." A trial court commits reversible error if it denies a capital defendant the opportunity to ask prospective jurors whether they would automatically vote to impose the death penalty if the defendant is found guilty of the capital offense. *Morgan v. Illinois*, — U.S. —, 119 L. Ed. 2d 492 (1992).

The defendant in this case was not prevented from making this inquiry. The record shows that immediately after sustaining the State's objection to the preceding question, the trial judge specifically stated that he would allow the defendant to ask prospective jurors whether their "support for the death penalty [was] so strong that

[they] would find it difficult or impossible to vote for life in prison for a person convicted of murder?" This question, although phrased in different terms, allowed the defendant to determine whether the prospective jurors would automatically sentence the defendant to death upon his conviction for murder. We find no error in the trial court's control of this portion of *voir dire*.

[5] The defendant also assigns error to the trial court's refusal to allow him to ask jurors how they felt about the concept of considering mitigating circumstances in determining an appropriate sentence. The trial court ruled this question improper on the ground that it was too broad. We cannot say that this ruling constituted an abuse of the trial court's discretion to control the manner and extent of jury selection.

[6] Next, the defendant says that he should have been allowed to ask prospective jurors whether they had read anything which made them think that the defendant should receive some sentence other than the death penalty. The record, however, shows that the defendant was allowed to question jurors about their exposure to pretrial publicity and whether they had formed any opinions about the case as a result thereof. Considering this record, the defendant has failed to show an abuse of discretion by the trial court.

[7] The defendant next contends that the trial court erred by refusing to allow him to ask prospective jurors a series of questions relating to their views of mental illness as a mitigating circumstance. Having reviewed these proposed questions, we find that they were hypothetical in nature and that they could properly be viewed by the trial court as impermissible attempts to indoctrinate the prospective jurors regarding the existence of a mitigating circumstance. *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990); *State v. Parks*, 324 N.C. 420, 378 S.E.2d 785 (1989). Defendant has not shown an abuse of discretion.

[8] The defendant next says that the trial court erred by preventing him from asking prospective jurors whether they believed that alcoholism is a disease or an illness. The State's objection to this question was properly sustained. The purpose of *voir dire* is to ferret out jurors with latent prejudices and to assure the parties' right to an impartial jury. Whether the jurors believed that alcoholism is a disease or an illness would not reveal a reasonable basis for the exercise of a peremptory challenge. In addition, the record shows that the trial court allowed the defendant to ask jurors whether they had ever

thought about, seen, or talked to alcoholics. Thus, the defendant was not foreclosed from ascertaining juror beliefs about alcoholism. We hold that the defendant has failed to show an abuse of discretion. *See State v. Leroux*, 326 N.C. 368, 390 S.E.2d 314, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990).

[9] The defendant next says that he was improperly prevented from asking potential jurors if they understood that if they could not reach a unanimous verdict, the court would automatically impose a life sentence. This Court has long held that it is improper for a trial court to inform the jury of the effect of its failure to reach a unanimous verdict. Such an instruction is improper because it permits the jury to escape its responsibility to recommend the sentence to be imposed. *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981); *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979). Because the question proposed by the defendant would have a similar effect as an instruction by the court, we find no error in the trial court's ruling.

[10] The defendant also assigns error to the court's refusal to allow him to ask juror number one, Mr. Register, the following questions:

> So you're telling me that perhaps Mr. Jones may be intoxicated at the time that this shooting took place, that you would not be able to consider that as a mitigating factor under any circumstances, is that correct?
>
> Mr. Register, would you hold Mr. Jones to a higher burden of proof of proving that he was intoxicated than would normally be required by law in that specific instance?
>
> Mr. Register, you would have a difficult time in finding Mr. Jones was voluntarily intoxicated would you not so that you would not have a specific intent, is that correct?
>
> Mr. Register, you would have a difficult time in rendering a verdict in accordance with the law in that specific case, is that correct?

Where an objection to a question is sustained but the same or a substantially similar question is subsequently allowed, any error in the prior ruling is rendered harmless beyond a reasonable doubt. The record reveals that the defendant was permitted to ask Mr. Register numerous questions concerning his ability to consider the defendant's intoxication as it related to the relevant issues in the guilt/innocence and penalty phases of his trial. Therefore, even if we

assume that the defendant's proffered questions were proper, any errors in the trial court's rulings were harmless beyond a reasonable doubt.

[11] The defendant next says that he should have been allowed to ask the jurors whether they had any problem with "the law" that "with nothing else appearing the punishment for first degree murder is life in prison." This question was improper because it constituted an incomplete and ambiguous description of this State's capital sentencing scheme. N.C.G.S. § 15A-2000 (1988). Even if this was a proper question, which it was not, the defendant was not prejudiced by the court's ruling. The trial court expressly allowed the defendant to ask a subsequent question which more fully and accurately explained the issues to be determined during a capital sentencing proceeding. The defendant has not shown an abuse of discretion.

[12] The defendant also assigns error to the trial court's refusal to allow him to ask prospective jurors whether they believed the death penalty should be imposed because it is less expensive than keeping a person imprisoned for life; whether they could impose a life sentence for "a terrible, tragic crime;" how they felt "about a person who could do such a thing," and whether they believed that all persons convicted of first degree murder should be treated equally. The defendant does not say why it was error for the trial court to rule these questions improper. Moreover, even if we assume these were proper questions, the defendant does not suggest and we cannot discern how he was prejudiced by the trial court's rulings. We hold that the jury selection proceedings were free from prejudicial error.

[13] The defendant next assigns as error the trial court's denial of his motion for funds to hire an investigator to aid in the preparation of his defense. In addressing this question in previous cases, we have held that before an indigent criminal defendant is entitled to have the State pay for an expert, the defendant must make a threshold showing of a particularized need for the requested expert. *State v. Mills*, 332 N.C. 392, 420 S.E.2d 114 (1992); *State v. Parks*, 331 N.C. 649, 417 S.E.2d 467 (1992); *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988); *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984).

In order to make this threshold showing, the defendant must establish that the aid of the expert is "likely to be a significant factor" at trial. *Moore*, 321 N.C at 344, 364 S.E.2d at 657 (*quoting Ake v. Oklahoma*, 470 U.S. 68, 82, 84 L. Ed. 2d 53, 60 (1985)). The expert's assistance constitutes a significant factor if it would materially aid

the preparation of the defendant's defense, or the denial of assistance would deny the defendant a fair trial. *Parks*, 331 N.C. at 658, 417 S.E.2d at 472.

In support of the defendant's motion, defense counsel informed the court that the defendant had supplied them with the names of several people, located throughout eastern North Carolina, with whom the defendant had been associated in various ways. Defense counsel stated that his efforts to locate or contact these persons had been unsuccessful. Counsel intended to call these persons as witnesses if the defendant's trial progressed to the sentencing phase.

However, the defendant failed to enunciate how these witnesses would significantly aid his defense. No showing was made as to how the defendant would be prejudiced if these witnesses were not located. The defendant did not suggest that these were the only witnesses who could provide this sort of evidence, or that he would be denied a fair trial if an investigator was not appointed to locate and interview these witnesses. In short, defendant made no particularized showing of need. Rather, the defendant merely asserted in general terms that there were certain persons with whom the defendant had been associated and whom he anticipated calling as witnesses if the trial progressed to the sentencing phase.

Defense counsel also contended that there were eyewitnesses to the killing that he had not interviewed whom he wished to have interviewed by an investigator. Counsel intimated that it was necessary to have these witnesses interviewed by an investigator to insure their credibility. Counsel further suggested that an investigator was necessary to conduct these interviews because it would be "quite difficult" for defense counsel to do so in light of the rapidly approaching trial.

We are not persuaded that this was a sufficient showing. As the defendant states in his brief, an undeveloped assertion that defense counsel does not have adequate time to investigate is insufficient. *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988). Furthermore, the record reveals that defense counsel was aware of the insufficiency of their preliminary showing and that they were allowed ample opportunities to make the requisite showing.

The court repeatedly urged defense counsel to make a particularized showing of need rather than bare assertions. Despite these repeated warnings, no showing was made of how an investigator would be of material assistance. The inadequacy of the defendant's

showing was also apparent to defense counsel. When the judge intimated that he would deny the defendant's motion, defense counsel stated,

> we have requested written data concerning the defendant and what comes back in, *we don't know whether we will need a private investigator or not.* If we have, based on what we find out from that data, *if we have a particularized need* for a private investigator, would it be possible to come back to you? (Emphasis added.)

We hold that the defendant's showing amounted to no more than a mere hope or suspicion that favorable evidence might be uncovered if the motion was granted. *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), *post-conviction relief granted*, 338 N.C. 394, 450 S.E.2d 878 (1994). This assignment of error is overruled.

By his next assignment of error, the defendant contends that the trial court erred by allowing the prosecution to exercise its peremptory challenges against black jurors on the basis of their race. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986); *Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991). In *Batson*, the Supreme Court held that where a defendant establishes a *prima facie* case of discriminatory use of peremptory challenges, the State must rebut the defendant's *prima facie* case with neutral and reasonably specific reasons for the exercise of the peremptory challenges. *Batson*, 476 U.S. at 98, 90 L. Ed. 2d at 88.

To rebut a defendant's *prima facie* case, the State need not establish reasons rising to the level of a challenge for cause. *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88. The State may rebut the defendant's case by showing that the peremptory challenge was exercised on the basis of "legitimate 'hunches' and past experience[,]" so long as there was an absence of racially discriminatory motive. *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990) (*quoting State v. Antwine*, 743 S.W.2d 51, 65 (Mo. 1987) (en banc), *cert. denied*, 486 U.S. 1017, 100 L. Ed. 2d 217 (1988), *post-conviction relief denied*, 791 S.W.2d 403 (Mo. 1990), *cert. denied*, 498 U.S. 1055, 112 L. Ed. 2d 789 (1991)). The trial court's findings regarding the sufficiency of the State's rebuttal are given great deference on appeal. *Robinson*, 330 N.C. 1, 19, 409 S.E.2d 288, 297 (1991).

In this case, fifty-four jurors were examined during *voir dire.* Twenty-two of these jurors were black. Following challenges for

cause, only nine black jurors remained. Five of the remaining black jurors were peremptorily challenged by the State. On each occasion that the State sought to peremptorily challenge a black juror, the trial court excused all jurors from the courtroom and called a bench conference. During each bench conference, defense counsel sought to establish a *prima facie* case of discrimination, and the State sought to enunciate race-neutral and specific reasons for the exercise of the peremptory challenge. The trial court found that the State exercised its peremptory challenges against black jurors for neutral, nonpretextual, and specific reasons.

Because the State proffered explanations for its exercise of peremptory challenges, we find it unnecessary to determine whether the defendant successfully established a *prima facie* case of discrimination. *State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288. Thus, we proceed on the assumption that a *prima facie* case was established.

The prosecutor peremptorily removed juror Daniels for three reasons. Mr. Daniels had attended school with the defendant, he was acquainted with several witnesses for the defense, and he stated that he would be uncomfortable sitting as a juror in the case.

Juror Hargett was peremptorily challenged on the ground that she knew of the defendant and was acquainted with several of the defendant's witnesses. In addition, the juror stated that defense counsel had performed legal services for the juror's mother. Finally, the juror revealed that she had a relative who had been charged with murder.

The State exercised a peremptory challenge against juror Kinsey because she was acquainted with at least one defense witness and she had been represented by defense counsel on two separate occasions. The prosecutor also stated that he had been informed by one of the State's witnesses, a black S.B.I. agent, that juror Kinsey had given the agent the impression that she disliked the agent.

Juror Norman was peremptorily challenged because he failed to reveal during initial questioning that his aunt and his brother would be witnesses for the defense and that he knew two other defense witnesses.

Finally, the prosecutor's reasons for challenging juror Dove were his equivocation on his ability to consider imposing the death penalty in any case and the fact that he had been charged within the last several years with assault inflicting serious injury.

The defendant suggests that the prosecutor's reasons for his challenges against jurors Daniels and Kinsey were pretextual. With regard to juror Daniels, the defendant says that: the juror knew only three of more than fifty potential defense witnesses; the importance of two of these witnesses was minor; one of these witnesses became a prosecution witness; and one of these witnesses was known by white jurors who were not challenged peremptorily.

Regarding juror Kinsey, the defendant says that the prosecutor again relied on her acquaintance with minor witnesses. The defendant says that Kinsey's apparent dislike of a prosecution witness should not be considered a legitimate reason for her excusal.

We believe that defendant has overlooked the most convincing reasons for excusal of these jurors. Juror Daniels attended school with the defendant himself and juror Kinsey had been represented by defense counsel on more than one occasion. We believe these are race-neutral, specific, and non-pretextual reasons for peremptorily challenging any juror.

Likewise, we believe that the prosecutor's stated reasons for peremptorily challenging the remaining jurors were legitimate. The defendant does not suggest, and we cannot perceive, how these reasons were pretextual. Given the great deference which must be afforded the trial court's finding that the prosecutor's peremptory challenges were based on race-neutral and specific grounds, we overrule this assignment of error.

[15] Under his next assignment of error, the defendant argues that the trial court erred by refusing to give his requested preliminary instruction explaining the specific procedures of a capital case. The defendant says that the requested instruction was supported by applicable legal authorities and that therefore it was error to instruct the jury according to the applicable pattern jury instruction. The defendant contends that the pattern preliminary instruction denied him the opportunity to select a fair and impartial jury.

The defendant concedes that this Court has previously rejected similar claims. *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604, *on remand*, 327 N.C. 470, 397 S.E.2d 223 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991); *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990). However, the defendant argues that this case is different. The defendant says that in the prior cases the jurors were tediously educated about this

state's capital sentencing procedure through the prosecutor's thorough *voir dire*, whereas in this case, neither the trial court nor the prosecutor gave a detailed explanation of the nature of a capital trial. We disagree.

The defendant's characterization of the prosecutor's *voir dire* in *Artis* is inaccurate. Rather than tediously educating the jury about this state's capital sentencing procedure, the prosecutor, in more than one instance, misstated the law. On appeal in that case, the defendant argued that these misstatements made his proffered instructions critical to his ability to select a fair and impartial jury. Despite the inaccuracy of the prosecutor's description of a capital sentencing proceeding, we found no error in the trial court's refusal to give the defendant's proffered instruction. Thus, what distinguishes this case from *Artis* is that the jury in this case did not receive misinformation regarding the nature of a capital sentencing proceeding.

We find no abuse of discretion by the trial court in refusing to give the defendant's requested preliminary instruction. By utilizing the pattern instruction, a trial court accurately and sufficiently explains the bifurcated nature of a capital trial, avoids potential prejudice to the defendant, and helps to insure the uniformity of jury instructions for all trials. *Artis*, 325 N.C. at 295, 384 S.E.2d at 479. This assignment of error is overruled.

[16] By his next assignment of error, the defendant contends that prospective juror Powell was erroneously excused for cause. The defendant says that the juror's excusal violated *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985), because she never indicated a frank inability to follow the law. The defendant argues that in order to sufficiently establish the juror's inability to follow the law, it was necessary that she be examined by either the defendant or the trial court. We disagree.

Jurors may properly be excused for cause in a capital case if the juror's views concerning the death penalty would prevent or substantially impair their ability to perform their duties in accordance with the trial court's instructions and their oaths. *Wainwright v. Witt*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52; *see also Adams v. Texas*, 448 U.S. 38, 65 L. Ed. 2d 581 (1980). In *Witt*, the Court noted that the *Adams* standard for excusing a juror for cause "does not require that a juror's bias be proved with 'unmistakable clarity' " and that "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Witt*, 469 U.S. at

424, 83 L. Ed. 2d at 852. Moreover, a trial judge's decision to excuse a juror under this standard is entitled to deference because "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 425-26, 83 L. Ed. 2d at 852.

The following exchange occurred between the prosecutor and juror Powell (juror #12).

> MR. ANDREWS: Well, do you want me to rephrase the question? You're saying that you would automatically vote against the death penalty, is that right?
>
> JUROR #12: Yes, because I don't believe in it.
>
> MR. ANDREWS: So you're saying that you would never vote for the death penalty in any case regardless of what the evidence were, is that right, ma'am?
>
> JUROR #12: I don't think so.
>
> MR. ANDREWS: . . . So you're saying that you would then automatically vote against the death penalty regardless of what the evidence was, is that correct, ma'am?
>
> JUROR #12: The way I feel right now I would.
>
> MR. ANDREWS: Yes. And you would not be able to vote in favor of the death penalty under any circumstance, is that right, ma'am?
>
> JUROR #12: Right.

Juror Powell's answers may well have left the trial judge with the definite impression that she would be unable to faithfully and impartially apply the law. Given the deference that is due a trial judge's decision to excuse a juror, we are unable to say that the trial court committed error by allowing the State's challenge for cause. Likewise, the trial court's failure to attempt to rehabilitate the juror or to allow the defendant to do so was not error. *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991); *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990). This assignment of error is overruled.

[17] By his next assignment of error, the defendant contends that the trial court erred by instructing the jury that it could not consider as substantive evidence the information relied upon by the defendant's expert as the basis for the expert's opinion. Dr. Brown offered his expert opinion that at the time of the killing the defendant was so

intoxicated that he was incapable of premeditation or deliberation. In forming this opinion, the doctor relied on the statements of the defendant, his mother, and his wife. The defendant says that these statements were made for the purpose of medical diagnosis and therefore were admissible under N.C.G.S. § 8C-1, Rule 803(4).

Rule 803(4) excepts from the general prohibition against hearsay:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The rationale for this exception is a matter of common sense. As the Advisory Committee's Note to Rule 803(4) explains in part,

> Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's *strong motivation to be truthful*. . . . The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. (Emphasis added.)

N.C.G.S. § 8C-1, Rule 803(4) official commentary (1992).

In cases such as the instant case, the rationale for the Rule 803(4) exception to Rule 802 is entirely absent. The defendant was not evaluated by Dr. Brown until July of 1990, some ten months after the killing, and only three weeks prior to trial. It is readily apparent that the defendant was not seeking treatment of a medical condition. Nor was the defendant seeking a diagnosis of his condition for the purpose of obtaining treatment. Rather, the record clearly shows that the defendant's statements to Dr. Brown were made for the purpose of preparing and presenting a defense to the crimes for which he stood accused. *Cf. State v. Stafford*, 317 N.C. 568, 346 S.E.2d 463 (1986) (prosecuting witness' statements to doctor concerning past symptoms not made for purpose of medical diagnosis or treatment but for purpose of presenting State's "rape trauma syndrome" theory at trial that was to commence three days later). A person's motivation to speak truthfully is much greater when he seeks diagnosis or treatment of a medical condition than when he seeks diagnosis in order to prepare a defense to criminal charges. We hold that the defendant's

statements to Dr. Brown were not statements made for the purpose of medical diagnosis or treatment.

[18] Likewise, we hold that the statements of the defendant's mother and wife were inadmissible under Rule 803(4). The text of the rule makes it quite clear that only the statements of the person being diagnosed or treated are excepted from the prohibition against hearsay. We hold that the trial court properly instructed the jury that the statements of the defendant, his mother, and his wife were admissible only to show the basis of the expert's opinion and not as substantive evidence of the matter asserted. *State v. Wade*, 296 N.C. 454, 251 S.E.2d 407 (1979); *State v. Franks*, 300 N.C. 1, 265 S.E.2d 177 (1980). This assignment of error is overruled.

[19] The defendant next assigns as error the trial court's refusal to allow Dr. Brown to state, on redirect examination, if he had an opinion as to whether or not the defendant was lying to him during his evaluation of the defendant. The defendant contends that this testimony was relevant and admissible to show the reliability of the information upon which Dr. Brown based his opinion.

This Court has repeatedly held that N.C.G.S. § 8C-1, Rule 608 and N.C.G.S. § 8C-1, Rule 405(a), when read together, forbid an expert's opinion testimony as to the credibility of a witness. *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986); *State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986); *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986). However, a witness who renders an expert opinion may also testify as to the reliability of the information upon which he based his opinion. *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987); *State v. Wise*, 326 N.C. 421, 390 S.E.2d 142, *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990).

The defendant contends that the instant case is analogous to *Kennedy* and *Wise* because Dr. Brown was asked to assess the credibility of the information on which he based his opinion. The defendant further says that Dr. Brown was not asked to give his opinion as to the truthfulness of a witness because the defendant did not testify. Thus, says the defendant, the question did not violate the rule prohibiting expert testimony concerning the truthfulness of a witness.

We agree that the question would not have elicited Dr. Brown's opinion of a witness' credibility and that it was error for the trial court to rule the question improper. However, the defendant has the burden of showing that had this error not been committed there is a

reasonable possibility that a different result would have been reached. N.C.G.S. § 15A-1443(a) (1988); *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988); *State v. Turner*, 268 N.C. 225, 150 S.E.2d 406 (1966). Based on our review of the evidence that was properly admitted at trial, we conclude that it is inconceivable that the jury's verdict would have been different if Dr. Brown had been allowed to testify that he believed the defendant.

Our review of the record reveals that the only evidence that the defendant was incapable of premeditation and deliberation due to extreme alcohol intoxication consisted of the expert opinion of Dr. Brown. This opinion was based primarily on the statements of the defendant, statements which the doctor conceded may have been self-serving. The doctor also conceded that his opinion was not based on any independent knowledge of the defendant's condition at the time of the crime.

The evidence of the defendant's intoxication at the time of the killing was less than positive. None of the eyewitnesses to the shooting described the defendant as exhibiting any signs of physical or psychological impairment. Rather, these witnesses described the defendant's actions as being calm and deliberate. In addition, the law enforcement officers who observed the defendant after his arrest testified that his physical movements were coordinated and normal, he spoke articulately and without slurring, and he did not have a strong odor of alcohol about his person. Based on their observations of the defendant, these witnesses formed the opinion that the defendant was not intoxicated.

Finally, the testimony of the defense witnesses, while tending to show that the defendant was under the influence of alcohol during the morning of the day in question, failed to establish that the defendant was inebriated at 3:00 in the afternoon, the time of the killing.

We hold, in light of the evidence that was properly admitted, that the defendant has not met his burden of showing that there is a reasonable possibility that a different result would have been reached if the trial court had allowed Dr. Brown to state his opinion of the defendant's credibility. Because the defendant was not prejudiced by the trial court's error, we overrule this assignment of error.

[20] The defendant next assigns error to the court's charge as to discharging a firearm into an occupied vehicle. Before charging the jury, the court inquired of counsel "as to whether or not discharging a

weapon into occupied property requires specific intent as to an element of the offense or whether it does not require a specific intent." The defendant's attorney argued that the court should charge on specific intent and the district attorney said the court should not charge on specific intent. The court then ruled that the crime of discharging a firearm into an occupied vehicle was "a general intent rather than a specific intent" crime.

The court charged the jury correctly as to the elements of discharging a firearm into an occupied vehicle and then gave the following charge: "The law does not require any specific intent for the defendant to be guilty of the crime of discharging a firearm into occupied property. Thus, the defendant[']s intoxication can have no bearing upon your determination of his guilt or innocense [sic] of this crime."

The defendant argues that this charge was erroneous because it relieved the State of having to prove the defendant intentionally fired into the vehicle. The defendant also says it was erroneous because it did not allow the jury to consider his intoxication when determining whether he intentionally fired into the vehicle.

In some of our cases, we have made a distinction between crimes which have as an essential element a specific intent that a result be reached, which have been called specific intent crimes, and crimes which only require the doing of some act, which we call general intent crimes. *State v. Keel*, 333 N.C. 52, 423 S.E.2d 458 (1992); *State v. Davis*, 214 N.C. 787, 1 S.E.2d 104 (1939). First degree murder, which has as an essential element the intention to kill, has been called a specific intent crime. Second degree murder, which does not have this element, has been called a general intent crime.

Discharging a firearm into a vehicle does not require that the State prove any specific intent but only that the defendant perform the act which is forbidden by statute. It is a general intent crime. *State v. Wheeler*, 321 N.C. 725, 365 S.E.2d 609 (1988). In *State v. Baldwin*, 330 N.C. 446, 412 S.E.2d 31 (1992), we held that intoxication does not negate a general intent. It was not necessary for the court to charge on intent or intoxication as a defense. This assignment of error is overruled.

[21] By his next assignment of error, the defendant contends that the trial court erred by refusing to instruct the jury on the lesser included offense of involuntary manslaughter. The Court's decisions in *State v.*

Hardison, 326 N.C. 646, 392 S.E.2d 364 (1990) and *State v. Young*, 324 N.C. 489, 380 S.E.2d 94 (1989), are dispositive of this issue. In *Hardison* and *Young*, the Court held that where a jury is properly instructed on the elements of first and second degree murder and thereafter returns a verdict of guilty of first degree murder based on premeditation and deliberation, any error in the trial court's failure to instruct the jury on involuntary manslaughter is harmless even if the evidence would have supported such an instruction.

In this case, the jury was properly instructed on the elements of first degree murder and second degree murder. The jury returned a verdict of guilty of first degree murder based on premeditation and deliberation. To reach this verdict the jury was required to find a specific intent to kill, formed after premeditation and deliberation. Such a finding would necessarily preclude a finding that the killing was the result of an accident or an act of criminal negligence. Therefore, any error in the trial court's failure to instruct the jury on the offense of involuntary manslaughter was harmless.

The defendant contends that *Beck v. Alabama*, 447 U.S. 625, 65 L. Ed. 2d 392 (1980), required the submission of involuntary manslaughter to the jury. In *Beck*, the United States Supreme Court held an Alabama statute unconstitutional which forbade the court from submitting a lesser included offense in a first degree murder case. The Court said if the evidence supported a lesser included offense it must be submitted because of the danger that faced with finding the defendant not guilty when the jury thought he was guilty of something, although not guilty of first degree murder, the jury might find him guilty of first degree murder rather than release him. In *Schad v. Arizona*, 501 U.S. 624, 115 L. Ed. 2d 555, *reh'g denied*, 501 U.S. 1277, 115 L. Ed. 2d 1109 (1991), the United States Supreme Court held that pursuant to *Beck*, a jury verdict of first degree murder was not constitutionally infirm when the lesser included offense of second degree murder had been submitted but the lesser included offense of robbery was not submitted. The Court said the submission of second degree murder alleviated the danger that the jury would find the defendant guilty of first degree murder rather than acquit him although it did not think he was guilty of first degree murder. Pursuant to *Beck* and *Schad*, it was not error to refuse to submit involuntary manslaughter to the jury. This assignment of error is overruled.

[22] By his next assignment of error, the defendant contends that the prosecutor's closing argument was improper and the court committed error by not sustaining the defendant's objections to certain parts of the argument. The prosecutor concentrated a portion of his argument on the testimony of a forensic psychiatrist who testified for the defendant that in his opinion because of the defendant's intoxication at the time of the killing, he could not have formed the specific intent to kill. The psychiatrist testified he based his opinion on interviews with the defendant, the defendant's wife and the defendant's mother. On cross-examination, the psychiatrist testified he did not interview anyone who witnessed the shootings.

In his argument to the jury the prosecutor said that because the psychiatrist did not interview witnesses to the killing, "[h]e is not interested in the truth." This statement is an inference which is based on the testimony of the psychiatrist. It was not error to allow this argument. *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), *rev'd on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988).

[23] The prosecutor referred to the defendant as a "killer." There was no conflict in the evidence that it was the defendant who fired into the vehicle. It was not error to allow this argument. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972).

[24] The prosecutor also argued that the psychiatrist admitted in his testimony that "he was hired for the sole purpose to form this intoxication defense." Although the record does not show the psychiatrist testified he was hired to form a defense, it is evident this was the reason he was employed.

We hold that the defendant was not unfairly prejudiced by the prosecutor's argument. *See State v. Kirkley*, 308 N.C. 196, 300 S.E.2d 144. This assignment of error is overruled.

[25] By his next assignment of error, the defendant contends that during the penalty phase of the trial the court erred by allowing the State to utilize extrinsic evidence to prove that the defendant had previously been convicted of felonies involving the use or threatened use of violence. N.C.G.S. § 15A-2000(e)(3) (1988). The defendant concedes that the prosecution may introduce evidence of the circumstances of the defendant's prior convictions for violent felonies, *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), *cert. denied*, 476 U.S.

1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), however, he contends that the evidence introduced in this case was so extensive that its probative value was outweighed by its prejudicial effect. We disagree.

In *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), the Court stated,

> We think the better rule here is to allow both sides to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation. If the capital felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed. Conversely, it could be to defendant's advantage that he be allowed to offer additional evidence in support of possible mitigating circumstances, instead of being bound by the State's stipulation.

Taylor, 304 N.C. at 279, 283 S.E.2d at 780. Control of the State's presentation of evidence concerning the circumstances of the defendant's prior convictions rests in the sound discretion of the trial court and the proper exercise of this discretion will prevent proof of aggravating circumstances from becoming a "mini-trial" of the previous charge. *State v. McDougall*, 308 N.C. 1 , 22, 301 S.E.2d 308, 321, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983).

The record in this case shows that the State sought to prove that the defendant had previously been convicted of three felonies involving the use of violence against the person. As part of its proof, each of the defendant's three prior victims described the circumstances of the defendant's prior violent felonies.

J. Jones testified that in 1973 he and the defendant engaged in a fistfight. Two or three hours after the fight, as Jones was leaving his brother's house, the defendant was waiting in ambush and shot Jones in the right knee with a twelve gauge shotgun. As Jones struggled to re-enter his brother's house, the defendant shot him again. On this occasion, Jones was shot in the left knee. The defendant then approached Jones, pointed the barrel of the gun at Jones' face, and began pulling the gun's trigger. The gun was jammed and did not discharge. Jones managed to wrestle it away from the defendant, and the defendant left the scene. Jones then described the injuries inflicted by the defendant. The injuries to his left knee required amputation of

his lower left leg. Jones' left leg, which was fitted with a prosthesis, was exhibited to the jury. He also testified that the wound to his right knee caused permanent nerve damage in his lower right leg.

H. Jones testified that in 1977, his parents lived next door to the defendant. One evening, Jones was returning home from a party and was about to enter his parents' house, when the defendant stepped around a corner and stuck a twelve gauge, sawed-off shotgun against Jones' chest. Without speaking a word, the defendant fired the gun into Jones' chest. As a result of this gunshot wound, Mr. Jones was hospitalized for nine months. After the wound healed, pellets and debris from the blast remained in his body. The scars on Mr. Jones' body were exhibited to the jury.

J. Fitzgerald testified that in 1977 he was in the Marine Corps and worked part-time as a convenience store clerk. One night, just after he began work, the defendant and an accomplice entered the store. The defendant leaned across the counter and pointed a handgun at Fitzgerald's face. The defendant continued to point the gun at Fitzgerald as he was removing the money from the cash register. After taking the money, the defendant ordered Fitzgerald to come from behind the counter and to lie face down on the floor. The defendant then fled from the scene. Mr. Fitzgerald testified that he was frightened by this experience.

Having reviewed this evidence and the trial court's rulings thereon, we find no abuse of discretion in the trial court's control of these proceedings. As was anticipated in *Taylor*, during cross-examination of the State's witnesses, the defendant was able to elicit testimony tending to temper the evidence of the defendant's prior convictions. This assignment of error is overruled.

[26] The defendant next assigns as error the trial court's denial of his motion for a continuance of the sentencing proceeding. The defendant contends that he was surprised by and unprepared for the live testimony of the victims of the defendant's prior violent felonies. The defendant says that he required a continuance of at least one week to investigate these convictions and prepare a defense. He further contends that the one day continuance offered by the trial court was insufficient and that the denial of his motion violated his rights to due process of law. We disagree.

When a motion to continue raises a constitutional issue, the trial court's ruling thereon involves a question of law which is fully review-

able on appeal. *State v. Searles*, 304 N.C. 149, 282 S.E.2d 430 (1981). However, the denial of a motion to continue, even when grounded on a constitutional issue, constitutes reversible error only when the defendant is prejudiced by the denial of the motion. *Id.* A defendant's rights to due process, assistance of counsel and confrontation of witnesses, include the right to have a reasonable time to investigate and prepare a defense. *State v. Branch*, 306 N.C. 101, 291 S.E.2d 653 (1982). However, what constitutes a reasonable time to investigate and prepare a defense must be determined upon the particular facts of each case. *Id.*

The record shows that the trial of this matter commenced approximately ten months after the defendant was indicted. The defendant was informed prior to the commencement of jury selection, two weeks prior to his motion for a continuance, that the State intended to call the defendant's prior victims as witnesses.

In support of the defendant's motion, defense counsel argued that a continuance was necessary to allow them to review the transcripts of the defendant's prior convictions. However, the record shows that defendant entered pleas of guilty to lesser charges in each of those cases and that therefore no transcripts would be available other than the transcripts of his guilty pleas. These transcripts, along with copies of the indictments, and the judgments and commitments from those cases, were furnished to the defendant by the State almost a month prior to jury selection.

Furthermore, the record does not reveal with any specificity how the defendant believed he would be prejudiced if his motion was denied. Counsel stated that they were unprepared for the testimony of the State's witnesses and that they wanted to investigate the defendant's prior convictions. Counsel, however, did not suggest how such investigation would prepare the defendant to meet the State's evidence. In his brief, the defendant argues that investigation of the prior convictions may have revealed grounds for exclusion of this evidence, yet he does not explain why such an investigation was not conducted prior to trial. We hold that the defendant has failed to show how he was prejudiced by the trial court's denial of his motion for a continuance of the sentencing proceeding. This assignment of error is overruled.

[27] By his next assignment of error, the defendant contends that the trial court erred by excluding certain hearsay evidence. The defendant called a witness who was prepared to testify that the defendant

had told him he was sorry for what he had done. The defendant says that this ruling was improper because it prevented him from offering evidence of his remorse as evidence in mitigation of punishment.

We agree that this was error. When evidence is relevant to a critical issue in the penalty phase of a capital trial, it must be admitted, evidentiary rules to the contrary under state law notwithstanding. *Green v. Georgia*, 442 U.S. 95, 60 L. Ed. 2d 738 (1979). The jury cannot be precluded from considering mitigating evidence relating to the defendant's character or record and the circumstances of the offense that the defendant offers as the basis for a sentence less than death. *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978). The proffered testimony that the defendant was sorry for what he had done showed his remorse and should have been admitted as relevant mitigating evidence in the sentencing phase of his capital trial.

The defendant has not shown prejudice from the exclusion of this evidence, however. Another witness read to the jury a letter the defendant had written to his wife and daughters in which he said: "I have always loved you very special as I have done little John, but as life itself can be a mistake, I just made a great one. I know what Little John 'brother' meant to you." The defendant thus got before the jury evidence suggesting remorse and regret on his part. In light of this evidence and of the facts and circumstances of the case as a whole, we hold that the exclusion of this evidence was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). This assignment of error is overruled.

[28] The defendant next assigns error to the jury instruction given by the trial court when the jury returned from its deliberations to the courtroom. The record shows that after several hours of deliberation, the following events transpired:

> THE COURT: . . . It's been indicated that the jury has reached a verdict?
>
> THE BAILIFF: They told me they were ready to come in.
>
> THE COURT: All right, Mr. Bailiff have the jurors return to their respective seats.
>
> (The jurors entered the courtroom.)
>
> THE COURT: All right, let the record reflect that all the jurors have returned to their respective seats. Mr. Jarman, have you reached a unanimous verdict, sir?

JUROR ONE: Unanimous, sir?

THE COURT: Yes, sir.

JUROR ONE: No, sir.

THE COURT: Did you report to the Court that you were ready? Is that the message?

JUROR ONE: Yes, sir.

THE COURT: Sir?

JUROR ONE: Yes, sir.

THE COURT: Do you have a question of the court, sir?

JUROR ONE: No, sir.

THE COURT: As foreman?

JUROR ONE: No, sir.

THE COURT: And you say you do not have one, unanimous decision?

JUROR ONE: No, sir.

THE COURT: All right, you may be seated for the moment, Mr. Jarman. All right, ladies and gentlemen of the jury, your foreman has reported to the Court that you have not so far been able to reach a unanimous decision. The Court does want to emphasize the fact that it is your duty to do whatever you can to reach a unanimous decision, that the jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. That each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with his or her fellow jurors. In the course of deliberations a juror should not hesitate to re-examine his or her own views and change his or her opinion if convinced it is erroneous. But no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors or for the mere purpose of returning a unanimous decision. With that instruction, I will ask that you retire to your jury room and resume your deliberations. Thank you.

These instructions are in accord with the instructions provided by N.C.G.S. § 15A-1235(b). N.C.G.S. § 15A-1235 was enacted by the General Assembly to provide definite guidelines for instructing a jury whose deliberations have failed to result in a unanimous verdict. *State v. Alston*, 294 N.C. 577, 243 S.E.2d 354 (1978).

The defendant, relying on this Court's decision in *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987), contends that in light of the circumstances surrounding the jury's return to the courtroom, the trial court's instruction "probably led to a unanimity that would not otherwise have been attained." *Id.* at 422, 358 S.E.2d at 339. We disagree.

In *Smith*, the question addressed by the Court was "what a jury should be told *when it inquires into the result of its failure to reach a unanimous verdict.*" *Id.* at 422, 358 S.E.2d at 339. In *Smith*, the jury returned to the courtroom without having reached a unanimous verdict and asked the court: "If the jurors' decision is not unanimous, is this automatic life imprisonment or does the jury have to reach a unanimous decision regardless?" *Id.* at 420, 358 S.E.2d at 338. This Court held that, "*in the context of the jury's inquiry*[,]" the court's instructions, which were similar to the instructions given in this case, were misleading and probably resulted in coerced unanimity. *Id.* at 422, 358 S.E.2d at 339.

In this case, the record shows that when the jury returned to the courtroom, it had not reached a unanimous verdict. While the exact purpose of the jury's return to the courtroom is unclear, the foreperson did not inquire as to the effect of the jury's failure to reach a unanimous verdict. We believe that the absence of such an inquiry by the jury distinguishes this case from *Smith*.

We find that the facts of this case more closely resemble those of *State v. Price*, 326 N.C. 56, 388 S.E.2d 84, *sentence vacated*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *vacated and remanded*, —— U.S. ——, 122 L. Ed. 2d 113, *aff'd*, 334 N.C. 615, 433 S.E.2d 746 (1993), *vacated and remanded*, —— U.S. ——, 129 L. Ed. 2d 888 (1994). In *Price*, the jury had been deliberating several hours when the foreperson informed the trial court, "[w]e're hung." *Id.* at 90, 388 S.E.2d at 104. The court, like the trial court in this case, instructed the jury in accordance with N.C.G.S. § 15A-1235(b). After continuing deliberations for less than an hour, the jury returned a unanimous recommendation that the defendant be sentenced to death. *Id.* at 91, 388 S.E.2d at 104.

This Court held that the trial court's instructions were proper. In so holding, the Court stated that *Smith* was not controlling because the court's instructions were not given in response to an inquiry by the jury regarding the effect of its failure to reach unanimity. In addition, the Court stated that the lesson of *Smith* is that in instructing the jury that its recommendation must be unanimous, "the trial court

must be vigilant to inform the jurors that whatever recommendation they *do* make must be unanimous and not to imply that a recommendation *must* be reached. *Id.* at 92, 388 S.E.2d at 105. The trial court's instructions in *Price* fell within the former category.

In this case, the trial court urged the jury to attempt to reach a unanimous decision but to do so without doing violence to the jurors' individual judgment. The court cautioned the jurors not to surrender their honest convictions solely because of the opinions of their fellow jurors or *merely* for the purpose of returning a unanimous decision. We hold that these instructions, in the context in which they were given, were proper and did not result in a unanimity that would not otherwise have been attained. This assignment of error is overruled.

[29] The defendant next assigns error to the jury instruction given by the trial court in response to a question from the jury regarding the length of a life sentence. The instruction given by the trial court was the same instruction which was approved by this Court in *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279. The instruction at issue evolved from the decision in *State v. Conner*, 241 N.C. 468, 85 S.E.2d 548 (1955), and was a proper response to the jury's inquiry. *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909; *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569. This assignment of error is overruled.

[30] The defendant next assigns as error the trial court's refusal to submit the statutory mitigating circumstance that the defendant had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1) (1988). In deciding whether to submit this statutory mitigating circumstance, the trial court must determine whether a rational jury could conclude that the defendant had no significant history of prior criminal activity. *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988). A defendant's criminal history is considered "significant" if it is likely to affect or have an influence upon the determination by the jury of its recommended sentence. *Id.*

As discussed above, the evidence in this case showed that defendant had three prior felony convictions which involved the use or threatened use of violence to the person of another. Specifically, the evidence showed that the defendant had previously been charged with two counts of assault with a deadly weapon with intent to kill inflicting serious injury and one count of robbery. In each case, the defendant entered pleas of guilty to lesser charges. These pleas resulted in three felony convictions.

Considering the evidence of the defendant's three prior felony convictions, we find no error in the trial court's conclusion that no rational jury could find that the defendant had no significant history of prior criminal activity. Additionally, the record shows that the jury found as an aggravating circumstance that the defendant had been previously convicted of a felony involving violence against the person. As we said in *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470, "it is unimaginable that, despite this finding and the evidence underlying it, the same jury might simultaneously have found that aggravating circumstance to be so irrelevant that it could reasonably infer the existence of the mitigating circumstance in N.C.G.S. 15A-2000(f)(1)." *Id.* at 316, 384 S.E.2d at 491. For the foregoing reasons, this assignment of error is overruled.

[31] Under his next assignment of error, the defendant argues that the trial court erred by refusing to instruct the jury that it was entitled to base its recommendation on any sympathy or mercy the jury might have for the defendant that arises from the evidence presented in this case. The instruction requested by the defendant was identical to the instruction requested by the defendant 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). For the reasons stated in the Court's decision in *Hill*, such an instruction is improper and was therefore properly refused by the trial court. This assignment of error is overruled.

Under his next assignment of error, the defendant contends that the trial court erred by allowing the prosecutor to make grossly improper arguments to the jury during the penalty phase of the trial. The defendant argues that the prosecutor made four separate arguments which were improper and which require that the defendant receive a new sentencing proceeding.

It is well-settled that in North Carolina counsel is granted wide latitude to argue the case to the jury. *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752; *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984). Counsel is permitted to argue the facts that have been presented as well as the reasonable inferences which can be drawn therefrom. *Id.* However, counsel may not argue matters to the jury which are incompetent and prejudicial by injecting his own knowledge, beliefs, or personal opinions or matters which are not supported by the evidence. *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975). Ordinarily, the control of jury arguments is left to the sound discretion of the trial court

and the trial court's rulings thereon will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976). Where the defendant does not object to a jury argument, this Court will find reversible error only where the jury argument was so grossly improper that the trial court should have intervened *ex mero motu*. With these principles in mind, we will address the defendant's arguments *seriatim*.

[32] First, the defendant says that the prosecutor should not have been allowed to argue that the only way the jury could prevent the defendant from killing again was to return a recommendation that he be sentenced to death. The defendant also says that it was improper for the prosecutor to argue that there had never been a more appropriate case for the death penalty and that the defendant had worked for and earned a sentence of death.

In *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765, this Court found no error in the prosecutor's argument that the only way to ensure that the defendant did not kill again was to sentence him to death. Likewise, there was no error in *State v. Johnson*, 298 N.C 355, 259 S.E.2d 752, where the prosecutor repeatedly argued for the death penalty as the only means of ensuring that the defendant did not kill again. Based on these decisions, the prosecutor's argument that the death penalty would prevent the defendant from killing again was a proper argument.

The evidence showed that the defendant had a history of committing extremely violent acts. The circumstances of the defendant's prior crimes, as well as the circumstances of the crime for which he was being tried, showed that he was a callous man with an explosive, unpredictable temper which might erupt in a deadly assault without provocation or warning. We believe that the prosecutor's argument that there had never been a more appropriate case for the death penalty and that the defendant had worked for and earned a sentence of death, were reasonable arguments in light of the evidence of the defendant's pattern of violent and deadly behavior.

The defendant next contends that the prosecutor argued matters which were not supported by the evidence and which could not reasonably be inferred therefrom. Having reviewed the prosecutors' arguments and the record of the evidence at trial, we conclude that the arguments were proper.

[33] The prosecutor argued that there was no need to ask the defendant whether he believed in the death penalty because he proved that he did when he killed the victim. The prosecutor also argued that the defendant's honorable discharge from the Army was not a circumstance which reduced the defendant's moral culpability for the killing of the victim. The prosecutor noted that Lee Harvey Oswald had also been honorably discharged from the military.

[34] We believe that evidence of an unprovoked, shotgun killing of an unarmed man supported the inference that the defendant "believes in the death penalty." Nor was it improper for the prosecutor to argue that the defendant's honorable discharge from the military did not reduce his moral culpability for the murder. It is for the jury to determine whether the submitted nonstatutory mitigating circumstances have mitigating value. *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 602, *on remand*, 327 N.C. 473, 397 S.E.2d 226 (1990), *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991). Therefore, the prosecutor was free to argue that the defendant's honorable discharge from the military was not a circumstance which mitigated against imposition of the death penalty. In support of this argument, it was not improper for the prosecutor to use Lee Harvey Oswald as an example of a person who also received an honorable discharge.

[35] The prosecutor also analogized the defendant to persons, referred to as "back shooters," who existed in the Old West. The prosecutor argued that the defendant, who calmly approached the victim and shot him, was the moral equivalent of a person who would shoot another person in the back. Although the defendant did not shoot the victim in the back, the prosecutor could properly argue that one who, without provocation, shoots an unarmed man is the moral equivalent of a "back shooter."

[36] The defendant further says that it was improper for the prosecutor to argue that the only reason the defendant had once testified for the State in a criminal prosecution was to "save his own skin." The evidence showed that in 1977 the State agreed to accept the defendant's plea of guilty to common law robbery in exchange for truthful testimony against his co-defendant. This evidence clearly supported the prosecutor's argument.

[37] Next, the defendant says that, because he did not testify, it was improper for the prosecutor to argue that the defendant had shown no remorse for killing his son. This argument was supported by the

evidence and was not otherwise improper. *State v. Price*, 326 N.C. 56, 388 S.E.2d 84; *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

[38] The defendant next argues that the prosecutor improperly urged the jury to sentence the defendant to death based on community sentiment. The prosecutor argued:

> You now have become the voice and the moral conscious [sic] of Jones County and as a result . . . . You have an obligation to do something . . . . To do something about serious crime. . . . In other words, ladies and gentlemen, the buck stops here, right here in this courtroom. . . .

This Court has held that prosecutorial argument encouraging "the jury to lend an ear to the community rather than a voice" is improper. *State v. Scott*, 314 N.C 309, 312, 333 S.E.2d 296, 298 (1985). "However, encouraging the jury to act as the voice and conscience of the community is proper and is one of the very reasons for the establishment of the jury system." *State v. Erlewine*, 328 N.C. 626, 634, 403 S.E.2d 280, 284 (1991). The argument above clearly urged the jury to act as the voice of the community and not because of it. This was a proper argument.

Finally, the defendant contends that it was improper for the prosecutor to argue: "[H]e put himself in this position. He gave himself the death penalty." The defendant says that this argument impermissibly diminished the jury's sense of responsibility for recommending a sentence. We disagree.

As authority for his argument, the defendant cites *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979), and *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985). Those cases involved arguments whereby the prosecutor informed the jury that the defendant's sentence would automatically be appealed. In the instant case, no reference was made to N.C.G.S. § 7A-27(a) or the right it provides a capital defendant to appeal any sentence a jury might impose. Assuming *arguendo* that it was improper to argue that the defendant "gave himself the death penalty," it is highly doubtful that the jury thought itself relieved of the responsibility of recommending the defendant's sentence. Clearly, the gist of the prosecutor's argument was that the defendant, by committing a capital crime, put himself in the position where he would be tried for his life. This assignment of error is overruled.

[39] By his next assignment of error, the defendant argues that the trial court erred by refusing the defense counsel's request to be allowed to open and close final jury arguments. This contention is without merit.

This Court considered and rejected the same argument in *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985). In *Wilson*, we held that N.C.G.S. § 15A-2000(a)(4) provides a capital defendant the right to the final argument during the penalty phase, but that neither this section nor any other statutory provision gives a capital defendant the right to make the first and the last arguments. This assignment of error is overruled.

[40] The defendant next assigns error to the refusal of the court to give a peremptory instruction on sixteen nonstatutory mitigating circumstances, the evidence of which he says was not controverted and inherently credible and which he requested. If the evidence of a nonstatutory mitigating circumstance is not controverted and is not inherently incredible, the defendant is entitled to a peremptory instruction on that circumstance if he requests it. The jury may still reject that circumstance if it finds the evidence is not convincing or if it finds the circumstance does not have mitigating value. *State v. Green*, 336 N.C. 142, 172-174, 443 S.E.2d 14, 32, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547, (1994); *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 (1989), *cert. granted and judgment vacated*, 497 U.S. 1021, 111 L. Ed. 2d 777, *on remand*, 327 N.C. 475, 397 S.E.2d 228 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991); *State v. Fullwood*, 323 N.C. 371, 396, 373 S.E.2d 518, 533 (1988). It was error not to give the peremptory instruction requested by the defendant.

We are confident that this error was harmless beyond a reasonable doubt. Of the sixteen nonstatutory mitigating circumstances submitted, the jury found six of them. This shows that in spite of the error in the charge, the jury found mitigating circumstances that it believed had mitigating value. The quality of the evidence to support the tendered mitigating circumstances not found was equal to that supporting the circumstances found. We are satisfied, therefore, that the jury rejected the mitigating circumstances not found because they determined these circumstances had no mitigating value, not because they rejected the factual basis for these circumstances. The document on which the jury made its recommendations shows that for the tendered mitigating circumstances which were not found not a single

juror felt they had mitigating value. With this unanimous rejection, we do not believe it would have been of any consequence if the court had given a correct charge. We hold this error in the charge was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988).

[41] The defendant next assigns error to the definition of mitigation which the court gave to the jury. The court instructed the jury as follows:

> A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment [than] other . . . first degree murders.

This definition has been approved in *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 446 (1981) and *State v. Hutchins*, 303 N.C. 321, 351, 279 S.E.2d 788, 806. It was not error for the court to give it.

During its deliberations, the jury requested a dictionary to learn "the true definition of mitigation." Defense counsel informed the court that he did not object to the jury's having a dictionary. The court then repeated its earlier instruction on mitigation and also read to the jury the American Heritage Dictionary definition of "mitigate" which was "to make or become less severe or intense" or "moderate." The defendant argues it was error to give the jury this definition from the dictionary.

The defendant assented to allowing the jury to use a dictionary during its deliberations. The defendant thus waived any error by the trial court in giving the jury the dictionary definition of "mitigate." This assignment of error is overruled.

[42] Under his next assignment of error, the defendant contends that the trial court erred by instructing the jury that robbery is a felony which by definition involves the use or threatened use of violence. The defendant says that this instruction relieved the State of its burden of proving the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance beyond a reasonable doubt. The defendant also argues that the instruction amounted to an expression of a judicial opinion on the evidence. We disagree.

In *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, the Court held that where the State introduces the record of a defendant's prior con-

viction, if the prior crime has the use or threat of violence as an element, the trial court may peremptorily instruct on the existence of the aggravating circumstance in N.C.G.S. § 15A-2000(e)(3).

Here, the State introduced the record of the defendant's conviction of common law robbery. Common law robbery is defined as "the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). Because the use, or threatened use, of violence is an element of common law robbery, the instruction at issue was proper. This assignment of error is overruled.

By his next assignment of error, the defendant contends that the trial court erred by denying his request for an instruction regarding the defendant's parole eligibility. For the often repeated reasons set forth in *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, this assignment of error is overruled.

[43] By his next assignment of error, the defendant challenges the constitutionality of the pattern capital sentencing instructions which were adopted as a result of the decision in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369, *on remand*, 326 N.C. 592, 391 S.E.2d 815 (1990).

In *McKoy*, the United States Supreme Court held that the unanimity requirement of North Carolina's capital sentencing scheme was unconstitutional because it prevented "the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury does not unanimously find." *McKoy*, 494 U.S. at 435, 108 L. Ed. 2d at 376. A sentencer may not be precluded from giving effect to all mitigating evidence. *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988); *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973. In *Mills*, on which the *McKoy* decision was based, the Court reasoned that a unanimity requirement allows a single juror's holdout vote on a particular mitigating circumstance to prevent the remainder of the jury from giving that circumstance any effect when weighing mitigating circumstances against aggravating circumstances. *Mills*, 486 U.S. at 376, 100 L. Ed. 2d at 393.

In the instant case, the trial court instructed the jury in Issue Two, in accordance with *McKoy*, that if *one or more* jurors found a mitigating circumstance to exist they should write "yes" in the space pro-

vided. With regard to the third sentencing issue, the weighing issue, the court instructed in pertinent part as follows:

> If you find from the evidence one or more mitigating circumstance[s], you *must* weigh the aggrevating [sic] circumstances against the mitigating circumstances. When deciding this issue, each juror *may* consider any mitigating circumstance or circumstances that *the juror determines to exist* by a preponderance of the evidence in issue two. (Emphasis added.)

With regard to determining the fourth issue, whether the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty, the court instructed:

> And in deciding this issue you're not to consider the aggrevating [sic] circumstances standing alone. You *must* consider them in connection with any mitigating circumstances *found by one or more of you.* When making this comparison, each juror *may* consider any mitigating circumstance or circumstances *that juror determined to exist* by a preponderance of the evidence. (Emphasis added.)

The defendant argues that these instructions allowed jurors to disregard properly found mitigating circumstances. The defendant also contends that each juror should be required to consider every mitigating circumstance found by any one of the jurors. We disagree.

The jury was instructed under Issue Three that it *must* weigh any mitigating circumstances it found to exist against the aggravating circumstances. This directive to weigh the mitigating circumstances against the aggravating circumstances is not ambiguous. The next sentence of the instruction describes which mitigating circumstances are to be considered by the jurors in this weighing process. The word "may" indicates that each juror is allowed to consider those mitigating circumstances that he or she may have found to exist by a preponderance of the evidence.

The rule of *McKoy* is that jurors may not be prevented from considering mitigating circumstances which they found to exist in Issue Two. Far from precluding a juror's consideration of mitigating circumstances he or she may have found, the instant instruction expressly instructs that the evidence in mitigation *must* be weighed against the evidence in aggravation. Thus, the instruction given by the trial court fully comports with the decision in *McKoy.*

Nor are we persuaded by the defendant's contention that *McKoy* requires a juror to consider, at Issue Three and Issue Four, those mitigating circumstances which he or she did not find, but which were found by one or more other jurors. Were we to adopt this reading of *McKoy* and its progenitors, we would create an anomalous situation where jurors are required to consider mitigating circumstances which are only found to exist by a single holdout juror. We do not believe that the decisions in *McKoy* or *Mills* intended this anomalous result. The jury charge given in this case did not preclude the jurors from giving effect to all mitigating evidence they found to exist. This charge eliminates the defect found unconstitutional in *McKoy*. This assignment of error is overruled.

[44] Next, the defendant says that the trial court erred in sentencing him for assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into occupied property. The defendant says that the trial court should have found and considered the statutory mitigating circumstance that the relationship between the defendant and the victim was extenuating. N.C.G.S. § 15A-1340.4(a)(2)i (1988). We disagree.

This case is factually similar to the facts of *State v. Michael*, 311 N.C. 214, 316 S.E.2d 276 (1984). In *Michael*, the defendant pleaded guilty to second degree murder. The defendant contended that the trial court erred by failing to find and consider the mitigating factor that the relationship between the defendant and the victim was otherwise extenuating. N.C.G.S. § 15A-1340.4(a)(2)i (1988). The evidence showed that the defendant was the victim's son. During the morning prior to the murder, the defendant and the victim had argued. Later the same day, the victim spanked the defendant and held him by his hair while banging his head on the corner of a bed. That night, when the victim went to sleep on the couch, the defendant shot him in the head with a shotgun.

This Court held that the evidence in *Michael* was insufficient to compel the trial court to find the statutory mitigating factor. Unlike the evidence in *Michael*, which was characterized as credible, the only evidence in this case which tended to show the existence of the mitigating factor at issue was based on the self-serving statements of the defendant. We hold that the trial court did not err by failing to find and consider N.C.G.S. § 15A-1340.4(a)(2)i. This assignment of error is overruled.

The defendant brings forth additional assignments of error for preservation purposes. As we have previously decided the issues adversely to the defendant's position, we will not revisit those questions herein.

Having determined that there was no error in the defendant's sentencing proceeding, we are required by N.C.G.S. § 15A-2000(d) to determine (1) whether the record supports the jury's finding of the aggravating circumstances upon which the sentence of death was imposed, (2) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and (3) whether the sentence is excessive or disproportionate to the penalty imposed in the pool of similar cases, considering both the crime and the defendant. *State v. Quesinberry*, 325 N.C. 125, 381 S.E.2d 681 (1989), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603, *on remand*, 327 N.C. 480, 397 S.E.2d 233 (1990), *on remand*, 328 N.C. 288, 401 S.E.2d 632 (1991).

[45] The jury in this case found two aggravating circumstances: that the defendant had previously been convicted of a felony involving the use or threatened use of violence to the person, N.C.G.S. § 15A-2000(e)(3), and that the defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person, N.C.G.S. § 15A-2000(e)(10). As discussed herein, the evidence showed that the defendant had previously been convicted of common law robbery and two counts of assault with a deadly weapon inflicting serious injury. This evidence was sufficient to support the jury's finding of the aggravating circumstance in N.C.G.S. § 15A-2000(e)(3).

[46] The evidence was also sufficient to support the jury's finding that the defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person. N.C.G.S. § 15A-2000(e)(10) (1988). This Court has previously held that a shotgun is a weapon which is normally hazardous to more than one person if it is fired into a group of two or more persons in close proximity to one another. *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984). Likewise, a great risk of death is created when a shotgun is fired at close range into the occupied passenger compartment of an automobile. *Id.*

The evidence in this case showed that the defendant, from a distance of only ten feet, fired a twelve gauge shotgun into the rear seat

of the vehicle occupied by the victim and three other persons. The gun was loaded with a three inch, double aught, shotgun shell. The blast immediately killed one passenger and injured another. We hold that this evidence was sufficient to support the jury's finding that the defendant knowingly created a great risk of death to more than one person by use of a weapon which would normally be hazardous to the lives of more than one person.

Having thoroughly examined the record, transcripts and briefs in this case, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factors.

[47] We now turn to our final statutory duty of conducting a proportionality review. In determining whether a sentence of death is disproportionate, we consider both the defendant and the crime, and compare them to a pool of similar cases. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). In *Williams*, we said that the pool of similar cases to which we would compare the case under review would consist of:

> *[A]ll cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

Id. at 79, 301 S.E.2d at 355. The pool of similar cases includes only those cases which this Court has found to be free from error in both phases of the trial. *State v. Jackson*, 309 N.C. 26, 45, 305 S.E.2d 703, 717 (1983). In conducting our proportionality review, we

> compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and defendant's character, background, and physical and mental condition. If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently

been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). However, while we expressly analogize and distinguish many cases, we do not feel bound to cite all cases that we consider. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335.

The defendant contends that this case is similar to those cases where the defendant killed the victim during an emotional incident or after the victim had in some way provoked the defendant. We disagree.

The evidence showed that the defendant calmly and deliberately searched for the victim. When he encountered the victim walking along the roadway, he stopped his car, removed a shotgun from the rear seat, and walked toward the unarmed victim and his companions. As the victim pleaded for his life, the defendant calmly approached Ms. Jones' car to within ten feet and fired through the car's rear door. The blast fatally wounded the defendant's son and injured one of the children seated with him. The defendant then reloaded his gun, walked back to his car and drove away.

This evidence falls short of showing that the defendant acted because he was provoked or threatened by the victim. Nor do we believe that the jury's finding that at the time of the killing the defendant was under the influence of a mental or emotional disturbance means that the defendant was in a state of emotional excitement.

We believe that the significant characteristics of the defendant and the crime in this case are reflected by the jury's answers on the Issues and Recommendation Sheet. Regarding the defendant, the jury found that he had previously been convicted of a felony involving the use or threatened use of violence, and that at the time of the crime he was under the influence of a mental or emotional disturbance and in need of treatment for alcoholism and emotional disturbance. Regarding the defendant's crime, the jury found that the defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person. During the guilt phase, the jury found that the murder was premeditated and deliberate. Of these features, we believe

the defendant's three prior felony convictions to be the most significant.

Our review of the proportionality pool has revealed only one case where the jury found the same two aggravating circumstances which were found by the jury in this case. *State v. Hill*, 308 N.C. 382, 302 S.E.2d 202 (1983). The record in *Hill* reveals that the State's evidence showed that the defendant and two accomplices planned to commit robberies. The plan was for the female accomplice to stand by her car on the side of the road and act as if she was having car trouble. The defendant and the male accomplice would arm themselves and hide in nearby bushes until some passing motorist stopped to assist the female accomplice. The men would then come out of the bushes and rob the would-be samaritan.

After committing one robbery, the conspirators moved to another location and positioned themselves as previously planned. When three men stopped to render assistance to the female, the defendant and the other male robbed the men at gunpoint. The three men were then removed to another location. Two of the men were placed in the trunk of their car. The defendant took the third man and forced him to lie on the ground. The defendant then murdered the third man by shooting him in the head. Before leaving the scene, the defendant fired two bullets into the trunk of the car where the other two victims had been confined.

The jury found three aggravating circumstances and two mitigating circumstances. The jury recommended that the defendant be sentenced to life imprisonment.

In *Hill*, the defendant had one prior conviction for common law robbery. In this case, the defendant had previously been convicted of three violent felonies. This demonstrates that the defendant is an extremely violent individual who is uncommonly inclined towards using deadly force against unarmed, unsuspecting victims.

In addition, the jury in this case found that the murder was premeditated and deliberate whereas the murder in *Hill* was committed in the course of a felony. A conviction based on the theory of premeditation and deliberation indicates a more calculated and cold-blooded crime. *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470.

We have reviewed only two other cases in the pool where the jury found that the murder was committed with a weapon which endangered the lives of more than one person. *State v. Evangelista*, 319 N.C. 152, 353 S.E.2d 375 (1987); *State v. King*, 301 N.C. 186, 270

S.E.2d 98 (1980). In both of those cases, the defendants were sentenced to life imprisonment. However, neither of those defendants had been previously convicted of felonies involving the use or threatened use of violence. Because we believe that the defendant's multiple prior convictions for violent felonies constitute the most prominent feature of this case, we are not persuaded that *King* and *Evangelista* indicate that the defendant's sentence is disproportionate. Moreover, we do not believe that the number of cases in the pool in which the N.C.G.S. § 15A-2000(e)(10) circumstance has been found is sufficiently large to allow us to make any conclusions as to the weight that is generally accorded this circumstance during jury deliberations.

We note that a prior conviction for a felony involving the use of violence is among the most prevalent aggravating circumstances found in death-affirmed cases. *State v. Artis*, 325 N.C. 278, 342, 384 S.E.2d 470, 506. Although the presence of this aggravating circumstance is not determinative of whether the sentence in this case is proportionate, it is one indication that the sentence is not excessive or arbitrarily imposed. *Id.*

As previously discussed herein, the crimes in this case were both deliberate and callous. The defendant acted with total disregard for the lives of all the persons seated in the back seat of the automobile. The defendant was not dissuaded from action by the presence of small, innocent children and he showed no remorse for the injuries he inflicted on young Marrissa or for the death of his own son. As already discussed, the defendant's history of violent felonies unmistakably reveals his uncommon willingness to use deadly force against unsuspecting and innocent victims.

The murder in this case was the product of meanness and the culmination of a lengthy history of violence. The defendant exhibited a complete absence of compassion for his son, as well as the small children who sat beside him, as he begged for the defendant to spare his life. Based on our review of the cases set forth herein, as well as the other similar cases in the proportionality pool, we are led to the inescapable conclusion that the sentence of death was not excessive or disproportionate.

We hold that the defendant received a trial and sentencing proceeding free from prejudicial error, that the jury did not sentence the defendant out of prejudice or passion, and that the sentence is proportionate.

NO ERROR.

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

STATE OF NORTH CAROLINA v. CLINTON RAY ROSE AKA WAYNE RAYMOND GRICE

No. 32A92

(Filed 30 December 1994)

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

Defendant failed to establish that pretrial publicity prevented him from receiving a fair and impartial trial in the county on first-degree murder and armed robbery charges, and the trial court did not err in denying defendant's motion for a change of venue based on pretrial publicity, where many of the articles presented by defendant were factually based and followed the initial investigation and arrest; defendant's evidence showed virtually no coverage of the case the year before trial and that most jurors who had heard about the case could not remember specific details and had not formed opinions on defendant's guilt; the trial court conducted an initial screening to eliminate potential jurors who had formed opinions as to defendant's guilt or innocence, and the jurors who passed the initial screening were then subjected to a standard voir dire; and all jurors who actually sat either stated that they had no opinion as to guilt based on pretrial publicity or that they could set aside what they had heard or read and any opinion reached earlier.

Am Jur 2d, Criminal Law § 378.

Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.

Pretrial publicity in criminal case as affecting defendant's right to fair trial—federal cases. 10 L. Ed. 2d 1243.

2. Indigent Persons § 19 (NCI4th)— denial of funds for additional mental health expert—failure to show particularized need

The trial court did not abuse its discretion in the denial of defendant's motion in a first-degree murder and armed robbery

trial for funds to hire a neuropsychiatrist to determine whether defendant suffered from Fetal Alcohol Syndrome where defendant had already been examined and evaluated by two psychiatrists; these two psychiatrists had indicated that defendant suffered from alcohol abuse, and one had indicated that he suffered from other disorders as well; these psychiatrists were available to assist in evaluating, preparing and presenting his defense in both the guilt and sentencing phases; although defendant presented a neuropsychiatrist's affidavit that extensive neurological and neuropsychological examinations and testing would indicate whether defendant suffered from alcohol-related impairments, the affidavit did not indicate how such further testing would affect defendant's case; and defendant thus presented no evidence indicating a particularized need to establish that he was suffering from Fetal Alcohol Syndrome.

Am Jur 2d, Criminal Law §§ 771, 1006.

Right of indigent defendant in state criminal case to assistance for psychiatrist or psychologist. 85 ALR4th 19.

3. Evidence and Witnesses §§ 354, 364 (NCI4th)— escape from prison—thefts—admissibility to show intent and motive for murders

Chain-of-events evidence about defendant's escape from an Alabama prison and thefts he committed after his escape and before he committed the two murders at issue was properly admitted to establish defendant's intent and motive for the murders, and the trial court did not abuse its discretion by finding this evidence more probative than prejudicial. N.C.G.S. § 8C-1, Rules 403 and 404(b).

Am Jur 2d, Evidence §§ 435, 448 et seq.

Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged. 41 ALR Fed. 497.

4. Criminal Law § 375 (NCI4th)— lapsus linguae—no expression of opinion—absence of prejudice

The trial court's question, "You are ready for the sentencing—sorry, charge conference at this time?" was not an expression of opinion as to defendant's guilt but was a mere *lapsus linguae* which was not prejudicial to the defendant since the lapse was immediately realized and corrected by the trial court.

Am Jur 2d, Trial §§ 276 et seq.

5. Evidence and Witnesses § 116 (NCI4th)— conjecture of another's involvement in murders—testimony properly excluded

The trial court did not err by excluding a detective's testimony that, immediately after investigating the murders at issue, he believed that a named person had knowledge of, and might have been involved in, the murders since this testimony constituted mere conjecture that another person was involved in the murders, did not point directly to another's guilt, and was not inconsistent with defendant's guilt.

Am Jur 2d, Evidence § 587.

6. Homicide § 226 (NCI4th)— defendant as perpetrator of murders—sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant was the perpetrator of two first-degree murders where it tended to show that defendant was living at a campsite about four-tenths of a mile from the victims' campsite; he had a motive to steal from the victims and kill them if discovered because he had escaped from jail and was hiding, stealing food and other supplies to survive; on 22 June 1990 defendant was seen walking toward the victims' campsite; the victims were killed by a 16-guage shotgun on 22 or 23 June; a 16-guage shotgun was found at defendant's campsite that had chambered and ejected shells that were found at the victims' campsite; a pair of boots with tread similar to an impression left all over the crime scene was also found there; the day after the murders defendant possessed many of the victims' goods, including a gold ring which had been worn by one victim on his left ring finger; this ring finger had been severed; on 24 June witnesses saw defendant acting nervous and brandishing a pistol; and defendant stated that "he was ready for anything if anything went on like what went on last night" and that "ain't nobody going to f— me no more."

Am Jur 2d, Homicide § 435.

7. Robbery § 53 (NCI4th)— armed robbery—killings and recent possession of victims' goods—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of two armed robberies where it tended to show that

defendant killed the victims and possessed the victims' goods a few days after the killings.

Am Jur 2d, Robbery §§ 62 et seq.

8. Homicide § 552 (NCI4th)— first-degree murder—instruction on second-degree murder not required

The trial court did not err by refusing to instruct the jury on second-degree murder in this prosecution for two first-degree murders based on premeditation and deliberation where all the evidence tended to show that defendant went to the victims' campsite, shot them at close range, and then stole their possessions; one of one victim's fingers was cut off and a ring later found in defendant's possession was taken from his hand; one victim was sitting down with a blanket or pillow on his chest when shot, indicating lack of provocation on his part; defendant had a motive to steal from the victims and kill them if discovered because he had escaped from prison, was hiding, and was stealing food and other supplies to survive; and after the murders defendant was heard talking about how no one was going to "f— with him no more" and that "he was ready for anything if anything went on like what went on last night." Evidence that a hunting knife was found under one victim's body, that this victim was standing when shot, and that the two victims drank on camping trips was insufficient to support an inference that defendant shot the victims spontaneously during an altercation without premeditation and deliberation.

Am Jur 2d, Homicide §§ 525 et seq.; Trial §§ 1427 et seq.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

9. Criminal Law § 465 (NCI4th)— reasonable doubt—jury argument—no due process violation—error cured by instruction

The prosecutor's closing argument on reasonable doubt that it was sufficient if the jurors "believed basically" that defendant was guilty and that they could find defendant guilty if their doubts were no greater than the substantial level of uncertainty confronted by farmers when they plant each year did not lower the State's burden of proof in violation of defendant's due process rights where it is clear when the argument is viewed in its entirety that the prosecutor was indicating to the jurors that they did

not have to have "absolute certainty" to find defendant guilty. Moreover, the trial court's correct instruction on reasonable doubt, which followed the complained-of statement by the prosecutor, remedied the error, if any, in the prosecutor's closing argument.

Am Jur 2d, Trial § 640.

10. Criminal Law §§ 1337, 1347 (NCI4th)— capital sentencing—aggravating circumstances—course of conduct—prior violent felony—submission of both—no error

The trial court did not err by submitting both the "course of conduct" and "prior violent felony" aggravating circumstances in a capital sentencing proceeding for two first-degree murders where evidence of defendant's conviction of an Alabama murder supported the finding of a prior conviction of a violent felony, and the murder of each of the victims in this case supported the finding of a course of violent conduct in the sentencing for the murder of the other victim. Considering the instructions in their entirety and in context, the trial court's instruction directing the jury to consider whether defendant was involved in a course of violent conduct "on or about the alleged date" of the murders of the two North Carolina victims could not have been interpreted by the jury to mean that the murder of the Alabama victim could be considered as a part of the course of violent conduct that included the much later murder of the victims in this state.

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.

11. Criminal Law § 1320 (NCI4th)— capital sentencing—two aggravating circumstances—failure to instruct not to consider same evidence—no plain error

The trial court did not commit plain error by failing to instruct the jury in a capital sentencing proceeding without a request by defendant that it should not consider the same evidence for both the "course of conduct" and "prior violent felony"

aggravating circumstances since this failure did not have a probable impact on the jury's finding of these circumstances.

Am Jur 2d, Trial §§ 1441 et seq.

12. Criminal Law § 1312 (NCI4th)— capital sentencing—circumstances of prior crimes—admissibility to show conviction of violent felony aggravating circumstance

An F.B.I. agent's testimony about the circumstances surrounding a murder committed by defendant in Alabama, and his testimony about the circumstances surrounding a kidnapping by defendant in Oregon as related to him by the victim, was relevant to sentencing defendant for two murders in this state and was properly admitted in this capital sentencing proceeding to support the prior conviction of a violent felony aggravating circumstance, notwithstanding the State had offered certified copies of court documents to establish defendant's convictions for those crimes, defendant had not presented evidence of his good character, and the testimony about the kidnapping was hearsay.

Am Jur 2d, Evidence §§ 427 et seq.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.

13. Criminal Law § 455 (NCI4th)— capital sentencing—prosecutor's argument—possibility of another escape and murder

Where defendant had escaped from prison in Alabama after being sentenced to life imprisonment for murder, the prosecutor could properly argue to the jury in a capital sentencing proceeding that defendant might again escape and kill if given a life sentence for two murders in this state.

Am Jur 2d, Trial §§ 572 et seq.

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

14. Criminal Law § 454 (NCI4th)— capital sentencing—prosecutor's argument—Biblical references

The prosecutor's jury argument in a capital sentencing proceeding that the Bible states that those who have committed mur-

der should be punished with death was not so grossly improper as to require *ex mero motu* intervention by the trial court.

Am Jur 2d, Trial §§ 572 et seq.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

15. Criminal Law § 1350 (NCI4th)— capital sentencing—mitigating circumstances—incorrect response by jury foreman—written response on recommendation form—all circumstances considered

Where the jury was instructed as to mitigating circumstance five, and the issues and recommendation form carried into deliberations indicated that at least one juror had found this circumstance to exist and have mitigating value, the jury foreman's response to an inquiry by the court indicating that the jury had rejected mitigating circumstance five did not show that the jury did not pass on the existence of all mitigating circumstances so as to entitle defendant to a new sentencing hearing.

Am Jur 2d, Criminal Law §§ 598, 599.

16. Criminal Law § 1373 (NCI4th)— two murders—death sentences not disproportionate

Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate to the penalty imposed in similar cases, considering the crimes and the defendant, where the jury found the course of conduct, prior violent felony and murder during the commission of armed robbery aggravating circumstances; defendant had escaped from a minimum security prison in Alabama while serving a life sentence for a previous murder; while on escape defendant murdered the two victims by shooting them at close range, stole many of their possessions, and cut off one victim's finger in order to steal a ring; and defendant did not assist his victims.

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.

STATE v. ROSE

[339 N.C. 172 (1994)]

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death entered by Wood, J., at the 2 December 1991 Criminal Session of Superior Court, Rockingham County. Defendant's motion to bypass the Court of Appeals as to additional judgments imposing sentences of imprisonment entered upon his conviction for two counts of robbery with a dangerous weapon was allowed 23 August 1993. Heard in the Supreme Court 14 April 1994.

Michael F. Easley, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.

Burton Craige for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of the first-degree, premeditated and deliberated murders of Richard Dean Connor and Larry Dale Connor. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended, and the trial court entered, a sentence of death for each murder. Defendant was also convicted of the armed robbery of each victim and sentenced to a forty-year term of imprisonment for each robbery. We conclude that the trial was free from prejudicial error, and that the death sentences are not disproportionate.

On 23 April 1990 defendant, Clinton Ray Rose, escaped from a minimum security prison in Alabama. Sometime in May, Allen Wagner saw him on the Mayo River off Anglin Mill Road in Rockingham County where defendant had set up a campsite. Wagner talked to defendant on one occasion, and defendant introduced himself as Wayne Grice. Defendant also met Steve Harvey and John Nance while camping on the river.

While camping defendant would go regularly to Dalton's Market, a mile or a mile and a half from the campsite, to buy a cookie and a Pepsi. On 10 June 1990 someone broke into Dalton's; beer, money, and canned foods were stolen. Defendant did not return to Dalton's following the robbery.

On 22 June 1990, while David Stanley's truck was parked near the river, his pistol was stolen from the truck. On 22 June 1990, while Steve Harvey was at the river, he saw defendant and talked to him for a few minutes around dusk. The two men began walking on Anglin Mill Road. During the walk Harvey passed the tents and truck of the victims, Larry and Richard Connor. Defendant wanted to see if the

victims would give him some beer; Harvey did not go with defendant into the victims' campsite.

Allen Wagner saw defendant early in the morning on 24 June 1990. Defendant was carrying a camera, was dressed better than normally, and had several watches and a Browning automatic .22-caliber pistol with him. He also showed Wagner money he had in his billfold. Later that day John Nance saw defendant at the river. Defendant was carrying a .22-caliber pistol and appeared nervous. Defendant began talking to Nance and to Jerry Lester, Billy Anders and Patty Best, who were with Nance. Lester testified that defendant had the pistol out and was waving it around, stating that "he was ready for anything if anything went on like what went on last night." Defendant also noted that "ain't nobody going to f—— me no more."

Thomas Holliman also saw defendant on 24 June 1990. Holliman recognized the .22-caliber pistol defendant was carrying as the one lost by his friend David Stanley on 22 June 1990. Holliman told defendant his friend would give a reward if he was given back his gun. Defendant said the gun was given to him by his brother, who had bought it in Greensboro.

On 25 June 1990 Deputy Sheriff Mike James received information that Larry Dale Connor and Richard Dean Connor were missing. That evening he spotted the Connors' red GMC pickup truck in a camping area off of Anglin Mill Road next to the Mayo River. James investigated the campsite and saw two tents but no people. After noticing that the right side window of the pickup truck had been broken, James called for assistance.

Sheriff's Deputy Hutchinson, an off-duty officer who lived in the area, was the next officer to arrive at the scene. Hutchinson and James began to search the area. James went to unzip one of the tents and noticed a strong odor. He then saw one of the victims, who appeared dead, in a lawn chair. James radioed Sergeant Lunsford, who was en route to the scene, and told him what he had found.

David Hudson, a crime scene investigation and identification officer, arrived later. He photographed the area and took fingerprints. Hudson noticed impressions of tennis shoes and heavy-soled shoes, such as hiking boots, in the area. He also found four shotgun shells in the area of the victims' tents. Hudson then discovered the bodies of Larry and Richard Connor. Larry was lying face down on his left arm; when he was turned over, Hudson observed a large wound to his

chest and a hunting knife near his left arm. Richard was sitting in a lounge chair; he had a large wound over his right eye, and one of his fingers had been cut off.

Defendant's campsite was about a quarter of a mile away. Officers went there around 9:30 a.m. on 26 June 1990. Defendant identified himself as Wayne Grice; he did not attempt to leave when the officers arrived. Deputy Hudson went to defendant's campsite to investigate on that same day.

Deputy Hudson found a cooler with Rick Connor's name on it at defendant's campsite. Hudson also saw a pair of work boots with a pattern similar to that he had seen at the victims' campsite, as well as a 16-gauge shotgun. Scott Connor, the son of Richard Connor, testified that a camera found at defendant's campsite was his and that he had loaned it to his father before his father went camping. Scott also identified other items found at defendant's campsite as his father's, including: a Craftsman tool kit, a brown tent bag, a lounge chair, a sleeping bag, a hatchet, a wristwatch, tennis shoes, fishing rods, a checkbook, and a diamond ring.

Debra Grubbs was living with Larry Connor in June of 1990. She identified camouflage pants and Nike tennis shoes which were being worn by defendant on 26 June 1990 as being the clothes Larry had worn the day he went camping.

Annie Cassidy, who worked at Dalton's Market, identified a number of items found at defendant's campsite as having come from her store. She identified the goods based on the handwritten price stickers found on the food items. She also testified that some were items stolen from the Market on 10 June 1990.

A 16-gauge Mossburg, bolt-action shotgun also was found at defendant's campsite. Michael Gavin, a Special Agent for the State Bureau of Investigation, concluded that a 16-gauge shell found at the victims' campsite had been chambered in and ejected from this shotgun. The shotgun waddings and pellets recovered from the victims' bodies and the crime scene were consistent with waddings and pellets in Remington's 16-gauge shells.

Dr. Robert Thompson performed an autopsy on Larry Connor on 26 June 1990. He determined that Larry had been dead about three or four days. He had been shot from a distance of about four feet; the bullet had run from left to right, backward, and slightly upward. Larry died from the shot to his heart and the bleeding that resulted. Dr.

Thompson testified that Larry would not have died instantly but could have lived eight to ten minutes after he was shot.

Dr. Thompson also participated in Richard Connor's autopsy. Richard seemed to have been dead for the same period as Larry. He had died from a shotgun wound to the head; the gun had been fired from a distance of three to four feet. The shotgun wound track appeared to go downward, slightly to the left, and then slightly backward. The autopsy also noted that Richard's ring finger had been cut off.

Defendant presented no evidence during the guilt phase.

During sentencing evidence was presented that defendant had been convicted of the first-degree murder of Gary Fidslar and sentenced to life in prison in Alabama in 1975. Defendant also had been convicted of the second-degree kidnapping of Michael O'Malley in Oregon.

Defendant presented evidence at sentencing that he had not stolen from a family he had met on the river, even though the members were camped next to him and left their campsite—with a new gas grill, diamond set, rifle, and shotgun in it—unattended. He had taken care of himself while growing up in a family of bootleggers. He was a good artist and would draw pictures and sell them or give them to people he met in the area.

PRETRIAL PHASE

[1] In his first assignment of error, defendant argues the trial court erred in denying his motion for a change of venue. He contends he could not obtain a fair and impartial trial in Rockingham County, as virtually the entire jury pool was familiar with media reports containing information that would have been inadmissible in the guilt phase of his trial—information guaranteed to predetermine his guilt.

In his motion defendant noted that information about the crime and his criminal history had permeated the county through the press, other media, and community discussion. In support of his motion, defendant introduced twenty-seven articles addressing (i) the killing of the victims, (ii) the fact that he had escaped from an Alabama prison while serving a life sentence for murder, and (iii) the fact that he had attempted to escape from prison in Rockingham County while awaiting this trial. The last article submitted had been published in

December 1990. Most had appeared in the papers in June and July 1990, immediately after the murders.

Defendant presented a local attorney who stated that the deaths had been a regular topic of conversation in the area where he lived, near where the murders had occurred. The discussions included the fact that defendant had been charged with murder in Alabama. The witness also testified, however, that he had not heard any conversation about the case in a number of months.

Judge Preston Cornelius denied the motion at the 16 September 1992 Criminal Session of Superior Court, Rockingham County. Defendant renewed the motion at the beginning of his trial, noting that two articles on commencement of the trial had been published since the motion was previously made. Judge Wood denied the motion but did allow for individual questioning of jurors on the issue of pretrial publicity and their feelings on capital punishment.

The statute pertaining to change-of-venue motions provides:

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or
>
> (2) Order a special venire under the terms of G.S. 15A-958.

N.C.G.S. § 15A-957 (1988). The test for determining whether a change of venue should be granted due to pretrial publicity is whether "there is a reasonable likelihood that the defendant will not receive a fair trial." *State v. Jerrett*, 309 N.C. 239, 254, 307 S.E.2d 339, 347 (1983).

> [A] defendant's motion for a change of venue should be granted when he establishes that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed.
>
> . . . .
>
> Our cases indicate that a defendant, in meeting his burden of showing that pretrial publicity precluded him from receiving a

> fair trial, must show that jurors have prior knowledge concerning the case, that he exhausted peremptory challenges and that a juror objectionable to the defendant sat on the jury. In deciding whether a defendant has met his burden of showing prejudice, it is relevant to consider that the chosen jurors stated that they could ignore their prior knowledge or earlier formed opinions and decide the case solely on the evidence presented at trial.

Id. at 254-55, 307 S.E.2d at 347-48 (citations omitted). "The burden of proving the existence of a reasonable likelihood that he cannot receive a fair trial because of prejudice against him in the county in which he is to be tried rests upon the defendant." *State v. Yelverton*, 334 N.C. 532, 540, 434 S.E.2d 183, 187 (1993). The determination of whether a defendant has carried his burden of showing that pretrial publicity precluded him from receiving a fair trial rests within the trial court's sound discretion. *Id.*

From our review of the jury *voir dire* and materials submitted by both defendant and the State, we are satisfied that defendant failed to meet his burden of proving that pretrial publicity tainted his chances of receiving a fair and impartial trial. Many of the articles at issue were factually based and followed the initial investigation and arrest. "This Court has consistently held that factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue." *State v. Gardner*, 311 N.C. 489, 498, 319 S.E.2d 591, 598 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985).

In addition, the trial court protected defendant from being judged by anyone who would not base a decision of guilt or innocence solely on the evidence. All jurors who actually sat either stated that they had no opinion as to guilt based on pretrial publicity or that they could set aside what they had heard or read and any opinion reached earlier. Defendant thus did not show he had been prejudiced by pretrial publicity.

Further still, to assure a fair and impartial venire the trial court conducted an initial individual screening to eliminate potential jurors who had formed opinions as to defendant's guilt or innocence. While a majority had heard or read something about the case, they had not formed an opinion on defendant's guilt based on the evidence. The court excused potential jurors who had formed an opinion that they could not put aside. The jurors who passed the initial screening were then subjected to a standard *voir dire*.

Thus, noting that defendant's evidence showed virtually no coverage of the case the year before trial and that most jurors who had heard about the case could not remember specific details and had not formed opinions of defendant's guilt, we conclude that defendant did not establish that pretrial publicity prevented him from receiving a fair and impartial trial in Rockingham County. We hold, therefore, that the trial court did not err in denying defendant's motion for a change of venue.

[2] Defendant next contends the trial court erred by denying his motion for funds to hire an additional independent medical expert and his related motions for a continuance. Defendant renewed the motion for an expert at the beginning of the sentencing phase, and it was again denied.

On 18 July 1990 defense counsel sought an order committing defendant to Dorothea Dix Hospital. The record does not reflect a ruling on this motion. On 14 November 1990 defense counsel renewed his motion, requesting that defendant

> be examined to determine whether by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings and to assist in his defense in a rational or reasonable manner, and that he be examined to determine his psychological condition and his general state of mental health.

Defendant was transported to Dorothea Dix on 14 November 1990. He was examined by Dr. Patricio P. Lara, who diagnosed him as suffering from an adjustment disorder with mixed disturbance of emotions and conduct, a nonspecified personality disorder, alcohol abuse, and possible dependence on anxiolytics. Dr. Lara determined that defendant was capable of standing trial.

On 25 July 1991 defendant made a motion for funds with which to hire a psychologist to aid in his defense. He argued that the commitment order did not direct Dr. Lara to evaluate him to determine whether he had the capacity to premeditate or deliberate any of the offenses or to appreciate the criminality of his conduct, or to determine if there were other mitigating circumstances relating to his mental or emotional background. The trial court authorized defendant to expend $1,500 for a psychologist.

On 2 December 1991, before the trial began, defendant filed a motion for continuance. He asked that the case be continued until he had been further tested and examined by another psychiatric or psychological expert. At that time Dr. Faye Sultan, a psychologist, had interviewed defendant. Dr. Sultan had informed defendant's counsel that defendant's mental and emotional condition at the time of the crime, as well as at that time, were possibly affected and influenced by Fetal Alcohol Syndrome. She believed defendant should be tested and examined by a neuropsychiatrist. Defendant had received the name of a neuropsychiatrist but had been unable to contact him due to the Thanksgiving holidays. Defendant stated that further examination was crucial to his defense, particularly during the sentencing phase.

Defendant filed another motion to continue on 16 December 1991, the day before the jury reached a verdict. With this motion, he filed an affidavit from Dr. Sultan averring that he could have been suffering from Fetal Alcohol Syndrome. Dr. Sultan also indicated she was not qualified to perform testing for this condition. Dr. Claudia Coleman, who was qualified to do so, reviewed Dr. Sultan's affidavit and the psychological report from Dorothea Dix. Dr. Coleman filed an affidavit indicating the likelihood that defendant suffered from neurobehavioral and cognitive deficits because of his drinking and/or his mother's perinatal drinking. Dr. Coleman stated that she would be better able to determine the extent of alcohol impairment if she could perform a neuropsychological and neurological evaluation. Her charge for such an evaluation was between $2,500 and $3,000, and she would not be able to evaluate defendant until after 20 December 1991. The trial court denied both of defendant's motions to continue.

An indigent defendant is entitled to the assistance of an expert in preparation of his defense when he makes a " 'particularized showing that (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case.' " *State v. Ballard*, 333 N.C. 515, 518, 428 S.E.2d 178, 179, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 438 (1993) (quoting *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992))."The statutory and common law principles governing the appointment of an expert witness for an indigent defendant are well settled." *State v. Mills*, 332 N.C. 392, 400, 420 S.E.2d 114, 117 (1992).

> The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall

> approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State.

N.C.G.S. § 7A-454 (1986).

"The particularized showing demanded by our cases is a flexible one and must be determined on a case-by-case basis." *State v. Parks*, 331 N.C. at 656-57, 417 S.E.2d at 471. The determination of whether a defendant has made an adequate showing of particularized need lies within the trial court's discretion. *State v. Mills*, 332 N.C. at 400, 420 S.E.2d at 117.

> This Court recognized the constitutional implications of an indigent defendant's request for expert assistance nearly a decade before the United States Supreme Court decided *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), the landmark case which guaranteed indigent defendants the right to expert assistance under certain circumstances.

State v. Parks, 331 N.C. at 655, 417 S.E.2d at 471. "[W]hat is required by *Ake* is that a 'defendant be furnished with a competent psychiatrist for the purpose of not only examining defendant but also assisting defendant in evaluating, preparing, and presenting his defense in both the guilt and sentencing phases.' " *Id.* at 659, 417 S.E.2d at 473 (quoting *State v. Gambrell*, 318 N.C. 249, 259, 347 S.E.2d 390, 395 (1986)).

We conclude that the trial court did not abuse its discretion when it denied defendant's motions to continue so he could be evaluated by a neuropsychologist. Defendant had already been examined and evaluated by two psychiatrists, Dr. Lara and Dr. Sultan. Dr. Lara had indicated that defendant was suffering from an adjustment disorder with mixed disturbance of emotions and conduct, a nonspecified personality disorder, alcohol abuse, and possible dependence on anxiolytics. Dr. Lara also concluded that if further evidence was presented that the patient was intoxicated at the time of the crime, his condition as a result of the intoxication should be considered to represent impairment of his capacity to conform his actions within limits established by law. There was no evidence that such diagnosis required evaluation by a neuropsychologist, yet defendant chose not to allow Dr. Lara to assist him in his defense. Dr. Sultan also noted that defendant suffered from long-term alcohol and substance abuse, and indicated the possibility that defendant suffered from some mental or neuro-

logical impairment. Defendant also chose not to call Dr. Sultan to testify in his defense.

In his motion defendant presented the affidavit of Dr. Coleman indicating that extensive neurological and neuropsychological examinations and testing would indicate whether defendant suffered from alcohol-related impairments. The affidavit, however, did not indicate how such further testing would affect defendant's case. Two other psychiatrists had already indicated that defendant suffered from alcohol abuse, and one had indicated that he suffered from other disorders as well. Defendant presented no evidence indicating a particularized need to establish that he was suffering from Fetal Alcohol Syndrome.

On these facts, defendant failed to demonstrate a particularized need to have a third expert examine him. Defendant was furnished with two competent psychiatrists who examined him and were available to assist in evaluating, preparing, and presenting his defense in both the guilt and sentencing phases. The trial court did not abuse its discretion in determining that defendant did not establish a particularized showing that without an evaluation by a neuropsychologist, defendant would be deprived of a fair trial or that there was a reasonable likelihood that a neuropsychologist would materially assist him in the preparation of his case. This assignment of error is overruled.

GUILT PHASE

[3] Defendant next argues that the trial court erred by overruling his objections to testimony about his escape from an Alabama prison and thefts he committed after the escape and before the murders. George McKinney testified that defendant had escaped from an Alabama minimum security prison on 23 April 1990. Annie Cassidy testified that there was a break-in at her grocery store either late in the evening on 10 June 1990 or early in the morning on 11 June 1990. She identified food items found at defendant's campsite as having come from, or being the type of items stolen from, her store. John David Stanley testified that a .22-caliber weapon was stolen from his vehicle, which was parked in the Anglin Mill Road area, on 22 June 1990. Wayne Holliman, a friend of Stanley's, testified that he saw defendant with the weapon on 24 June 1990. The weapon was seized at defendant's campsite on 26 June 1990.

Defendant argues that the only probative value of this evidence was to show that he had the propensity or disposition to commit an offense of the nature charged, which violates N.C.G.S. § 8C-1, Rule

404(b). Even if the evidence was properly admitted under Rule 404(b), he contends, any probative value was outweighed by its prejudicial effect, which violates N.C.G.S. § 8C-1, Rule 403.

The State argues that the evidence presented facts in a chain of circumstances leading up to the murders that indicated defendant's willingness to support himself by any means necessary. The instances all established a motive for murdering the victims, or that defendant needed goods to survive and to avoid apprehension. Defendant argues, however, that the evidence could not support the theory that he killed the victims to avoid apprehension because a double murder would generate an intensive search of the area and cause him to be discovered.

> "Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury."

State v. Agee, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)). The Court in *Agee* held that such evidence could be admitted even if it was evidence of other crimes, wrongs, or acts if it was admitted to establish a chain of circumstances leading up to the crime charged. *Id.* at 550, 391 S.E.2d at 175-76. Rule 404(b) is a rule of inclusion "subject to but *one exception* requiring [the] exclusion [of evidence] 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, 279, 389 S.E.2d 48, 54 (1990).

In *State v. Bray*, 321 N.C. 663, 365 S.E.2d 571 (1988), evidence was presented that the defendant there had escaped from jail, stolen a truck and a rifle, and killed a state trooper. The defendant argued that the trial court erroneously admitted testimony about his escape and the stolen truck and rifle. *Id.* at 675, 365 S.E.2d at 578. This Court held the testimony admissible to show intent and motive. The "testimony shows that defendant and Rios [codefendant] intended to escape from jail, then do whatever was necessary to avoid capture, and therefore that they had a motive for killing [the trooper]. The chain of events from the time of their escape demonstrates their attempt to avoid apprehension." *Id.* The Court also found that the probative value of the testimony outweighed any possible unfair prej-

udice to defendant and that the evidence was correctly admitted pursuant to N.C.G.S. § 8C-1, Rules 403 and 404(b). *Id.* at 675, 365 S.E.2d at 579; *see also State v. Meekins*, 326 N.C. 689, 699-700, 392 S.E.2d 346, 351 (1990) (permissible to cross-examine defendant about a pending rape charge because it established intent and motive for murder and robbery to obtain a means of escape).

We conclude that the chain-of-events evidence here was properly admitted to establish defendant's intent and motive for the murders at issue, and that the trial court did not abuse its discretion by finding the evidence more probative than prejudicial. This assignment of error is overruled.

[4] Defendant next contends the trial court erred by expressing an opinion as to his guilt. At the conclusion of the State's case and prior to closing arguments, the following colloquy occurred:

> COURT: Now the State has rested. Anything for the defendant?
>
> MR. STULTZ: The defendant does not choose to offer any evidence, Your Honor.
>
> COURT: You are ready for the sentencing—Sorry, charge conference at this time?

Defendant argues this was an improper expression of opinion in contravention of N.C.G.S. § 15A-1222 and § 15A-1232, and that it came at a critical time because the jury was waiting to hear from him and instead heard the court express an opinion as to his guilt.

In *State v. Hill*, 237 N.C. 764, 75 S.E.2d 915 (1953), this Court held that a *lapsus linguae* potentially indicating an expression of opinion was not prejudicial error. The trial court there was charging the jury when it stated: "So the Court says and contends that your verdict upon this evidence should be that of guilty as charged in the bill of indictment." *Id.* at 765, 75 S.E.2d at 916. The prosecutor pointed out that the charge should have been prefaced by the words "the State contends." *Id.* The trial court immediately corrected the charge, and this Court found that "no prejudicial harm" resulted.

Likewise, in *State v. Kennedy*, 320 N.C. 20, 34, 357 S.E.2d 359, 367 (1987), the trial court inadvertently stated "victim" instead of "alleged victim" when listing the offenses for prospective jurors. Defendant argued that this was an impermissible expression of opinion; this Court held that the remark was a mere *lapsus linguae* that did not prejudice the defendant. *Id.* at 34, 357 S.E.2d at 368.

We conclude that the statement here was also a mere *lapsus linguae*. The lapse was immediately realized and corrected by the trial court and was not prejudicial. This assignment of error is overruled.

[5] Defendant next argues the trial court erred by not allowing him to ask Detective Oakley if he had an opinion about the number of people involved in the murders. During an offer of proof, Oakley stated that immediately after investigating the murders he believed there was a strong possibility that Steve Harvey had knowledge of, and might have been involved in, the murders. Defendant argues that this statement should have been admitted because it was relevant evidence which showed that someone else committed the murders.

> [W]here the evidence is proffered to show that someone other than the defendant committed the crime charged, admission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant. Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt.

State v. McNeill, 326 N.C. 712, 721, 392 S.E.2d 78, 83 (1990).

> "Evidence which tends to show nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so, is too remote to be relevant and should be excluded."

State v. Brewer, 325 N.C. 550, 564, 386 S.E.2d 569, 576 (1989) (quoting *State v. Britt*, 42 N.C. App. 637, 641, 257 S.E.2d 468, 471 (1979)), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990). The evidence at issue presents mere conjecture that Harvey was involved in the murders. It does not show that defendant did not commit them.

Defendant notes that in *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988), and *State v. Sneed*, 327 N.C. 266, 393 S.E.2d 531 (1990), evidence pointing toward another person's commission of the crimes at issue was held admissible. In *McElrath* and *Sneed*, however, the evidence at issue both exculpated the defendant and inculpated another. That is not true of the evidence here, which simply indicated that one person felt that Harvey might have been "involved." This evidence was not inconsistent with defendant's guilt.

Defendant also argues that to require that evidence point directly to another's guilt *and* be inconsistent with defendant's guilt contra-

venes the liberal interpretation of relevance mandated by N.C.G.S. § 8C-1, Rule 401. He presents no authority to support his position that only one prong of the test must be satisfied, however. This Court has consistently required that such evidence satisfy both prongs. *See, e.g., State v. Annadale*, 329 N.C. 557, 575, 406 S.E.2d 837, 848 (1991); *State v. Sneed*, 327 N.C. at 271, 393 S.E.2d at 533; *State v. McNeill*, 326 N.C. at 721, 392 S.E.2d at 83; *State v. Brewer*, 325 N.C. at 564, 386 S.E.2d at 577; *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 279-80 (1987).

Defendant also argues that exclusion of the proffered evidence deprived him of his due process right to present evidence in his defense, in violation of the Fourteenth Amendment. This argument was not made to the trial court and thus is not properly before us. *State v. Benson*, 323 N.C. 318, 312-22, 372 S.E.2d 517, 519 (1988).

We conclude that the evidence at issue was not relevant as it was mere conjecture that someone else was involved and was not inconsistent with defendant's guilt. This assignment of error is overruled.

[6] Defendant argues that denial of his motion to dismiss was error. "When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). "Whether the evidence presented constitutes substantial evidence is a question of law for the trial court." *State v. Sexton*, 336 N.C. 321, 361, 444 S.E.2d 879, 902, *cert. denied*, — U.S. —, 130 L. Ed. 2d 429 (1994). Evidence is deemed "substantial" if the evidence is "existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). In reviewing

> "the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, 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."

Id. (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)). In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor. *State*

v. Sumpter, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986). If the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

The evidence showed that defendant lived about four-tenths of a mile from the victims' campsite. He had a motive to steal from the victims and kill them if discovered because he had escaped from jail and was hiding, stealing food and other supplies to survive. On 22 June 1990 he was seen walking toward the victims' campsite; the murders occurred on 22 or 23 June 1990. The victims were killed with a 16-gauge shotgun. A 16-gauge shotgun was found at defendant's campsite that had chambered and ejected shells that were found at the victims' campsite. A pair of boots whose tread was similar to an impression left all over the crime scene was also found there. The day after the murders defendant possessed many of the victims' goods, including a gold ring which had been worn by Richard Connor on his left ring finger. Richard's left ring finger had been severed. Finally, on 24 June 1990 witnesses saw defendant acting nervous and brandishing a pistol. Defendant stated that "he was ready for anything if anything went on like what went on last night." Defendant also said "ain't nobody going to f—- me no more."

[7] This evidence clearly supports a reasonable inference—more than a mere suspicion or conjecture—that defendant was the perpetrator of the murders. Further, the killing of a victim and a defendant's recent possession of the victim's goods is sufficient evidence to support a verdict of guilty of robbery with a dangerous weapon. *See State v. Robbins*, 319 N.C. 465, 513, 356 S.E.2d 279, 307, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). This assignment of error is overruled.

[8] Next, defendant argues the trial court erred in refusing to instruct on the lesser included offense of second-degree murder. He contends that because there was evidence that (1) a hunting knife was found under Larry Connor's body, (2) Larry was standing when shot, and (3) Larry and Richard Connor drank on camping trips, the jury could have inferred that defendant went to the camp, an altercation ensued between him and Larry, Larry grabbed his hunting knife, and defendant then shot Larry and Richard without premeditation or deliberation.

The trial court is not required to instruct on second-degree murder in every case in which it instructs on first-degree murder. *State v. Strickland*, 307 N.C. 274, 284-85, 298 S.E.2d 645, 653 (1983), *modified on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). "[D]ue process requires only that a lesser offense instruction be given 'if the evidence would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater.' " *Id.* at 286, 298 S.E.2d at 654 (quoting *Beck v. Alabama*, 447 U.S. 625, 635, 65 L. Ed. 2d 392, 401 (1980)).

> 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).

> 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.

State v. Skipper, 337 N.C. 1, 26-27, 446 S.E.2d 252, 265-66 (1994). Premeditation and deliberation are not usually susceptible to direct proof; they can be inferred, however, from circumstances such as: "(1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; . . . and (6) evidence that the killing was done in a brutal manner." *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).

The evidence here permitted a finding that defendant went to the victims' campsite, shot them at close range, and then stole their pos-

sessions. One of one victim's fingers was cut off, and a ring—later found in defendant's possession—was taken from his hand. Richard Connor was sitting down with a blanket or pillow on his chest when shot, indicating lack of provocation on his part. After the murders defendant was heard talking about how no one was going to "f—- with him no more" and that "he was ready for anything if anything went on like what went on last night." There was also evidence that defendant had a motive for the killing—to obtain supplies and to stay hidden. This evidence cumulatively supports a finding of every element of first-degree, premeditated and deliberated murder. Further, there was no evidence—only conjecture—supporting defendant's theory that he shot the victims spontaneously during an altercation. The evidence showed that Richard was sitting in a chair when he was shot; there was no evidence he had been drinking. As the State's evidence was positive as to each element of first-degree murder, and there was no conflicting evidence, it was not error to refuse to instruct on the lesser included offense of second-degree murder.

[9] Defendant next contends the prosecutor denied him a fair trial by arguing that the jury should apply an unconstitutional definition of the reasonable doubt standard. He argues that the prosecutor's explanation of reasonable doubt allowed the jury to apply an unconstitutionally lenient standard of proof and violated due process. The prosecutor stated:

> I would like to start by focusing on some things that I think have become a critical issue for you in your deliberation. That is whether the State's evidence is sufficient to convince you beyond a reasonable doubt of [defendant's] guilt.
>
> Question is whether this evidence is sufficient to lead you to believe basically that he killed the Connor brothers. You have to understand there is no such thing as an absolute certainty, but there is a certainty sufficient for the purposes of human life. That is essentially what proof beyond a reasonable doubt means.
>
> You know that farmers till their fields every year in preparation to plant. They plant but they never know with a certainty that they will actually harvest their crops, but they do all of this year after year as they sufficiently believe that they will in fact harvest.
>
> What is required here, ladies and gentlemen, is not that you be convinced absolutely as to know the defendant's guilt. What is required [is] that you be convinced to the point of believing he is

guilty. The evidence must convince the twelve of you who have no personal knowledge to the point where you have enough knowledge to where you believe that he is guilty.

What you must do at this point is examine your beliefs. What you must do at this point is examine the evidence and weigh it, and weigh it against your conscience and when you do the State is convinced that you will be satisfied that Clinton Ray Rose, the defendant, murdered these victims.

Defendant notes that in *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990) (per curiam), the United States Supreme Court held that a reasonable doubt instruction which required the jury to have a "substantial doubt" or "grave uncertainty" suggested a higher degree of doubt than is required for acquittal, and that when these statements are considered with the phrase "moral certainty," rather than evidentiary certainty, a juror can find defendant guilty "based on a degree of proof below that required by the Due Process Clause." *Id.* at 41, 112 L. Ed. 2d at 342. He argues that the prosecutor's language—that it was sufficient if the jurors "believed basically" that defendant was guilty, and that they could find defendant guilty if their doubts were no greater than the substantial level of uncertainty confronted by farmers when they plant each year—allowed the jury to find him guilty based on a degree of proof below that which due process requires.

Defendant did not object to this argument. Thus, we consider only whether the argument was so grossly improper that it was a denial of due process for the trial court to fail to intervene *ex mero motu*. *State v. Zuniga*, 320 N.C. 233, 257, 357 S.E.2d 898, 914, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987).

"[P]rosecutorial statements are not placed in an isolated vacuum on appeal." *State v. Pinch*, 306 N.C. 1, 24, 292 S.E.2d 203, 221, *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). In viewing the argument in its entirety, it is clear that the prosecutor was indicating to the jurors that they did not have to have "absolute certainty" to find defendant guilty. This was not error. The jury does not have to be absolutely certain or totally free from doubt to find a defendant guilty. *See State v. Watson*, 294 N.C. 159, 166-67, 240 S.E.2d 440, 445-46 (1978) (instruction that reasonable doubt does not mean jurors

"must be satisfied beyond any doubt or all doubt" held proper). Instead, the jury must believe defendant is guilty beyond a reasonable doubt. A reasonable doubt may be an "honest, substantial misgiving," but it is not a "vain, imaginary or fanciful doubt." *State v. Hudson*, 331 N.C. 122, 141-43, 415 S.E.2d 732, 742-43 (1992), *cert. denied*, —— U.S. ——, 122 L. Ed. 2d 136, *reh'g denied*, —— U.S. ——, 122 L. Ed. 2d 776 (1993). The argument here did not lower the State's burden of proof in violation of defendant's due process rights.

Defendant notes that the United States Supreme Court and this Court have held that a jury instruction defining reasonable doubt which requires an improperly high degree of doubt for acquittal offends due process. *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339; *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993), *sentence vacated on other grounds*, —— U.S. ——, 128 L. Ed. 2d 42, *on remand*, 337 N.C. 298, 446 S.E.2d 71 (1994) (with a different result). *Cage* and *Bryant*, however, dealt with instructions the trial court gives to the jury. These cases "are not controlling here, where the statements complained of were made by the prosecutor during jury arguments." *State v. Jones*, 336 N.C. 490, 495, 445 S.E.2d 23, 25 (1994).

Prior to closing arguments, the court instructed the jury: "It is now the time for the final arguments of the attorneys. At the conclusion of the arguments I will then instruct you on the law in this State and you may go to the jury room at that time and begin your deliberations." During jury instructions the trial court properly instructed as to "reasonable doubt." It instructed that

> [a] reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

This correct instruction, which followed the complained-of statement by the prosecutor, remedied the error, if any, in the prosecutor's closing argument. "In this context, any error of the prosecutor in defining the term reasonable doubt could not have denied the defendant due process and did not require a new trial." *State v. Jones*, 336 N.C. at 496, 445 S.E.2d at 26; *see also State v. Anderson*, 322 N.C. 22, 38, 366 S.E.2d 459, 469 (any misstatements of law in prosecutor's closing argument cured by trial court's proper instructions), *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988); *State v. Gladden*, 315 N.C. at 426, 340 S.E.2d at 690-91 (same). This assignment of error is overruled.

[10] Defendant argues that the trial court erred in submitting both the "course of conduct" and "prior violent felony" aggravating circumstances. The court instructed as to the "course of conduct" circumstance as to Richard Connor's murder as follows:

> The third aggravating circumstance that the State alleges and has the burden of proving beyond a reasonable doubt [is], "was this murder a 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."
>
> 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. If you find from the evidence beyond a reasonable doubt that in addition to killing the victim, Richard Dean Conn[o]r, the defendant on or about the alleged date was engaged in a course of conduct which involved the commission of another crime of violence against another person and that this crime was included in the same course of conduct in which the killing of the victim, Richard Dean Conn[o]r, was also a part, you find this aggravating circumstance and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form.

It gave the same instructions for this aggravating circumstance as to Larry Connor's murder. Defendant argues that the court failed to specify what the jury should consider as "other crimes of violence," and the jury thus could have considered the Alabama murder and Oregon kidnapping as part of the course of conduct in the murders here. This error was magnified, he says, by the prosecutor's pointing out that both the Alabama murder victim and Larry Connor had been shot in the head above the right eye and that defendant had stolen from both of these victims. Because the Alabama incident supported the "prior violent felony" aggravating circumstance, it could not be used to support a second aggravating circumstance.

In *State v. Gay*, 334 N.C. 467, 434 S.E.2d 840 (1993), we stated that "where there is separate evidence to support each aggravating cir-

cumstance, it is not improper for both of the circumstances to be submitted." *Id.* at 495, 434 S.E.2d at 856. There was separate evidence here to support both a finding that defendant had been previously convicted of a violent felony and the finding that the murders of Richard and Larry Connor were part of a course of violent conduct. The evidence of the murder of the Alabama victim supported the finding of prior conviction of a violent felony. The murder of Richard Connor supported the finding of a course of violent conduct in the sentencing for the murder of Larry Connor, while the murder of Larry Connor supported the finding of a course of violent conduct in the sentencing for the murder of Richard Connor. The instructions directed the jury to consider whether defendant was involved in a course of violent conduct "on or about the alleged date" of the murders of Larry and Richard Connor. Defendant argues that the phrase " 'on or about the alleged date' is so ambiguous as to be incomprehensible." We disagree. Considering the instructions in their entirety and in context, we conclude that the jury could not have interpreted them to mean that the murder of the Alabama victim could be considered as part of a course of violent conduct that included the much later murders of the victims here.

[11] Defendant contends the trial court did not ensure that the jury did not use the same evidence to support both aggravating circumstances. In *State v. Jennings*, 333 N.C. 579, 628, 430 S.E.2d 188, 214, *cert. denied*, — U.S. —, 126 L. Ed. 2d 602 (1993), we noted that "the trial court should have instructed the jury that it could not use the same evidence as the basis for finding both circumstances." *See also State v. Gay*, 334 N.C. at 495, 434 S.E.2d at 856. We went on to note, however, that the defendant had not objected to the trial court's failure to instruct the jury not to use the same evidence to support both circumstances, and stated: "We do not believe the failure to so instruct had a probable impact on the jury's finding of these circumstances; we thus decline to find plain error in the failure to so instruct." *State v. Jennings*, 333 N.C. at 628, 430 S.E.2d at 214. Here, too, defendant did not ask the trial court to instruct the jury that it could not use the same evidence to support both aggravating circumstances. We again conclude that this failure did not have a "probable impact" on the jury's finding of these circumstances and was not plain error.

[12] Defendant next argues the trial court erred in admitting the testimony of Lynn Enyard regarding the circumstances of defendant's convictions for the murder of Gary Fidslar and the second-degree kid-

napping of Michael O'Malley. Enyard was a Special Agent for the Federal Bureau of Investigation. He questioned O'Malley and defendant on 26 October 1973 after the two had been arrested for firing shots in the downtown area of Eugene, Oregon. O'Malley claimed that defendant had abducted him. He stated that he had held defendant at bay by pretending he was planning a robbery and asking defendant if he wanted to be involved. Defendant was convicted of the second-degree kidnapping of O'Malley.

When first questioned by police in Oregon, defendant identified himself as Gary Fidslar. Enyard learned that Fidslar had been reported missing in Tennessee. Defendant then told Enyard he was not Fidslar but knew Fidslar because he had helped him with a drug deal that had gone bad. Defendant told Enyard that Fidslar had given defendant his money, wallet, and identification and told defendant to travel west to get away from the drug dealers who were after them. Fidslar's body was eventually found in Alabama; he had been killed by a .38-caliber gunshot to his right forehead.

Our capital sentencing statute provides, in conformity with the constitutional mandates of the Eighth and Fourteenth Amendments, "that any evidence may be presented at the separate sentencing hearing *which the court deems* 'relevant to sentence' or 'to have probative value,' including matters related to aggravating or mitigating circumstances." *State v. Pinch*, 306 N.C. at 19, 292 S.E.2d at 219, *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) (quoting N.C.G.S. § 15A-2000(a)(3) (1994)). "[T]he ultimate issue concerning the admissibility of . . . evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation." *Id.*

> Evidentiary flexibility is encouraged in the serious and individualized process of life or death sentencing. *See Williams v. New York*, 337 U.S. 241, . . . 93 L. Ed. 1337 (1949). However, as in any proceeding, evidence offered at sentencing must be pertinent and dependable, and, if it passes this test in the first instance, it should not ordinarily be excluded.

Id. at 19 n.9, 292 S.E.2d at 219 n.9.

The United States Supreme Court has noted that "the sentencing authority has always been free to consider a wide range of relevant

material." *Payne v. Tennessee*, 501 U.S. 808, 820-21, 115 L. Ed. 2d 720, 732 (1991). A capital trial will satisfy the requirements of the Eighth Amendment if it (1) narrows the decisionmaker's judgment as to the circumstances under which to impose the death penalty, and (2) does not limit the consideration of relevant mitigating information. *Id.* at 824, 115 L. Ed. 2d at 734-35. Beyond these limitations, the states have latitude to prescribe the method by which those who commit murder should be punished. *Id.* at 824, 115 L. Ed. 2d at 735.

Defendant argues that the evidence was not admissible under these guidelines because it constituted inadmissible hearsay or because it was offered to show bad character when he had not presented evidence of his good character. In *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), the Court noted that the "prosecution must be permitted to present *any* competent, relevant evidence relating to the defendant's character or record which will substantially support the imposition of the death penalty so as to avoid [its] arbitrary or erratic imposition." *Id.* at 61, 337 S.E.2d at 824. This contention is without merit.

Defendant also argues that because the State had offered certified copies of court documents to establish that he had been convicted of felonies involving the threat or use of violence against a person, it should not have been allowed to introduce additional testimony about the circumstances of the felonies. The "better rule[, however,] is to allow both sides to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation." *State v. Taylor*, 304 N.C. 249, 279, 283 S.E.2d 761, 780 (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); *see also State v. McDougall*, 308 N.C. 1, 22-23, 301 S.E.2d 308, 321, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). The United States Supreme Court has also supported an inclusion of evidence before a sentencer, noting that "where sentencing discretion is granted, it generally has been agreed that the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant—*if not essential*—[to the] selection of an appropriate sentence.' " *Lockett v. Ohio*, 438 U.S. 586, 602-03, 57 L. Ed. 2d 973, 988-89 (1978) (quoting *Williams v. New York*, 337 U.S. 241, 247, 93 L. Ed. 2d 1337, 1342 (1949)). We conclude that the trial court correct-

ly admitted the evidence about the circumstances surrounding the murder of Gary Fidslar in Alabama.

Finally, with regard to the evidence surrounding the kidnapping, defendant argues that the statements by the victim to Enyard constituted inadmissible hearsay and should not have been admitted, citing *State v. McLaughlin*, 316 N.C. 175, 340 S.E.2d 102 (1986). *McLaughlin*, which involved the admission of an accomplice's confession during the guilt phase of a rape trial, is not pertinent. *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, — U.S. —, 116 L. Ed. 2d 232 (1991), is more on point.

In *Roper* an S.B.I. agent, who had investigated a prior felony of which defendant had been convicted, was allowed to testify that while the victim of the prior violent felony was begging for his life defendant stated that if the victim did not die he would shoot him again. *Id.* at 364, 402 S.E.2d at 615. The statement had been related to the agent by an unidentified declarant while the agent was investigating the prior killing for which defendant was convicted. *Id.* The defendant there argued that this statement was inadmissible hearsay; this Court held that the evidence was relevant to sentencing and was admissible to aid the sentencer. *Id.* at 364, 402 S.E.2d at 615-16.

We conclude here, similarly, that the circumstances surrounding the kidnapping in Oregon, as relayed by the victim to an investigating officer, were relevant to sentencing and admissible to aid the sentencer. The trial court correctly admitted evidence of the circumstances of the prior murder and kidnapping to support the aggravating circumstance that defendant had been convicted of a prior violent felony. This assignment of error is overruled.

Next, defendant argues the trial court erred when it failed to intervene *ex mero motu* during the prosecutor's closing argument. Specifically, he argues that he was prejudiced by statements indicating that if given a life sentence he might again escape and kill, and by biblical references. As there was no objection, defendant must establish that the impropriety was so gross that the trial court abused its discretion in not correcting the arguments *ex mero motu*. *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). To establish an abuse of discretion, defendant must show that the prosecutor's comments " '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. DeChristoforo*, 416 U.S. 637, 643, 40 L. Ed. 2d 431, 437 (1974)).

[13] First, defendant argues that the prosecutor erred when he argued:

> The people of the State of Alabama thought they put him into prison for the rest of his life but he walked away. And he believes that is all that will happen to him.
>
> Now he is eligible for a life sentence. He would go back to prison. Work like he did in Alabama and he will go on and on until he gets to a point where he can escape again. Gets tired of it again. He can escape and somebody else then is going to die.

Defendant contends this statement was analogous to a prosecutor arguing about parole, which was held impermissible in *State v. Jones*, 296 N.C. 495, 502, 251 S.E.2d 425, 429 (1979).

Trial counsel are allowed wide latitude in jury arguments. *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). They are entitled to argue the law, the facts, and all reasonable inferences therefrom. *State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). Here, defendant had escaped from jail in the past after being sentenced to life imprisonment. This was a fact in evidence that the prosecutor could mention. He was not addressing parole but defendant's potential future dangerousness if he again received a life sentence. We have held such specific deterrence arguments permissible in capital cases. *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), *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); *State v. Zuniga*, 320 N.C. at 269, 357 S.E.2d at 920. This argument is without merit.

[14] Defendant also contends the prosecutor's argument that the Bible states that those who have committed murder should be punished with death was prejudicial. He asks us to adopt the holding of the Pennsylvania Supreme Court and conclude that biblical arguments are *per se* reversible error. *See Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630 (1991), *cert. denied*, —— U.S. ——, 119 L. Ed. 2d 214, *reh'g denied*, —— U.S. ——, 120 L. Ed. 2d 937 (1992). We instead continue to follow our own precedents.

This Court has held "more often than not" that biblical arguments "fall within the permissible margins" allowed counsel arguing "hotly contested cases." *State v. Artis*, 325 N.C. 278, 331, 384 S.E.2d 470, 500

(1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604, *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). Prosecutors have read passages similar to those read here, and we have held that this was not so grossly improper as to require *ex mero motu* intervention. *See State v. Artis*, 325 N.C. at 330, 384 S.E.2d at 500; *State v. Fullwood*, 323 N.C. 371, 398-99, 373 S.E.2d 518, 534-35 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991). We hold that the quotations at issue here, like the similar ones in *Artis* and *Fullwood*, were not so grossly improper as to require the trial court to intervene *ex mero motu*.

Defendant also argues that the cumulative effect of the specific deterrence arguments and references to Bible verses was prejudicial. Neither was grossly improper standing alone, and we cannot hold that their cumulative effect was prejudicial. This assignment of error is overruled.

[15] Defendant's final argument is that he is entitled to a new capital sentencing proceeding because the jury did not clearly pass on the existence of all mitigating circumstances submitted. The issues and recommendations forms indicated that at least one juror believed mitigating circumstance number five—that defendant's background at the time of the offense was influenced or possibly influenced by the fact that he had been incarcerated since October 1973—existed and had mitigating value in both murders. After the jury turned in the verdict sheets, the trial court asked the foreman: "You have indicated on the verdict form that you have found mitigating circumstance one, two, three, and you did not find mitigating factor, or circumstance, four, and you did not find mitigating circumstance five, and did not find mitigating circumstance six." The foreman replied: "Yes, Your Honor." Defendant argues that because the written sheets indicate that the jury did find mitigating circumstance five, but the foreman's answer indicates that mitigating circumstance number five was rejected, the jury must not have considered it, and this violates the Eighth Amendment. Defendant notes his right to have the jury consider any mitigating evidence. *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

While a defendant has the right to have a jury consider and give effect to any mitigating evidence, the statement in question does not establish that the jury did not consider the mitigating circumstance. The jury was instructed as to this circumstance, and the circumstance

was set forth and responded to on the written sheet carried into deliberations. The record thus clearly indicates that the jury considered this circumstance. This assignment of error is overruled.

PROPORTIONALITY REVIEW

[16] Neither defendant nor the State argues proportionality. Nevertheless,

> [h]aving found defendant's trial and capital sentencing proceeding free of prejudicial error, we are required by statute to review the record and determine whether (i) the record supports the existence of the aggravating circumstances on which the court based its sentence of death, (ii) the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (iii) the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.

State v. Sexton, 336 N.C. at 376, 444 S.E.2d at 910.

The jury found the existence of the same three aggravating circumstances as to each murder: (1) that defendant had been previously convicted of a felony involving the use of violence to a person, N.C.G.S. § 15A-2000(e)(3); (2) that the murder was committed while defendant was engaged in the commission of robbery with a firearm, N.C.G.S. § 15A-2000(e)(5); and (3) that the murder was part of a course of conduct in which defendant engaged, which included defendant's commission of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11). We have noted above that evidence supported the jury's finding of the first and third aggravating circumstances. The record also supports the jury's finding that the murders were committed while defendant was engaged in the commission of an armed robbery. Nothing in the record indicates that the jury's decision to impose the death sentence was influenced by passion, prejudice or any other arbitrary factor. We thus consider "whether the death sentence[s] . . . [are] excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. at 70, 337 S.E.2d at 829.

This Court has determined death sentences to be disproportionate in seven cases: *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 (1988); *State v. Young*, 312

N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). In only two of these, *Bondurant* and *Rogers*, did the jury find the existence of the course of conduct aggravating circumstance. In *Bondurant* the Court noted that the defendant had shown concern for the victim's life, and remorse, by getting the victim to the hospital and going into the hospital to seek medical assistance for him. *State v. Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182. In *Rogers* the course of conduct aggravating circumstance was the only one submitted, and the course of conduct did not involve a second murder. *State v. Rogers*, 316 N.C. at 234, 341 S.E.2d at 731. Defendant here did not assist his victims, and the course of conduct here involved two murders, not one. We have never held a death sentence disproportionate in a case involving multiple murders.

Defendant here had escaped from a minimum security prison while serving a life sentence for a previous murder. While on escape he murdered Richard and Larry Connor by shooting them at close range, stole many of their possessions, and even cut off one victim's finger in order to steal a ring. No statutory mitigators were presented to the jury. The jury found the following nonstatutory mitigators in both cases: (1) defendant was an honor grade prisoner in Alabama, (2) defendant has a talent as an artist, (3) defendant did not attempt to elude sheriff's deputies when they came to his camp, and (4) defendant's background at the time of the offense was influenced or possibly influenced by the fact that he had been incarcerated since October 1973.

In *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), the defendant robbed two convenience stores in one night, shooting clerks in both at close range. The only aggravating circumstance found was that the defendant was engaged in a course of violent conduct. The jury found two statutory and four nonstatutory mitigating circumstances. We concluded that the death sentence was not disproportionate. In *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591, the defendant committed a double murder and stole money from the victims' employer. The jury found two aggravating circumstances—one being the course of conduct circumstance present in this case—and two nonstatutory mitigating circumstances. The Court determined that the death sentence was not disproportionate. *Id.* at 514-15, 319 S.E.2d at 607. We have found the death penalty not

disproportionate in other cases with similar facts or similar aggravating circumstances. *See State v. Vereen*, 312 N.C. 499, 504-05, 517-19, 324 S.E.2d 250, 254-55, 262-63 (same three aggravating circumstances found), *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526 (1985); *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984) (defendant killed and robbed one victim and injured another when he was discovered robbing the home of one of the victims), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). We find these to be the cases in the proportionality pool most similar to this case.

Finally, we note that 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." *State v. Skipper*, 337 N.C. at 64, 446 S.E.2d at 287. This case involves a defendant who had previously been convicted of first-degree murder and second-degree kidnapping. He escaped from prison and proceeded to murder again—this time killing two people by shooting them at close range. He then stole their possessions. Based on our review of the cases in the pool and the "experienced judgment" of the members of this Court, we cannot hold as a matter of law that the death sentences here are disproportionate.

We conclude that defendant received a fair trial and sentencing proceeding, free of prejudicial error, before an impartial judge and jury. The evidence supports the convictions and the aggravating circumstances found; the death sentences were not imposed under the influence of passion, prejudice or any other arbitrary factor; and they are not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. CHARLES FRANCES HARDY, JR.

No. 278A93

(Filed 30 December 1994)

1. Evidence and Witnesses §§ 1294, 1289 (NCI4th)— noncapital first-degree murder—confession—trickery—implied promises

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to suppress inculpa-

tory statements where the trial court found as fact that prior to the interview defendant was not arrested; he was given *Miranda* warnings, he understood those warnings, and he waived his rights; the interrogating officers wore civilian clothing, displayed no weapons, and the environment was not intimidating; defendant was calm and in control of his faculties; he was told that he was free to leave; he had experience with the criminal justice system; he was thirty-five and had worked in responsible managerial positions in different businesses; defendant stated that Agent Crawford was cordial during the interview and that he did not feel threatened; and the interview lasted thirty-six minutes. Although Agent Crawford conceded that some of his statements to defendant were untrue and several contained statements which defendant contends included implicit promises or threats, the untrue statements alone do not establish coercion, many were ambiguous, there were clearly times when Crawford was simply urging defendant to confess in order to ease his conscience, and defendant's voir dire testimony tends to belie the assertion that his confession was coerced.

Am Jur 2d, Evidence §§ 728 et seq.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud. 99 ALR2d 772.

Comment Note: Constitutional aspects of procedure for determining voluntariness of pretrial confession. 1 ALR3d 1251.

2. Evidence and Witnesses § 1247 (NCI4th)— noncapital first-degree murder—defendant's clothes at time of crime—no necessity to renew Miranda warnings

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to suppress the clothes he was wearing at the time of the murder, which were recovered in some woods following defendant's statement to officers, on the ground that defendant's *Miranda* warnings had grown stale. Even if the warnings had grown stale, defendant's argument would fail because he seeks to exclude physical evidence and not the statements given by him; moreover, the record reveals that there was no interrogation of defendant which led to this discovery.

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence § 749.

3. Searches and Seizures §§ 53, 63 (NCI4th)— noncapital first-degree murder—search of defendant's vehicle—plain view—consent

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to suppress evidence obtained without a warrant where officers, being called to the scene of a dead body in a restaurant, discovered in the restaurant a pocketbook with hair on it that was later determined to be hair of the victim; officers later witnessed defendant walking near his car looking in the window; he appeared to be nervous; the officers eventually approached the car and saw a bloody money bag in the bed of the station wagon; hair and blood on the bag was later determined to be consistent with the victim's hair and blood; and a search of the car also revealed a bloody sock. The officers were lawfully in the restaurant and, while the record is not totally clear, the pocketbook appears to have been found near the body on the floor; the items in the car were visible through the window and so were in plain view; defendant signed a consent form; he was advised that he did not have to consent to the search, the form was read aloud to him, and he appeared to understand what he was doing; he was not in a coercive environment and his actions were the product of his free will; and, although he was not given his *Miranda* warnings, *Miranda* warnings are not necessary prior to obtaining a consent to search.

Am Jur 2d, Searches and Seizures §§ 55, 83.

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

Applicability of "plain view" doctrine and its relation to Fourth Amendment prohibition against unreasonable searches and seizures—Supreme Court cases. 110 L. Ed. 2d 704.

Validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases. 111 L. Ed. 2d 850.

4. Evidence and Witnesses § 876 (NCI4th)— noncapital first-degree murder—victim's diary—recitation of facts—not admissible under state of mind exception

The diary of a murder victim was not admissible under the state-of-mind hearsay exception in the noncapital first-degree murder prosecution of her husband where the diary described an incident in which defendant had hit and slapped the victim, thrown water, dishes, ashtrays, and paper at her, and screamed that he was going to kill her. The statements in the diary are not statements of the victim's state of mind, but are merely a recitation of facts. Mere statements of fact are provable by other means and are not inherently trustworthy. Moreover, the diary is at best speculative as to the victim's state of mind and contains indications that she was not intimidated by defendant.

Am Jur 2d, Evidence § 866.

5. Evidence and Witnesses § 1941 (NCI4th)— noncapital first-degree murder—diary of victim—not admissible

There was error which was not prejudicial in a first-degree murder prosecution where the court admitted statements from the victim's diary which recounted assaults upon her and a threat to kill her by defendant. Although the State contended that the statements were admissible as tending to show a bad relationship between the victim and defendant and were not offered to prove the truth of the statements, to the extent the State relies upon the assaults and threat contained in the diary to establish the relationship between Karen and defendant, it is using the diary entry for the truth of the matter asserted. To whatever minimal extent the victim's relationship with defendant is probative of defendant's state of mind, which was the central issue in the case, that probative value is substantially outweighed by the danger that the jury would misuse the diary entry, which sets forth two assaults by defendant upon Karen and a threat to take her life, as proof that defendant actually committed these acts. However, most of the diary entry was repetitive of other testimony, which went much further in describing the assault and threat. The only harmful statement in the diary entry not contained in the other testimony was that defendant had hit the victim in the head and slapped her across the face on a particular occasion, but there was other testimony of an assault around that time and, in light of the subsequent more severe assault and the weighty evidence against defendant, including his inculpatory statements, there is

no reasonable possibility that the admission of the diary entry affected the outcome of the trial. N.C.G.S. § 15A-1443(a).

Am Jur 2d, Evidence § 1074.

6. Evidence and Witnesses § 701 (NCI4th)— noncapital first-degree murder—victim's diary—instruction

There was no prejudicial error in a noncapital first-degree murder prosecution where the jury was instructed that it could not consider the evidence in the victim's diary to prove the character of the defendant, but was in effect instructed that it could consider the contents of the diary entry as substantive evidence for other purposes. Even if Rule 403 did not require the exclusion of the diary entry, the evidence contained in the diary was not admissible to show defendant's character or anything else beyond the extent to which those matters are shown by the victim's state of mind. However, in light of other evidence, there is no reasonable possibility that the outcome was affected by the erroneous instruction.

Am Jur 2d, Trial § 1283.

7. Evidence and Witnesses § 3052 (NCI4th)— noncapital first-degree murder—impeachment of witness—marijuana use

There was no error in a noncapital first-degree murder prosecution where defendant contended that the court prevented him from impeaching a witness based upon marijuana use and poor memory, but, if there was error in sustaining the State's initial objections, it was cured by the later ruling permitting inquiry into the witness's marijuana use. Defendant chose not to ask about the marijuana use and cannot now complain.

Am Jur 2d, Witnesses §§ 591-595.

Use of drugs as affecting competency or credibility of witness. 65 ALR3d 705.

8. Homicide §§ 250,253, 252 (NCI4th)— noncapital first-degree murder—premeditation and deliberation—evidence sufficient

There was sufficient evidence of premeditation and deliberation in a noncapital first-degree murder prosecution where a threat defendant made to kill his wife within one week of the murder is strong evidence that defendant premeditated the mur-

der of his wife; his actions in arriving at the restaurant, keeping the lights off and awaiting the arrival of his wife also tend to indicate premeditation; the manner in which he obtained a knife, held his wife down, and inflicted numerous stab wounds shows an intent to kill formed before the murder; much of the evidence stated above is also probative to show that defendant killed his wife in a cool state of blood; defendant's actions after the killing especially indicate that he deliberated the killing of his wife in that he immediately attempted to make the killing seem connected to a robbery, soon attempted to destroy incriminating evidence, and returned to the restaurant where he feigned shock upon finding the fate of his wife and concocted an alibi which he repeatedly told the police.

Am Jur 2d, Homicide §§ 437 et seq.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment for murder in the first degree entered by Johnston (Robert), J., at the 30 November 1992 Criminal Session of Superior Court, Cleveland County. Heard in the Supreme Court 13 April 1994.

Michael F. Easley, Attorney General, by William B. Crumpler, Associate Attorney General, for the State.

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

EXUM, Chief Justice.

On 20 April 1992 defendant was indicted for the murder of his wife. Defendant was tried noncapitally, found guilty of first-degree murder, and on 15 December 1992 he was sentenced to life imprisonment.

Defendant and his wife, Karen Hardy, were married on 4 July 1980. They had two children together and Karen had a daughter from a previous marriage. They opened a restaurant, the Mountaineer Restaurant, in King's Mountain. Their marriage, however, turned sour and they eventually separated; in August 1991 defendant moved out of the family home. Defendant slept at the restaurant until March

1992 at which time he moved into a mobile home. He and Karen continued, however, to operate the restaurant together.

In January or February of 1992 Chad England, who lived with the Hardys, witnessed defendant and Karen arguing at the restaurant. Defendant attempted to strike her with his open hand but Karen deflected the blow.

On 27 February 1992 defendant and Karen had another altercation at the restaurant according to Alan Davis, who worked at the restaurant. It occurred around 9:30 or 10:00 p.m. and concerned defendant's desire to be reunited with his wife. Defendant was upset and threw items around the restaurant. As defendant's wife left the restaurant, he said, "Karen, I will kill you, bitch." Defendant followed Karen to her car where he pounded on the car and attempted to enter the car. He managed to get inside and started beating Karen. She attempted to block the blows. Davis removed defendant from Karen as defendant put his hands around her neck. Karen then drove off. Defendant was very upset and angry. Davis described defendant as having an explosive temper, and arguments between defendant and Karen were usually started by defendant.

Karen made an entry in her diary regarding the incident in the restaurant; it stated in part that defendant "[s]creamed he was going to kill me." It also indicated that a harassment charge had been filed against defendant. The full diary entry is set forth in Issue IV. This diary was found by Karen's mother after her death.

On 4 March 1992 Roy Pennington, who operates a produce stand near the restaurant, saw Karen arrive at the restaurant at 4:50 a.m. Mike Medlin, a delivery man for a meat packing company, arrived at the restaurant at 6:30 a.m. to make a delivery. There were no lights on, which was unusual. He entered and found Karen's body on the kitchen floor; her blouse was pulled up and one breast was exposed. He told a companion to call the police.

Defendant soon arrived at the restaurant. He drove up in his station wagon and asked Medlin and Evalina Thompson, who had arrived on the scene, if something was wrong inside. He entered the restaurant, turned the lights on, and said, "Oh, my God, that's my wife." Defendant then went to the restroom, whereupon Medlin heard him make noises as though he were vomiting.

Officer Ben Melvin of the King's Mountain Police Department arrived between 6:45 and 7:00 a.m. He spoke to defendant, who said

he had awakened late and called his son, who informed him that Karen had already left for the restaurant. Defendant said he called the restaurant but there was no answer. He then went to the restaurant, where he found two men outside. He said there was supposed to be money inside. Defendant was nervous and upset; Melvin heard defendant making vomiting noises in the restroom. The drive-through window was ajar and, according to an officer, appeared to have been jimmied; a candy machine and soda bottles were overturned on the floor near the window.

Officer Houston Corn arrived around 6:47 a.m. He observed defendant at a table in the restaurant. Defendant was nervous but not crying. Defendant exited the restaurant with others at the request of Corn. Corn noticed defendant pacing back and forth in front of the restaurant. As he walked past his vehicle, defendant would glance in the window on the passenger side of the back door. Defendant walked by at least three or four times looking in the back.

Officer Corn then walked by the vehicle, at which time he saw a beige jacket inside. Beneath the jacket was a beige money bag with blood and hair on it. Corn described this finding to Lieutenant Reynolds. Reynolds then looked in the station wagon and saw the items also. The back seat had been folded forward to make a flat cargo area. The bag was on the back of the rear seat near the passenger window. The doors to the station wagon were unlocked.

Agent Crawford and Reynolds approached defendant and asked him to go to the police department. Crawford identified himself and said he needed to speak with defendant if defendant were willing. Crawford asked defendant if he was the victim's husband and defendant said that he was. Crawford asked defendant if he would be willing to talk at a later time, and defendant said yes. Crawford then asked if defendant would like to go to the police department, and defendant said that he would because he would like to get away from the crime scene.

Corn transported defendant to the police department. At approximately 9:00 a.m. defendant signed a Miranda waiver form. Defendant then made a statement which was recorded. He stated that he went to the restaurant at 5:30 a.m. to try to talk with his wife. His intent upon going to the restaurant was that he wanted her back. He left the lights off "[b]ecause [he] just wanted to talk to her." Upon her arrival he said, "Karen, let's talk." She was angry. They had a confrontation during which she called him a homosexual. He explained that his wife

had known that he was a homosexual and that she said she was never going back to a homosexual like him. Then "it just snapped." He got a knife from the kitchen, held his wife down, and stabbed her. She quit moving. Defendant took the money in an attempt to make the crime appear to involve a robbery. He then left and went back to his trailer. He said he threw his clothes out as he was driving. Defendant said he spent the previous night with a friend, Marty Kee, who knew nothing of the murder.

After the interview defendant and officers searched the highway unsuccessfully for the clothes defendant said he had thrown out. They then went to the home of Martin Spencer, a friend of defendant, at defendant's direction. Officers spoke with Spencer, after which officers searched the wooded area near Spencer's trailer.

Martin Spencer testified that on 3 March 1992 defendant arrived at his home between 8:00 and 9:00 p.m. and said his wife wanted a divorce. Defendant asked if he could spend the night there. They went to bed between 11:00 and 11:30 p.m.

Spencer arose at 6:00 a.m. and noticed that defendant was gone. Defendant soon arrived wearing sweat pants with blood on them. Spencer asked defendant about the blood. Defendant said that he had killed his wife at the restaurant with a knife by cutting her jugular vein. He said the "bread man" saw him leaving the restaurant. Defendant and Spencer went to defendant's trailer where defendant changed into new clothes and placed his old clothes in a plastic bag which he asked Spencer to burn. As Spencer was leaving defendant's trailer, defendant said, "Burn them clothes, now, Marty. Burn them because the bread man saw me leaving and this here's evidence." Spencer returned to his trailer and hid the clothes in the woods. He burned some garbage to make defendant think he was burning the clothes, after which defendant left. Later that day, at about 1:30 p.m., an officer went to Spencer's trailer. Spencer took him to the bag of clothes in the woods.

On that same day, after defendant signed a consent to search form, SBI agent William Lane examined the vehicle in which the money bag had been seen. At about 1:50 p.m. he entered the car and retrieved the money bag, in which he found three bank bags containing $700. He also seized a sock from the vehicle. The money bag appeared to have blood and hair on it.

An autopsy revealed that the victim had multiple wounds to her chest, neck, head and hands. Several of the wounds were defensive wounds. The victim bled to death as a result of both of her carotid arteries being severed.

A forensic serologist for the SBI analyzed several items found in connection with the investigation. The sock and money bag had blood on them consistent with that of the victim. Hair on the money bag was consistent with the victim's head hair. Numerous items of clothing in the plastic bag in the woods had blood consistent with that of the victim; they were a pair of jockey shorts, a shirt, a jacket, a sock, blue jeans, and sweat pants.

Defendant wrote a letter to Karen's mother in which he expressed his sadness over her death and made incriminating statements such as, "I know there are no words that could be said to adjust to the loss I have caused all of us," and, "I will also live in a sure hell in my heart and my mind for what I have done . . . ."

I.

[1] Defendant first argues that the trial court erred in denying his motion to suppress inculpatory statements he made to officers Crawford and Reynolds on the ground these statements were involuntary. Defendant moved to suppress these statements. The trial court conducted a voir dire hearing during which officers Crawford, Reynolds and Corn and defendant testified. The trial court then made findings of fact and conclusions of law and denied the motion.

Evidence at the voir dire hearing tended to show the following: Crawford spoke to defendant at the scene and explained that it would be necessary at some point to talk with him about what he might know about the murder; he then said he would be back with him in a few minutes. Defendant said that would be fine. Corn and Crawford asked defendant at the restaurant whether he would mind riding to the police department so officers could find out what he knew. Defendant was not arrested; he was told that he could leave but never asked to do so. Defendant's breath did not smell of marijuana or other odors. His speech was clear, and he was responsive but nervous. Before defendant left the restaurant Crawford asked defendant whether he understood that he was not in custody. Defendant testified that in fact he wanted to get away from the crime scene.

Defendant rode with Corn to the station; they did not speak on the way. Reynolds and Crawford rode together to the station in a sep-

arate car. Before leaving the scene, Crawford learned that defendant had been seen earlier that morning at the restaurant; he also learned that defendant and his wife had been having domestic problems, including a fight at the restaurant. At the police station Corn took defendant to a room and asked if he wanted something to drink. Defendant asked for water, which Corn obtained. Reynolds and Crawford sent word to Corn that he should bring defendant to the office of the Chief of Police.

Defendant was taken to the Chief's office. The dimensions of the office were 15 feet by 20 feet, it was carpeted and contained a desk, a computer, and several chairs. Reynolds and Crawford wore civilian clothing and they did not display weapons. Defendant was offered a cup of coffee, which he accepted. Defendant was asked if he needed to use the restroom. Defendant was attentive and seemed to understand what was said to him as Crawford read him the Miranda warnings. Reynolds would not have let defendant leave if he had wanted to do so based on the money bag in defendant's vehicle. Crawford told defendant that he was not in custody.

Crawford then advised defendant of his Miranda rights and warnings. Defendant said he could read and write. Crawford read the entire form and had defendant read along with him. Crawford then reviewed the Miranda rights individually and defendant responded that he understood and he initialled each of the rights. Defendant indicated that he wanted to talk to Crawford and Reynolds without an attorney. Defendant signed the waiver at 9:00 a.m. Crawford understood that he did not have probable cause to detain defendant if defendant had asked to leave.

Crawford first obtained perfunctory information from defendant, such as his age and address. He then stated, "I don't know any of the situation," and prodded defendant about his domestic problems. Defendant explained that he and his wife had been having problems. Crawford then turned the examination toward the events of the night before and that morning. Defendant explained that he awoke late, called the house of his wife who had just left, and arrived at the restaurant to find his wife's dead body.

Crawford then asked, "Can I just be right honest with you?" and said, "I think you killed her." Defendant denied killing his wife and Crawford responded, "What if I tell you that I can prove that you did?" After more denials, Crawford said:

> Well, somebody saw you in there when all of it was going on, you and her fighting and arguing before the time you say. You were there before the time that you said you got there and the Jesse Jones [sic] was there. The Phillips 66 station saw you there.

Defendant said, "They didn't see me there," and Crawford responded, "They certainly did."

Defendant said that someone was setting him up. Crawford expressed his disbelief and then said, "I want to hear your side of it rather than it just appear that you're a cold-blooded murderer. I don't think you are, though. I think something just happened. Either she hit you or something caused you to go off. And she can't tell me her side of it." After more denials by defendant Crawford said, "I can put you there, and I can put you being the one that killed your wife." After more denials he continued:

> Yeah, I know you did, and all I want to know is why, and that is important to you, because that has to do in the criminal system—that is going to have a lot to do with how you are treated and what happens to you. If you don't tell me the reason, whether she threatened you or whether she hit you or whatever, then all we are going to look like is that you just went there and killed her. See, she is not going to be able to tell us her side of it. All we are going to be able to know of why is from you. And the why is important for you and everybody else. . .

After more denials of guilt, Crawford reiterated his certainty of defendant's guilt and said, "It's very important that you tell your side of it. It's not a fact of whether or not you did or didn't. It's not a fact of whether we can prove it or not prove it." Defendant then said, "She had a boyfriend that threatened to kill me." Crawford then said:

> . . . I know it wasn't somebody else. All I want to know from you is why. And that is very important. Your side of it is very important. And you are going to feel better when you tell the whole thing that led up to it. If she had a boyfriend, that's jealousy. I know what boyfriends are like if you're married. I'm going to be able to understand what you are going to tell me, and you are going to feel better telling me your side of it. 'Cause if your side is not told, it's going to appear to be a lot worse than it looks. I mean, you know, it's obvious to me that there was an argument. It's obvious to me that it moved around in the restaurant, that it

didn't just happen in one place. And what I want you to do is tell me your side of it. It's important. It's important to you.

Defendant again denied his guilt, and Crawford tried again to obtain a confession. He then stated, "And you are going to feel better telling me. It's going to be like a big weight has lifted off of you when you tell your side of it." After more denials, Crawford said, "Charlie, I know you did, and I can prove it. If you want to keep saying that, it's going to be very hard. It's going to look very bad." Defendant then asked, "How can you prove I killed my wife?" to which Crawford replied:

> Because I don't think you're a violent person. I don't think you intended to do what you did. I think it escalated. I think it started out, and she either said something to you or hit you or threatened you or did something to cause what happened up there, and the only way I'm going to know that's from you. Or you can just let it look like it appears and we'll not say no more to you and everybody's going to think the worst. Or you can tell exactly what happened. It's entirely up to you now. But I know you were there, and I know you were responsible for her death. But it's very important for you to tell me how it happened. It ain't going to go away. I'm not going to go away. Lieutenant Reynolds is not going to go away. But it's way up here right now, and it looks the worst that anything can look, is way up here. And how you—when you give your explanation determines if it stays up here or if it comes down to here.[1] Domestic things happen every day, Charlie, and you don't live with somebody as long—I lost my train of thought. You don't—you don't live with somebody and be married to them and not have problems. Now, I want you to tell me your side of it.

At that time defendant made incriminating statements. The entire examination took thirty-six minutes.

On voir dire Crawford explained many of the statements he made during the interrogation of defendant. When he told defendant someone had seen him in the restaurant, he was referring to his having been told that they had fought in the restaurant in the past. Crawford admitted that he lied to defendant in order to find out the truth. He denied "holding out hope" for defendant if defendant confessed. He did not intend to threaten defendant. When Crawford said it would be hard on defendant, he meant that it would be hard on him and his

1. Testimony revealed that Crawford raised his hands to his head while saying, "it's way up here right now," and lowered them while saying, "it comes down to here."

family in general; he did not mean to imply that the State would make it harder. During the interrogation Crawford believed that defendant killed his wife, but he did not know how it happened.

Defendant also testified about the interrogation. He was thirty-five years old. He completed high school and some college courses. He owned and managed the restaurant where the killing took place. He had been arrested before for indecent liberties with a child at which time he was given Miranda warnings. He was somewhat familiar with the criminal justice system. At around 6:00 a.m. on the morning of the murder he smoked a marijuana cigarette. He had developed a tolerance for marijuana.

During the interview he understood his rights and Crawford's questions. He never expressed a desire to leave, or for an attorney. Crawford was friendly during the interview. Defendant did not feel that he was free to leave. He felt some of the things Crawford said were not true. Regarding the interview, defendant testified as follows:

> Q. Did you think that Agent Crawford was making any threats towards you?
>
> A. Uh, not actual threats.
>
> Q. Then what did you think?
>
> A. Well, I feel like he was, you know, baiting me and leading me on, you know, and that type of thing.
>
> Q. All right, during the questioning, did you think that he was holding out some kind of hope for you?
>
> A. Yes.
>
> Q. And why did you think that?
>
> A. Just the way he went about the interrogation, you know. Telling me that if I would, you know, tell what happened that things wouldn't be as bad as they were and that type of thing.
>
> . . . .
>
> Q. Now, the officer—or did the officer tell you that it would be easier on you or you would feel better if you told—told what happened?
>
> A. Yes, sir.
>
> Q. When he said that, what did you think he meant, that it would be easier on you?

A. Well, I—I guess I felt, you know, the whole situation, as a whole, would be easier.

Q. Do you recall the officer telling you by hand motions that it looked like it was way up here but if you told, it would be down here?

A. Yes, I do believe I remember that.

Q. Okay, did he use hand motions?

A. Yes.

Q. What did you think he meant by that?

A. Well, by, you know, the—the severity of, you know, what had happened.

Based on the voir dire evidence, the trial court made the following findings of fact: Defendant was nervous but not crying at the restaurant. Defendant understood Crawford's questions at the scene. Defendant was asked to go to the police station. He was not placed under arrest, nor was he in handcuffs or shackles. He was given a drink at the station, and there is no indication that any request of defendant was denied. Reynolds and Crawford wore civilian clothes and did not display weapons. There was no evidence that the physical setting was intimidating to defendant. Defendant was in control of his faculties. Defendant was told he was free to leave. Defendant's rights were explained to him; he read them, and he signed the waiver form. Defendant had experience with the criminal justice system. Defendant understood the questions asked of him. He had smoked marijuana at 6:15 a.m. that morning. Defendant had developed a tolerance for marijuana, and there was no evidence that the marijuana affected defendant's ability to understand his rights or the questions asked of him. Defendant was thirty-five, completed high school and other courses and worked in responsible positions in businesses. Crawford questioned defendant in a friendly manner. Defendant did not feel he was free to leave. He never asked to leave nor was he prevented from leaving. Crawford's statements to defendant indicating that defendant had been seen fighting with his wife that morning were "not correct." Crawford was trying to find out the truth and had no intention of threatening defendant. The trial court then concluded as a matter of law that defendant's statements were not involuntary and denied defendant's motion to suppress.

The test for voluntariness in North Carolina is the same as the federal test. *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989). If, looking to the totality of the circumstances, the confession is "the product of an essentially free and unconstrained choice by its maker," then "he has willed to confess [and] it may be used against him"; where, however, "his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Schneckcloth v. Bustamonte*, 412 U.S. 218, 225-26, 38 L. Ed. 2d 854, 862 (1973) (quoting *Columbe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 2d 1037, 1057-58 (1961)). Factors to be considered in this inquiry are whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant. *Jackson*, 308 N.C. at 582, 304 S.E.2d at 153. *See also Schneckcloth*, 412 U.S. at 226, 36 L. Ed. 2d at 862 (listing factors, including defendant's age and deprivation of food or sleep).

The trial court's findings of fact are binding if supported by competent evidence in the record. *State v. Rook*, 304 N.C. 201, 212, 283 S.E.2d 732, 740 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). The conclusion of voluntariness, however, is a legal question which is fully reviewable. *State v. Davis*, 305 N.C. 400, 419, 290 S.E.2d 574, 586 (1982).

Applying these principles to the case at hand, we conclude that the trial court correctly concluded that defendant's confession was voluntary. The trial court found as fact that prior to the interview defendant was not arrested. He was given Miranda warnings, he understood those warnings, and he waived his rights. The interrogating officers wore civilian clothing, displayed no weapons, and the environment was not an intimidating one. Defendant was calm and in control of his faculties. He was told that he was free to leave. He had experience with the criminal justice system. He was thirty-five and had worked in responsible managerial positions in different businesses. These findings are supported by competent evidence in the record.

Other evidence elicited on voir dire also indicates that the confession was not coerced. Defendant stated that Crawford was cordial

during the interview and that he did not feel threatened. Further, the interview lasted thirty-six minutes. *See State v. Booker*, 306 N.C. 302, 310, 293 S.E.2d 78, 83 (1982) (five and one-half hour interview held not coercive).

We acknowledge that there are present in this case several facts which generally tend to support a finding of coercion. Crawford conceded that some of his statements to defendant were untrue, and the trial court found in accord with this testimony. We reiterate that we do not condone such tactics, but they alone do not establish coercion. *See Jackson*, 308 N.C. at 582, 304 S.E.2d at 152. Also, defendant for some time adamantly denied Crawford's accusations that he killed his wife. That alone, however, does not establish that his eventual confession was coerced.

Also, Crawford made several statements which defendant contends contained implicit promises or threats. Crawford stated, for example, "I want to know . . . why [you killed your wife], and that is important to you, because that has to do in the criminal system—that is going to have a lot to do with how you are treated and what happens to you. If you don't tell me the reason . . . then all we are going to look like [sic] is that you just went there and killed her," and "[I]f your side is not told, it's going to appear to be a lot worse than it looks."

We agree with defendant that these statements in isolation could be interpreted to contain implicit promises or threats; but viewed in context, and in light of defendant's voir dire testimony, they do not mandate a conclusion that defendant's statements were coerced. We first note that many of Crawford's statements were ambiguous; it was often not at all clear exactly what he was saying. Further, there were clearly times when Crawford was simply urging defendant to confess in order to ease his conscience. He stated, for example, "And you're going to feel better when you tell the whole thing and what led up to it," and, "It's going to be like a big weight has lifted off of you when you tell your side of it."

Moreover, defendant's voir dire testimony tends to belie the assertion that his confession was coerced. On voir dire he stated that he did not feel Crawford was threatening him, and he never stated that he interpreted Crawford's statements to mean that he would be treated better by the criminal justice system if he confessed. We believe defendant's testimony falls considerably short of establishing that defendant was led to believe that the criminal justice system

would treat him more favorably if he confessed to the murder of his wife.

Looking to the totality of the circumstances, we conclude that defendant's "independent will was not overcome, so as to induce a confession that he was not otherwise disposed to make, by mental or psychological coercion or pressure." *Jackson*, 308 N.C. at 582, 304 S.E.2d at 152-53.

II.

[2] Defendant next argues that the trial court erred in denying his motion to suppress the clothes found near the home of Martin Spencer on the ground that the Miranda warnings given to defendant that morning had grown stale.[2]

The evidence showed that defendant was given Miranda warnings at 9:00 a.m. at the police station. At 10:00 a.m. defendant and officers left the police station in search of defendant's clothes, which he claimed to have thrown out of his vehicle. Around noon defendant told Crawford that his clothes were at the home of a friend, Martin Spencer. Police went to the home upon defendant's direction. Spencer took them to defendant's clothes, which Spencer had taken into the woods near his home.

A Miranda warning does not have unlimited efficacy. *State v. McZorn*, 288 N.C. 417, 433, 219 S.E.2d 201, 212 (1975), *vacated on other grounds*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). Where the effect of a Miranda warning becomes diluted due to the passage of time, a second warning is required. *Id.* Any statement obtained as a result of a custodial interrogation requiring Miranda warnings in which those warnings were not given is inadmissible. *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966).

Physical evidence obtained as a result of a failure to give required Miranda warnings, however, need not be excluded. *State v. May*, 334 N.C. 609, 611-13, 434 S.E.2d 180, 181-82 (1993), *cert. denied*, —— U.S. ——, 127 L. Ed. 2d 661 (1994). Thus, even if the warnings had grown stale, defendant's argument would fail because he seeks to exclude physical evidence and not the statements given by him. We also note

2. Defendant also makes an argument relating to the voluntariness of his statement leading to the discovery of the clothes. This argument put forth by defendant in his brief, however, seems to depend on a finding in his favor on Issue I, which we have rejected. We therefore reject the argument relating to the voluntariness of the statement made to officers leading to the discovery of the clothes.

that defendant's argument fails because the record reveals that there was no interrogation of defendant which led to this discovery of evidence.[3]

III.

[3] Defendant next argues that the trial court erred in denying his motion to suppress evidence which was obtained without a warrant.

After arriving at the restaurant officers discovered a pocketbook with hair on it that was later determined to be hair of the victim. Officers later witnessed defendant walking near his car looking in the window. He appeared to be nervous. The officers eventually approached the car and saw a bloody money bag in the bed of the station wagon. Hair and blood on the bag was later determined to be consistent with the victim's hair and blood. A search of the car also revealed a bloody sock. The officers did not have a warrant for any of these searches and seizures. Defendant, however, had signed a consent form stating:

> Knowing my lawful right to refuse to consent to such a search, I willingly give my permission to the above named officer(s) to conduct a complete search of the premises and property, including all buildings and vehicles, both inside and outside of the [restaurant]. The above said officer(s) further have my permission to take from my premises and property, any letters, papers, materials or other property or things which they desire as evidence for criminal prosecution in the case or cases under investigation.

The trial court found that the items seized were in plain view and that defendant consented to the searches and admitted the pocketbook, moneybag and sock into evidence.

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3. The following occurred on cross-examination of Crawford:

> Q. Okay. At some point in time, did you question him and say that the clothes were not out there and you wanted him to tell the truth about where the clothes were?
>
> A. No, sir, as I previously testified, we—including the defendant—searched for the clothes for some period of time, and he made a statement to me that he had not told me the truth about where the clothes were.

Crawford also later said that "there was not an interrogation out on the road." The trial court found that defendant and Crawford "talked" and that the clothes were found as a result of "Crawford's conversation with defendant." Based on this record, we find that no interrogation occurred in any event so as to require re-Mirandization even if the original warnings had grown stale.

"[A] governmental search and seizure of property unaccompanied by prior judicial approval in the form of a warrant is per se unreasonable unless the search falls within a well-delineated exception to the warrant requirement." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 620 (1982). One such exception is the plain view doctrine. "It is well settled that evidence of crime falling in the plain view of an officer who has a right to be in a position to have that view is subject to seizure and may be introduced into evidence." *State v. Mitchell*, 300 N.C. 305, 309, 266 S.E.2d 605, 608 (1980), *cert. denied*, 449 U.S. 1085, 66 L. Ed. 2d 810 (1981). A warrant is not necessary for a search or seizure when the owner of the item seized consents to the search or seizure. *State v. Vestal*, 278 N.C. 561, 578-79, 180 S.E.2d 755, 767 (1971), *cert. denied*, 414 U.S. 874, 38 L. Ed. 2d 114 (1973). The burden is on the State to show that the consent was given without coercion, duress, or fraud. *Id.*

We find that the State has shown that the warrantless searches and seizures in the case at hand fall within both of these exceptions. The officers, being called to the scene of a dead body, were lawfully in the restaurant. While the record is not totally clear on the location of the pocketbook within the restaurant, it appears to have been found near the body on the floor. This is consistent with defendant's statement to officers that his wife was "slinging her purse." Thus, being in plain view, the seizure of the purse as evidence in a murder investigation was not unconstitutional. Similarly, the items in the car were in plain view since they were visible through the window. *See Texas v. Brown*, 460 U.S. 730, 744, 75 L. Ed. 2d 502, 515 (1983) (seizure of items from defendant's car not Fourth Amendment violation even though officer at license check had no warrant when he had probable cause to associate the item with criminal activity and the item was lawfully viewed by the officer).

Defendant's consent also obviated the need for a warrant. The trial court found as fact that prior to signing the form, defendant was advised that he did not have to consent to the search; defendant had a copy of the consent form while Crawford read it aloud to him; and defendant appeared to understand what he was doing. Defendant also restates his arguments in Issue I relating to involuntariness, but as we found in Issue I, defendant was not in a coercive environment and the actions taken by defendant were the product of his free will. Defendant emphasizes that he was not Mirandized at the time he gave consent, but Mirandization is not necessary prior to obtaining a consent to search. *See Vestal*, 278 N.C. at 579, 180 S.E.2d at 767.

Since the evidence seized was within plain view, and since defendant in any event consented to the searches and seizures, his assignment of error is overruled.

IV.

[4] Defendant next argues the trial court erred in admitting, over objection, portions of Karen Hardy's diary.

At trial the prosecutor called Karen's mother and asked her to read the 27 February 1992 entry in Karen's diary to the jury. Defendant objected on the grounds the diary was hearsay and any relevance was substantially outweighed by the prejudicial effect of the diary. The trial court overruled the objection and ruled the diary entry admissible under Rule 803 to show "the relationship of the parties."

The trial court then instructed the jury as follows:

> Now, members of the jury, I do want to indicate that evidence of other actions may be included by the defendant in this exhibit. That evidence is not admissible to prove the character of the defendant 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, identity or absence of mistake, entrapment or accident.

The trial court gave no further instructions regarding the diary entry.

The diary entry for 27 February 1992 was read to the jury. It said:

> Charlie went off this morning. He wanted to take his break and I said, 'Please, let's catch up the dishes first,' and he got mad. When we finished the dishes, he wouldn't leave. I said, 'Act immature, why don't you? Why don't you try acting like an adult male?' He hit me in the side of the head and slapped me across the face, then took off. He came back a little later, didn't apologize, wanted to use the vacuum. David changed the lock on my break. Late that night, he went off berserk, threw water, dishes, ashtrays, paper at me. Screamed he was going to kill me. Alan came to help mop and tried to hold him back. He jumped up in the car and broke the steering wheel adjuster. We filed a harassment charge. Waiting twenty-four hours.

We have had many occasions in recent times to consider whether a victim's out-of-court statements are admissible to show the victim's state of mind, and we are once again faced with this issue. We now

recede from some prior holdings and take this opportunity to clarify this area of law.

The State argues the diary entry was admissible since "defendant's violent conduct and threat toward his wife as shown by the exhibit were directly relevant to premeditation and deliberation and intent . . ." and since "the State may introduce evidence of violent conduct and threats by a husband against his wife in a trial of him for murdering her." The State also argues that the diary entry was admissible to show inferentially Karen's state of mind and her relationship with defendant. We deal with these arguments in turn.

In response to the State's argument that the diary entry is admissible to show defendant's violent conduct and his threat toward Karen, defendant argues that the State is attempting to prove the "truth of the matter asserted" in the diary entry and thus the diary entry is being used for a hearsay purpose.[4] *See* N.C. R. Evid. 801. Thus, the diary entry is inadmissible unless it is subject to a hearsay exception. N.C. R. Evid. 802.

The State in response refers to N.C. R. Evid. 803(3), which excepts from 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), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

The State argues that the statements in the diary are "statement[s] of [Karen's] then existing state of mind" and that they are therefore not excluded by the hearsay rule. We cannot agree.

The statements in the diary are not statements of Karen's state of mind but are merely a recitation of facts which describe various events. This Court faced a similar issue in *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *judgment vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *in light of McKoy v. North Carolina*, 494 U.S. 433, 108

4. The State argues defendant has not preserved any error as to the admission of this evidence on hearsay grounds since defendant's assignment of error states only that the diary was "inadmissible, unauthenticated, and irrelevant." We believe, however, that in light of the centrality of the hearsay issue to the admissibility of this evidence, and considering that defendant sufficiently raised hearsay objections at trial, defendant has properly preserved any error relating to the diary being hearsay.

L. Ed. 2d 369 (1990). In *Artis* the trial court prevented defendant from introducing evidence showing the victim said she was going to be killed if "the people" ever caught up with her. *Id.* at 303, 384 S.E.2d at 484. Defendant argued on appeal that this hearsay evidence was admissible as a statement of the victim's state of mind. We disagreed, however, finding the statements to be merely a " 'statement of . . . belief to prove the fact . . . believed.' " *Id.* at 304, 384 S.E.2d at 484 (quoting Rule 803(3)). Statements of a declarant's state of mind, are, for example, "I'm frightened," or, "I'm angry." *See State v. Locklear*, 320 N.C. 754, 759-60, 360 S.E.2d 682, 685 (1987) (rape victim's statement that she was "scared" of defendant is statement of state of mind and thus excepted from hearsay rule). Karen's diary, however, contains no statements like these which assert her state of mind.

Our conclusion is bolstered by the policy behind the state-of-mind hearsay exception, which is that "there is a fair necessity, for lack of other better evidence, for resorting to a person's own contemporary statements of his mental or physical condition" and that such statements are more trustworthy than the declarant's in-court testimony. 6 John H. Wigmore, *Evidence* § 1714 (James H. Chadbourn rev. 1976). Mere statements of fact, however, are provable by other means and they are not inherently trustworthy. The case before us makes this point quite clearly. The facts in Karen's diary, which portray attacks upon her and a threat against her, were admissible through the testimony of other persons who witnessed these events. Also, the facts lack the trustworthiness of statements such as "I'm frightened" and amount to precisely the type of evidence the hearsay rule is designed to exclude.

We are further persuaded that these statements are not admissible under the state-of-mind hearsay exception on the ground the diary entry is at best speculative as to Karen's state of mind. The State seems to assert that the diary shows that Karen feared defendant, but the diary entry is conflicting on that point. While the diary entry describes two attacks by defendant upon Karen, and we could infer generally that one who is attacked will fear her attacker, there are also indications in the diary entry that Karen was not intimidated by defendant. The diary states that Karen asked defendant to wash the dishes at which time he became "mad." Karen then said to defendant, "Act immature, why don't you? Why don't you try acting like an adult male." These are not words we would ascribe to a woman fearful of a physical attack by her husband.

The entire entry in fact expresses no emotion and seems to have been written in a calm and detached manner. This further tends to

refute any inference that Karen's state of mind was one of fear. In a footnote the State says, "Her [Karen's] initiation of some legal proceeding helps reveal her mental condition and helps illuminate her relationship with defendant." The State fails, however, to clarify what that mental condition was or the nature of the relationship. To the extent the State is arguing that filing a "harassment charge" is an indication of fear, we must recognize that most battered wives do not report acts of violence out of fear of retaliation.[5] That Karen filed a harassment charge, therefore, may be some indication that Karen did not fear defendant. Thus, it is not at all clear what state of mind is supposedly demonstrated by the diary entry. *See State v. Walker*, 332 N.C. 520, 542, 422 S.E.2d 716, 729 (1992), *cert. denied*, —— U.S. ——, 124 L. Ed. 2d 271 (1993) (Webb, J., dissenting, joined by Exum, C.J., and Frye, J.) (victim's statements that defendant attacked her were inconclusive as to victim's state of mind).

Thus, we conclude the diary entry was not admissible under the state-of-mind hearsay exception.

[5] As stated earlier, the State also argues that the statements in the diary are admissible as tending to show a bad relationship between Karen and defendant. The State's argument seems to be that the diary entries were not offered to prove the truth of the statements themselves; rather they were offered to show merely that the victim made them. Simply by showing that the victim made such statements, the State argues, is indicative of a bad relationship between her and defendant. Under this argument the diary entry is not offered to "prove the truth of the matter asserted" and thus we are not presented with a hearsay problem. *See* N.C. R. Evid. 801(c); *see also State v. Holder*, 331 N.C. 462, 484, 418 S.E.2d 197, 209 (1992) (victim's statements that defendant had a gun and that defendant threatened her not hearsay when used to show merely that statements were made and when statements were coupled with a statement that the victim was "scared").

Even if evidence that such statements were made by Karen is relevant on the issue of her relationship with defendant to show that this relationship was bad, its admissibility is still subject to Rule 403 which requires its exclusion if its probative value is substantial-

5. *See, e.g., Planned Parenthood v. Casey*, —— U.S. ——, ——, 120 L. Ed. 2d 674, 723 (1992) (referring to district court's finding that "A battered woman, therefore, is highly unlikely to disclose the violence against her for fear of retaliation by the abuser" and stating that the findings are supported by numerous studies).

ly outweighed by the danger of unfair prejudice. *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990). We find in this case that the statements in the diary as they bear on Karen's relationship with defendant should have been excluded since any probative value they may have had was substantially outweighed by the danger of unfair prejudice.

To the extent that the diary statements are indicative of a bad relationship between the victim and the defendant, their probative value is substantially outweighed by the danger that the jury will make improper use of the statements. It would not be permissible for the jury to consider the statements as proof of the facts they declare; the jury would be restricted to considering simply the fact that the statements were made.

The evidence in this case showed that defendant assaulted his wife at the restaurant and caused her death. Defendant returned to Martin Spencer's home on the morning of 4 March 1992 with blood on his pants, and he admitted to Spencer that he killed his wife at the restaurant by cutting her jugular vein with a knife. Police found bloody money bags in defendant's station wagon and defendant later made a full confession to police in which he detailed how he met his wife at the restaurant that morning and killed her with a knife. There was no evidence, nor any contention, that defendant killed his wife in self-defense or that his wife committed suicide. Based on this presentation of evidence, the only real issue for the jury was the degree of homicide of which defendant was guilty.

Thus, the central issue in the case was defendant's state of mind at the time of the murder. The issue before us is the extent to which Karen's relationship with defendant was relevant on any issue in the case. The State asserts, without further elaboration, that this relationship, to the extent that it was bad, was "helpful in proving issues like defendant's ill will." After examining the arguments of the parties and considering the other evidence in the case, we conclude Karen's relationship with defendant bears so tangentially on the issue of defendant's state of mind that it cannot justify admission of the diary entry.

First, the diary entry does not clearly reflect a certain type of relationship between Karen and defendant. To the extent the State relies upon the assaults and threat contained in the diary to establish the relationship between Karen and defendant, it is using the diary entry

for the truth of the matter asserted, which we have already found to be an impermissible hearsay use of the diary.

To whatever minimal extent Karen's relationship with defendant is probative of defendant's state of mind, it is substantially outweighed by the danger that the jury would misuse the diary entry, which sets forth two assaults by defendant upon Karen and a threat to take her life, as proof that defendant actually committed these acts. As stated by Justice Cardozo:

> It will not do to say that the jury might accept the [victim's] declarations for any light they cast upon [her state of mind], and reject them to the extent that they [incriminate the defendant with hearsay.] Discrimination so subtle is a feat beyond the compass of ordinary minds. . . . It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, and practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

Shepard v. United States, 290 U.S. 96, 104, 78 L. Ed. 196, 201-02 (1933).

Having found that admission of the diary entry was error, we must next determine whether that error entitles defendant to a new trial. After reviewing the evidence against defendant, we find that there is no reasonable possibility that the admission of the diary entry affected the jury's verdict that defendant was guilty of first-degree murder. N.C.G.S. § 15A-1443(a) (1988).

The diary entry essentially described two assaults upon Karen Hardy and a threat to take her life. The latter of these assaults and the threat, however, were related to the jury through the testimony of John Davis who arrived at the restaurant on 27 February 1992 at 9:30 to 10:00 p.m., shortly before closing. Davis testified in detail about how he saw defendant "throwing things around such as ashtrays, paper pamphlets, newspaper, kitchen utensils"; he later explained that "[s]ometimes he was [throwing things] at Karen and then sometimes it was anger—you know, it was just slamming stuff." Davis then testified that defendant said, "Karen, I will kill you, bitch." He proceeded to explain that Karen went to her car but that it would not start. Davis then saw defendant banging on the car and attempting

unsuccessfully to enter the driver's side. Defendant then went to the back of the vehicle and managed to enter the vehicle. Davis testified that he "saw him beating on her" and that Karen tried to stop him by covering her head. Defendant then put his hands around Karen's neck, at which time Davis pulled defendant off Karen. Karen then drove off.

Thus, most of the diary entry was repetitive of Davis' testimony. In fact, Davis' testimony went far beyond the entry in the diary in terms of describing the assault upon Karen on the night of 27 February 1992 and the threat defendant made to Karen. The only harmful statement in the diary entry not contained in Davis' testimony was the statement that in the morning, "He hit me in the side of the head and slapped me across the face, then took off." It must also be noted, however, that Chad England testified to an attack upon Karen in January or February at the restaurant. In light of the more severe assault on the evening of 27 February 1992, which involved defendant throwing items at Karen, threatening to kill her, banging on her car in an attempt to enter it, beating her inside the car and eventually choking her, and in light of the weighty evidence against defendant, including his inculpatory statements to Martin Spencer and to the police, we find that there is no reasonable possibility that the admission of the diary entry affected the outcome of the trial. N.C.G.S. § 15A-1443(a); *State v. Austin*, 320 N.C. 276, 285, 357 S.E.2d 641, 646, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987) (admission of victim's statements harmless).

V.

[6] Defendant next argues that the trial court erred in giving the following instruction to the jury prior to the reading from Karen Hardy's diary:

> Now, members of the jury, I do want to indicate that evidence of other actions may be included by the defendant in this exhibit. That evidence is not admissible to prove the character of the defendant 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, identity or absence of mistake, entrapment or accident.

There were no other instructions given the jury regarding the diary entry. Thus, while the jury was instructed that it could not consider the evidence in the diary to prove the character of the defendant, it

was in effect instructed that it could consider the contents of the diary entry as substantive evidence for other purposes.

This instruction was error. As stated earlier, the statements in the diary were not admissible to establish the truth of the matters asserted therein. Even if Rule 403 did not require the exclusion of the diary entry, the attacks and the threat as described therein were admissible only to show Karen's state of mind. The evidence contained in the diary was not admissible to show defendant's character or anything else, such as motive or intent, beyond the extent to which those matters are shown by Karen's state of mind.

We find, however, that there is no reasonable possibility that this instruction affected the outcome. N.C.G.S. § 15A-1443(a). As discussed above in Issue IV, Alan Davis testified to the attack upon Karen in the restaurant on the night of 27 February 1992. He also testified to the threat defendant made to her and the assault which continued outside the restaurant. Since these statements were made at trial they are not hearsay; further, this evidence is relevant and admissible to show defendant's state of mind.

Evidence of other wrongs is admissible under Rule 404(b) depending on the similarity and temporal proximity of those wrongs to the crime charged. *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *in light of McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). The evidence in this case, as introduced through Davis, of an assault by defendant on the victim within one week of her death is admissible to show malice. *See State v. Simpson*, 327 N.C. 178, 185, 393 S.E.2d 771, 775 (1990); *State v. Kyle*, 333 N.C. 687, 697, 430 S.E.2d 412, 417 (1993). Also, the threat defendant made to Karen, as testified to by Davis, was admissible and properly considered by the jury as evidence of defendant's intent. *State v. Syriani*, 333 N.C. 350, 376-77, 428 S.E.2d 118, 131-32, *cert. denied*, ---- U.S. ---- , 126 L. Ed. 2d 341 (1993), *reh'g denied*, ---- U.S. ---- , 126 L. Ed. 2d 707 (1994).

Thus, the jury could properly consider, through the testimony of Davis, the assault upon Karen on 27 February 1992 and the threat to her life as evidence of defendant's motive and intent. That the jury was instructed it could consider the assault and threat as evidence of defendant's motive and intent from the diary entry as well could have had no appreciable effect on the jury's determination of defendant's intent or motive. We also emphasize that Chad England testified to an incident in January or February of 1992 in which defendant attempt-

ed to strike Karen in the restaurant and that the evidence that defendant killed his wife was tremendous. In light of the testimony of Davis, which the jury properly could have considered as bearing on defendant's intent or motive, the testimony of England, and the other evidence of defendant's guilt, there is no reasonable possibility that the outcome was affected by the erroneous instruction.

VI.

[7] Defendant next argues that the trial court erred in preventing him from impeaching Martin Spencer based on Spencer's marijuana use and poor memory.

A voir dire of Martin Spencer revealed that he was involved in a car wreck years earlier which affected his memory. Spencer also used marijuana regularly which affected his memory. The night before he testified he smoked two marijuana cigarettes. There was no testimony specifically showing that he was unable to remember the pertinent events of 3 March 1992 or 4 March 1992 about which he testified.

Later on cross-examination of Martin Spencer, before the jury, defense counsel asked, "Okay, sir, and you're a drug user, aren't you?" The State objected, which was sustained. Defense counsel then asked, "On the day of—that you're testifying to, did you smoke marijuana?" The State again objected and asked to be heard outside the presence of the jury. The court never ruled on this objection on the record. The parties and the judge then left the courtroom and an unrecorded proceeding was conducted.

When they returned to the courtroom, and outside the presence of the jury, the prosecutor said:

> Just—just so I can get it straight in my mind, you are going to allow questions as to—as to Mr. Spencer smoking marijuana on March the 3rd and March the 4th, if it is asked by the defendant. I guess my inquiry is at this point, are you—is the Court—not you. Is the Court going to allow questions as to any smoking marijuana over extended period of time, even though that's not—that question has not been asked.

The trial court responded:

> I have difficulty ruling in advance on questions and speculating on what might be asked or what might not be asked. I did say that I would be inclined, if the defense counsel wanted to go into that area, to allow him to ask those questions about marijuana

> smoking on the night of—on the night of March 3rd but I further indicated the concern—well, I won't go—go into detail but I did indicate that I would allow him to get into that line of questioning if he chose to do so and asked him to make a determination as to whether he chose to do so.

Upon resuming cross-examination of Spencer in the presence of the jury, defense counsel asked no questions relating to Spencer's drug use.

We conclude that, based on this record, defendant was not in fact precluded from asking Spencer about his marijuana use. The statements of the prosecutor and the court recited above indicate that the court ruled that it would permit the defendant to ask Spencer about his marijuana use. The trial court could not have been clearer when it stated, "I did indicate that I would allow him to get into that line of questioning if he chose to do so . . . ." If there was error in sustaining the State's initial objections, it was cured by the later ruling of the trial court permitting inquiry into Spencer's marijuana use. Defendant chose to not ask about Spencer's marijuana use, and he cannot complain of that decision now. Defendant's assignment of error is therefore overruled.

VII.

[8] Finally, defendant argues that the trial court erred in denying his motion to dismiss the first-degree murder charge on the ground that there is insufficient evidence of premeditation and deliberation.

"On a motion to dismiss on the ground of insufficiency of the evidence, the question for the court is whether there is substantial evidence of each element of the crime charged." *State v. Bates*, 309 N.C. 528, 533, 308 S.E.2d 258, 262 (1983). Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). The evidence in this inquiry must be viewed in the light most favorable to the State and the State is to receive every reasonable inference that can be drawn from the evidence. *Id.* at 450, 439 S.E.2d at 585.

Premeditation requires an intent to kill that was formed some time, however short, before the murder; deliberation requires an intent to kill that was formed in a cool state of blood. *Id.* at 450, 439 S.E.2d at 586. As premeditation and deliberation are not ordinarily provable by direct evidence, they are often established with circum-

stantial evidence. *Id.* at 450, 439 S.E.2d at 586. Premeditation and deliberation can be inferred from the conduct and statements of the defendant before and after the killing. *Id.* at 451, 439 S.E.2d at 586.

In this case, there was evidence of a history of domestic difficulties between the defendant and the victim. Defendant had been seen striking his wife on two occasions and on one of those occasions he said, "Karen, I will kill you, bitch." The physical evidence showed that defendant stabbed the victim several times to her chest, neck, head and hands. She had several defensive wounds and died of loss of blood caused by the severing of her carotid arteries.

After killing his wife, defendant tried to make the murder appear to be connected with a robbery. He then returned to Martin Spencer's home where he ordered Spencer to burn his clothes; he remained at Spencer's until he saw Spencer burn what defendant believed to be his clothes. He later confessed to police that he went to the restaurant that morning where he left the lights off and waited for his wife to arrive. After his wife arrived they began arguing and his wife called him a homosexual, at which time "it just snapped." Defendant got a knife from the kitchen, held his wife down, and stabbed her.

We find that this evidence, viewed in the light most favorable to the State, is sufficient to support a conviction for first-degree murder. The threat defendant made to kill his wife within one week of the murder is strong evidence that defendant premeditated the murder of his wife. His actions in arriving at the restaurant, keeping the lights off and awaiting the arrival of his wife also tend to indicate premeditation. Further, the manner in which he obtained a knife, held his wife down, and inflicted numerous stab wounds shows an intent to kill formed before the murder.

Much of the evidence stated above is also probative to show that defendant killed his wife in a cool state of blood. Defendant's actions after the killing, however, especially indicate that he deliberated the killing of his wife. He immediately attempted to make the killing seem connected to a robbery, and he soon attempted to destroy incriminating evidence. He returned to the restaurant where he feigned shock upon finding the fate of his wife and concocted an alibi which he repeatedly told the police. This evidence all shows that defendant was in full control of his faculties immediately following the murder. This, in turn, is some evidence that he murdered his wife in a cool state of blood.

Since there was substantial evidence of premeditation and deliberation, defendant's assignment of error is overruled.

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

NO ERROR.

CURTIS WILSON TAYLOR v. VOLVO NORTH AMERICA CORPORATION

No. 410PA92

(Filed 30 December 1994)

1. Automobiles and Other Vehicles § 253 (NCI4th)— New Motor Vehicles Warranties Act—prerequisites for recovery of refund

In order to recover a refund under the New Motor Vehicles Warranties Act, a lessee or purchaser must establish (1) the terms of the manufacturer's express warranty, (2) that the vehicle failed to conform to those terms in the warranty, and (3) that after a reasonable number of attempts to remedy that breach of the warranty, (4) the vehicle still failed to conform.

Am Jur 2d, Automobiles and Highway Traffic §§ 721 et seq.

Validity, construction, and effect of state motor vehicle warranty legislation (lemon law). 51 ALR4th 872.

2. Automobiles and Other Vehicles § 253 (NCI4th)— lease of new motor vehicle—clicking sound and vibration—express warranty against defects

Plaintiff produced sufficient evidence that a new vehicle leased by plaintiff was expressly warranted against defects which would cause a clicking sound in a wheel or the front end to vibrate, although the written warranty was not introduced into evidence, where plaintiff presented the testimony of defendant's regional sales manager, who was defendant's former parts and service manager and was found by the trial court to be an expert on defendant's warranty; the manager testified as to the general terms of defendant's express warranty; and the manager also testified that a clicking noise in the wheel or brake was covered by the warranty if it was caused by a "defect," and that a vibration or

shimmy in the front end was covered by the warranty unless it was cause by the tires, a wheel imbalance, or a problem of that nature.

Am Jur 2d, Automobiles and Highway Traffic §§ 721 et seq.

Validity, construction, and effect of state motor vehicle warranty legislation (lemon law). 51 ALR4th 872.

3. Automobiles and Other Vehicles § 254 (NCI4th)— New Motor Vehicles Warranties Act—showing of specific mechanical defect not required

There is no statutory requirement that the buyer or lessee in all cases prove the cause of a nonconformity with the manufacturer's express warranty or identify a specific mechanical defect related to the nonconformity in order to recover under the New Motor Vehicles Warranties Act.

Am Jur 2d, Automobiles and Highway Traffic §§ 721 et seq.

Validity, construction, and effect of state motor vehicle warranty legislation (lemon law). 51 ALR4th 872.

4. Automobiles and Other Vehicles § 254 (NCI4th)— new vehicle—failure to conform to warranty—sufficiency of evidence

Plaintiff presented sufficient evidence that a continuing and uncorrected clicking sound in a wheel and a vibration in the front end of a new car leased by plaintiff was caused by a "defect" in the braking system and that the vehicle thus did not conform to defendant manufacturer's express warranty, although plaintiff introduced no evidence of any specific mechanical defect that caused the problems, where plaintiff's evidence tended to show that the dealer indicated that the clicking sound and vibration were caused by the anti-lock braking system and could not be corrected, and that the problems persisted after the replacement of worn parts.

Am Jur 2d, Automobiles and Highway Traffic §§ 721 et seq.

Validity, construction, and effect of state motor vehicle warranty legislation (lemon law). 51 ALR4th 872.

5. Automobiles and Other Vehicles § 259 (NCI4th)— New Motor Vehicles Warranties Act—manufacturer's unreasonable refusal to comply—sufficiency of evidence—treble damages

The trial court did not err by finding that defendant manufacturer unreasonably refused to comply with the New Motor Vehicles Warranty Act and that plaintiff was entitled to treble damages where the evidence showed that plaintiff believed that a new vehicle he leased did not conform to the express warranty because of a continuing vibration in the front end and a clicking sound in a wheel; plaintiff had been to defendant's dealer numerous times in unsuccessful attempts to have the problems corrected; and in response to plaintiff's written assertion of rights under the Act, defendant did nothing more than make one unsuccessful attempt to reach plaintiff's attorney by phone. N.C.G.S. §§ 20-351.2, 20-351.3.

Am Jur 2d, Automobiles and Highway Traffic §§ 721 et seq.

Validity, construction, and effect of state motor vehicle warranty legislation (lemon law). 51 ALR4th 872.

6. Automobiles and Other Vehicles § 259 (NCI4th)— New Motor Vehicles Warranties Act—manufacturer's unreasonable refusal to comply—reasonable use allowance—deduction before damages trebled

When the trier of fact finds that a manufacturer unreasonably refused to comply with the New Motor Vehicles Warranty Act, the reasonable allowance for plaintiff consumer's use of the vehicle should be deducted from the damages recoverable before the damages are trebled. Considering both the "Replacement or refund" and "Remedies" sections of the Act in pari materia, the reference in the "Remedies" section to "[m]onetary damages . . . fixed by the verdict" which are subject to trebling was intended by the legislature to refer to the net sum due to an injured consumer from the manufacturer pursuant to the provisions of the "Replacement or refund" section, and this sum is the total of the refunds, including consequential damages, due to the consumer minus the reasonable allowance for the consumer's use of the vehicle. N.C.G.S. §§ 20-351.3, 20-351.8.

Am Jur 2d, Automobiles and Highway Traffic §§ 721 et seq.

Validity, construction, and effect of state motor vehicle warranty legislation (lemon law). 51 ALR4th 872.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 107 N.C. App. 678, 421 S.E.2d 617 (1992), affirming the judgment of Allen (W. Steven, Sr.), J., entered at the 18 February 1991 Session of Superior Court, Guilford County. Heard in the Supreme Court 11 May 1993.

J. Sam Johnson, Jr., for plaintiff-appellee.

Smith Helms Mulliss & Moore, by William Sam Byassee, for defendant-appellant.

EXUM, Chief Justice.

This case arises out of the lease of an automobile manufactured by Volvo North America Corporation (Volvo), defendant, to Curtis Taylor, plaintiff. Taylor sued Volvo under the New Motor Vehicles Warranties Act (the Act), N.C.G.S. §§ 20-351 to 20-351.10 (1993) alleging that the vehicle failed to conform to its express warranty. After hearing the evidence the trial court made findings of fact and conclusions of law and ruled for Taylor, awarding treble damages of $8106.85 plus interest and attorney fees of $4125. The Court of Appeals affirmed and we granted defendant's petition for discretionary review.

The questions presented are whether (1) the evidence supports the trial court's findings regarding the existence of the warranty and the automobile's nonconformity; (2) the findings of the trial court support its conclusion that defendant unreasonably refused to comply with the Act; and (3) the reasonable allowance for use of the car should be deducted from the damages recoverable before the trebling of damages. We affirm the Court of Appeals decision affirming the trial court's order on the first two questions, but we reverse its decision on the third question. We conclude, contrary to the Court of Appeals and the trial court, that the reasonable allowance for use of the car should be deducted from damages prior to the trebling of damages.

I.

On 27 December 1988 Taylor went to Maxwell Volkswagen (Maxwell), an authorized dealer for Volvo, in Burlington, North Carolina, to lease an automobile for his business use. On that day he test drove a 1989 automobile manufactured by Volvo. This Volvo, which had been used by the wife of Maxwell's owner and which may have been used as a demonstration car, had slightly more than 700 miles on the odometer; Taylor was aware of the prior use of the car.

On the day Taylor tested and leased the car, he noticed an unusual noise and vibrations coming from the front left wheel. Taylor described the car's vibration as a "shimmy." Taylor pointed this out to at least two employees of Maxwell. Taylor leased the car on that day for 72 monthly payments of $486. Taylor testified that "they told me to drive it for a few days or a week or whatever and bring it back in and if I wasn't satisfied that they would correct the problem."

In order to maintain the vehicle warranty, Taylor was required to have the vehicle serviced by Maxwell after the first 1000 miles and every 5000 miles thereafter. Pursuant to this maintenance schedule, Taylor returned the car to Maxwell on 6 January 1989. Taylor testified that he then reported a "clicking noise in the front of the car. It happened when you put the brakes on." Taylor further testified that Maxwell balanced the wheels and that "they told me that it should take care of the shimmy and everything in the front of the car."

The shimmy in the Volvo, however, continued after 6 January 1989. On 6 March 1989 Taylor returned the car to Maxwell for its 5000 mile checkup. Taylor complained of a clicking in the wheel, or the brakes, and a shimmy. With respect to the clicking, the ticket stated, "no problem found—ABS pedal"; with respect to the shimmy, the ticket stated, "found no problem after tire rotation." Nevertheless, the problems persisted. On 16 May 1989 the Volvo was taken in again and Maxwell resurfaced the rotors for a fee, but the clicking noise and the shimmy remained. On 3 July 1989 the Volvo was taken in again and Maxwell's shop foreman drove the vehicle and determined that the anti-lock brakes were causing the shimmy and clicking noise. Taylor was told that the clicking noise was characteristic of the anti-lock braking system used on the type of Volvo he leased. The brake pads were changed but the problems persisted. On 10 July Maxwell made more repairs to the rotors, but the problems with the clicking and shimmy continued.

Taylor eventually quit driving the Volvo. At this time the vehicle had been driven approximately 22,000 miles, more than twice the distance permitted by the lease agreement. Plaintiff tried unsuccessfully to return the car to Maxwell and cancel the lease. Taylor stopped making payments after 27 July 1989, at which time he had paid $4511.95 in lease payments. On 11 September 1989 Taylor's counsel sent a letter to defendant indicating that Taylor's Volvo did not conform to the warranties, referring specifically to the brakes and shaking, and that Taylor wanted a refund of his payments or a comparable new car as provided by North Carolina's "Lemon Law." This was the only communication between Taylor and defendant while Taylor had the car. Due to an incomplete address, this letter was not received until 10 October 1989. Defendant made one attempt to reach Taylor's counsel by telephone, but that was unsuccessful. Taylor's car was repossessed on 25 October 1989. Joseph Blando, defendant's regional parts and service manager for North Carolina, inspected the car and found nothing wrong.

On 16 November 1989, Taylor sued defendant under the Act. N.C.G.S. §§ 20-351 to 351.10. Taylor testified that he leased the car and he described the problems he experienced with the car. He also introduced the repair tickets prepared by Maxwell relating to the car, evidence of his payments pursuant to the lease, and his correspondence with defendant. Taylor did not introduce the written warranty at trial. Plaintiff instead offered the testimony of Joseph Blando, who had worked for defendant as Regional Parts and Service Manager and who at the time of trial worked for defendant as Regional Sales Manager. The trial court accepted Blando as an expert on defendant's warranty. Blando testified that the Volvo was "warrantied for twelve months, unlimited mileage, the whole car, with exceptions for numerous things"; that the excepted items included tires, brake pads, rotors, and wheel balancing; and that based on the descriptions of the problems with the car, he could not determine whether these problems would be covered by the warranty.

The trial court found that the shimmy and clicking constituted a breach of defendant's express warranty. The trial court awarded Taylor $4511.95 plus interest, which represented the lease payments made, the $500 security deposit, and $123.95 in repair costs. The trial court further found that defendant unreasonably refused to comply with N.C.G.S. §§ 20-351.2 and 351.3, and trebled the damages to $13,535.85. The trial court then allowed defendant an offset of $5429, which represented a reasonable allowance for use of the vehicle.

Finally, the trial court awarded the plaintiff attorney fees of $4125 due to defendant's unreasonable failure to resolve the matter.

Defendant appealed to the Court of Appeals, which affirmed. We granted discretionary review, and we now affirm in part and reverse in part.

II.

A.

In 1987 North Carolina enacted the New Motor Vehicles Warranties Act. 1987 N.C. Sess. Laws 502, 502-05. This legislation was designed to provide protection to purchasers of new vehicles beyond that offered by various state and federal mechanisms. *See* Heather Newton, Note, *When Life Gives You Lemons, Make A Lemon Law: North Carolina Adopts Automobile Warranty Legislation*, 66 N.C. L. Rev. 1080 (1988). Section 20-351.2 of the Act provides that "[i]f a new motor vehicle does not conform to all applicable express warranties for a period of one year, . . . [upon notification] the manufacturer shall make, or warrant to have made, repairs necessary to conform the vehicle to the express warranties . . . ." Section 20-351.3 further provides as follows:

> (b) [In the case of a leased vehicle,] if the manufacturer is unable, after a reasonable number of attempts, to conform the motor vehicle to any express warranty by repairing or correcting, or arranging for the repair or correction of, any defect or condition or series of defects or conditions which substantially impair the value of the motor vehicle to the consumer, and which occurred no later than 24 months or 24,000 miles following original delivery of the vehicle, the manufacturer shall, at the option of the consumer, replace the vehicle with a comparable new motor vehicle or accept return of the vehicle from the consumer and refund the following:
>
> (1) To the consumer:
>
> a. All sums previously paid by the consumer under the terms of the lease;
>
> b. All sums previously paid by the consumer in connection with entering into the lease agreement, including, but not limited to, any capitalized cost reduction, sales tax, license and registration fees, and similar government charges; and

c. Any incidental and monetary consequential damages.

In the case of a refund, the leased vehicle shall be returned to the manufacturer and the consumer's written lease shall be terminated by the lessor without any penalty to the consumer. . . .

(c) Refunds shall be made to the consumer, lessor and any lienholders as their interests may appear. The refund to the consumer shall be reduced by a reasonable allowance for the consumer's use of the vehicle. A reasonable allowance for use is that amount directly attributable to use by the consumer prior to his first report of the nonconformity to the manufacturer, its agent, or its authorized dealer, and during any subsequent period when the vehicle is out of service because of repair. "Reasonable allowance" is presumed to be the cash price or the lease price, as the case may be, of the vehicle multiplied by ["the number of miles attributed to the consumer" divided by 100,000 miles.]

N.C.G.S. §§ 20-351(3) (1993).

If the "nonconformity has been presented for repair to the manufacturer, its agent, or its authorized dealer four or more times but the same nonconformity continues to exist," then "it is presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties." N.C.G.S. § 20-351.5(a)(1). "A consumer injured by reason of any violation of [this Act] may bring a civil action against the manufacturer . . . ." N.C.G.S. § 20-351.7. The consumer may recover attorney's fees if the manufacturer "unreasonably failed or refused to fully resolve the matter." N.C.G.S. § 20-351.8(3)a. Further, where the manufacturer "unreasonably refused to comply with G.S. 20-351.2 or G.S. 20-351.3," the monetary damages, as specified in N.C.G.S. § 20-351.3, shall be trebled. N.C.G.S. § 20-351.8(2).

[1] Thus, to recover a refund under the Act, a lessee or purchaser must establish (1) the terms of the manufacturer's express warranty, (2) that the vehicle failed to conform to the those terms in the warranty, and (3) that after a reasonable number of attempts to remedy that breach of the warranty (4) the vehicle still failed to conform.

Defendant argues the evidence was insufficient to establish liability under the Act. In determining the sufficiency of the evidence we must consider the evidence in the light most favorable to the party in whose favor judgment was rendered and give that party every reasonable inference to be drawn from the evidence. *Northern Nat'l Life*

Ins. v. Miller Machine Co., 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984); *Thomson v. Thomas*, 271 N.C. 450, 455, 156 S.E.2d 850, 853 (1967); *Smith v. Stepp*, 257 N.C. 422, 425, 125 S.E.2d 903, 906 (1962).

In asserting that the evidence was insufficient defendant challenges the following finding by the trial court which underlies its judgment imposing liability under the Act:

> 5. Defendant extended to plaintiff as to the subject vehicle an express warranty that it would be free from defect in parts and workmanship for at least twelve months and for unlimited mileage, with some exceptions which are not applicable in this case. The continuing and uncorrected clicking noise and shimmy in the front of the vehicle were direct violations of that warranty so as substantially to impair the vehicle to plaintiff as consumer, making it non-conforming to the contract.

Specifically, defendant argues that Taylor has not sufficiently established the terms of the warranty and that Taylor has not shown a breach of warranty since he did not establish the cause of the shimmy and clicking.

The only question before us on this issue is whether there was sufficient evidence to support the trial court's finding. It is well settled that the trial court's findings of fact are conclusive if supported by competent evidence. *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 350 S.E.2d 83, *reh'g denied*, 318 N.C. 704, 351 S.E.2d 736 (1986). The finding will be upheld even if there is evidence to the contrary so long as there is evidence supporting that finding. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975).

B.

[2] We first deal with whether plaintiff produced sufficient evidence of the manufacturer's express warranty. The Act does not set forth what constitutes a "warranty." We therefore presume that the legislature used that word in its ordinary sense. In the context of sales, "warranty" has been defined as "[a] promise or agreement by seller that [the] article sold has certain qualities . . . ." *Black's Law Dictionary* 1423 (1979). Further, in determining what constitutes an express warranty, we may look to other statutory provisions relating to warranties, such as Article 2, dealing with the sale of goods, and Article 2A, dealing with the lease of goods, found in Chapter 25 of the General Statutes. Those provisions state that a warranty is created by "[a]ny affirmation of fact or promise made by the seller [or lessor] to

the buyer [or lessee] which relates to the goods and becomes part of the basis of the bargain." N.C.G.S. § 25-2-313(a) (pertaining to sales warranties); N.C.G.S. § 25-2A-210(1)(a) (pertaining to lease warranties).

Also, the Act is limited to "express" warranties. While it is possible that there exist certain implied warranties with the purchase or lease of a new vehicle, *see* N.C.G.S. § 25-2-314, express warranties are those warranties that are agreed upon by the parties by written or oral conduct. Thus, despite plaintiff's arguments to the contrary, the terms of a manufacturer's express warranties do not necessarily include that the vehicle will meet its owner's, or lessor's, expectations.

We are concerned therefore only with plaintiff's evidence relating to defendant's written warranty, which was not introduced into evidence.[1] Plaintiff introduced the testimony of Joseph Blando, an employee of defendant, found by the trial court to be an expert on defendant's warranty, to establish the terms of defendant's warranty. The relevant direct examination of Blando follows:

> Q. And you were familiar with the warranty policies of the company as regards that particular model in 1989?
>
> A. Yes, sir.
>
> Q. Would you tell His Honor what the warranty of the manufacturer was on that car?
>
> A. There are a number of warranties.
>
> Q. With reference to parts and workmanship, what is the warranty?
>
> A. With reference to parts?
>
> Q. Parts and workmanship.

1. Plaintiff claimed that the written warranty, which was contained in the owner's manual, was in the car when it was repossessed. We recognize that the "best evidence rule" would normally require production of the written warranty since the plaintiff is seeking to prove the content of a writing. N.C. R. Evid. 1002 (1992). This issue, however, has not been argued below or on appeal and is not properly before us. Nevertheless, we note that Rule 1004 would probably permit plaintiff to establish the terms of the warranty through other means. This rule creates an exception to the best evidence rule if "[a]t a time when an original was under the control of a party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing." N.C. R. Evid. 1004(3).

A. Okay. The car—the car itself is warranted for twelve months, unlimited mileage, the whole car, with exceptions for numerous things.

Q. I didn't understand the last thing.

A. Well, there are exceptions for numerous items. One would be tires.

Q. All right. Your testimony then is that the car itself is warranted for twelve months and unlimited mileage?

A. Right.

Q. With certain exceptions, is that correct?

A. That's correct.

Q. What are the exceptions on this particular car warranty, to your knowledge?

A. Well, there are a number of them. Tires is one. There are specific exclusions for adjustments.

Q. To what?

A. Just about the entire car.

Q. What does that mean?

A. If you were to have to tighten nuts and bolts, for example, for different things, squeaks and rattle type items that are not covered for the same terms.

Q. Okay. What else is excepted to your knowledge?

A. Things that wear basically.

Q. Like what?

A. Brake pads, things that are consumed during the normal use.

Q. Are you saying that they did not warrant brake pads?

A. Not for wear.

Q. What about rotors?

A. At the time that the car was purchased, rotors were not included either for wear.

Q. What about for warp?

A. It would depend on what caused the warped condition.

Q. So warped rotors were warranted, is that correct?

[objections]

A. Not in total, no.

Q. But you say "not in total." There would be exceptions for wear, is that correct? That is abuse or some outside influence?

A. Abuse would be an exception also.

This testimony is sufficient to establish the general nature of the warranty. Blando's description of defendant's warranty indicates that "the whole car" is warranted. The warranty, however, excludes "abuse[d]" items, items that need "adjustment," "[t]hings that wear," and "things that are consumed during the normal use." Thus, for example, brake pads with normal wear are not warranted since brake pads wear with use.

Blando was also asked specifically about whether a shimmy would be warranted:

Q. Okay. If there were a shimmy in the front wheels of this car, is that warranted under the 1989 warranty?

A. It would be warranted depending on what causes the shimmy.

Q. What if you delivered the new car to the individual on December 27, 1988 and there was a shimmy and you said—your dealer said he would fix it, is it warrantied?

A. If it would be related to the tires or wheel balance or something of that nature, no.

Q. What did you say?

A. It it [sic] would be related to the tires or a wheel balance condition or something of that nature, no.

. . .

Q. Have you heard anything in the evidence this morning about the condition of the car that was delivered to the consumer on that day that would except it from the warranty for that shimmy that your dealer said he would fix?

[objections]

A. I don't know.

Q. You don't know of any exception about the condition of this car that would except it from that condition, do you?

[objections]

A. To answer that question, I would have to know what the shimmy condition is to answer that question.

Blando was then questioned about his contact with plaintiff's vehicle. Examination concerning the warranty then continued:

Q. Okay. Now you have you [sic] heard the evidence about the problem with the brakes on this case?

A. Yes, sir.

Q. All right. Were the brakes warranted on this car, this particular model for parts and workmanship?

A. Depending upon the condition of the brakes, yes, sir, they were.

Q. What did it depend on?

A. It would depend on what the problem was with the brakes.

Q. Well, if the problem was a clicking in the brakes that was unexplained and unrepaired, was that warrantied or not?

A. The clicking in the brakes?

Q. Yes, sir.

A. It would be warrantied if it were in fact a defect, yes, sir.

This testimony further illuminates defendant's warranty covering plaintiff's Volvo. Consistent with Blando's earlier testimony regarding defendant's warranty generally, Blando indicated that the clicking constituted a breach of warranty if it was caused by a "defect" and that the shimmy constituted a breach of warranty unless it was caused by the tires, a wheel imbalance, or a problem of that nature.

We find Blando's testimony, while clearly inferior to presenting the written warranty itself, is sufficient to support the trial court's findings concerning the existence and the terms of defendant's express warranty material to this case.

C.

Defendant next argues that even if plaintiff has established the terms of the express warranty, he has not established the vehicle's nonconformity to that warranty because he has not shown the "cause" of the shimmy. Defendant emphasizes the plaintiff is not a mechanic and introduced no evidence linking any specific mechanical defect in the car to the clicking and the shimmy. Section 20-351.3(b) of the Act states that the manufacturer is liable to the purchaser of a new motor vehicle if it "is unable . . . to conform the motor vehicle to any express warranty by repairing or correcting . . . any defect . . . ." The buyer must therefore prove that the vehicle failed to conform to the express warranty.

[3] There is no statutory requirement, however, that the buyer in all cases prove the cause of the nonconformity or identify any specific mechanical defect related to the nonconformity. Where, for example, a vehicle is warranted to be free from vibrations, the plaintiff need show only the car vibrates; the cause or the specific defect leading to the vibration is immaterial to establishing that the car fails to conform to the express warranty. *See Scheuler v. Aamco Transmissions, Inc.*, 571 P.2d 48, 52, 1 Kan. App. 2d 525, 530 (1977) (where defendant warranted "performance" of transmission, "[p]roof of a specific defect was not required").

[4] The trial court in this case found that defendant warranted the car to be free from defects and that the "continuing and uncorrected clicking noise and shimmy" caused the car not to conform to that warranty. With the testimony of Joseph Blando, plaintiff produced sufficient evidence to support the findings that the car was warranted against defects which would cause it to shimmy or click. The next inquiry is whether plaintiff produced sufficient evidence that the shimmy or click, or both, was caused by a defect, as opposed to a worn or abused part or a part in need of adjustment. We conclude plaintiff met this burden.

Taylor testified that he took the Volvo to Maxwell on 3 July 1989. Taylor successfully importuned the shop foreman on that occasion to test drive the car to experience the shimmy. Taylor testified on direct examination that, "he was trying to tell me that the problem in the car was that they had put anti-lock brakes on the car is what he told me." Taylor later testified on cross examination:

Q. Mr. Taylor . . . When you thought that they didn't fix it, you didn't go back to them, and say, "What in the world is going on; you didn't fix this problem?"

A. I most certainly did. I went back so many times they hid from me when I went back to the dealership.

Q. Mr. Taylor, they were telling you that they couldn't find the problem, isn't that correct?

A. They were telling me—no, that's not correct. *They were telling me that they couldn't fix the problem* is what they were telling me.

Q. Mr. Taylor, doesn't it say on these tickets, "No problem found?"

A. That's what they said. I would go back and keep complaining about the car. And it wasn't until—I don't know the guy, but I think the guy's name was Jordan and I rode down the interstate. *They kept telling me that because of the antilock brakes that was new on that model, and they kept telling me they had a problem with the brake pads.*

Q. *They kept telling you that the antilock brake system was what was causing this clicking. Isn't that what they said?*

A. *That's what the shop foreman was telling me.*

Q. *And said that was normal. Isn't that correct?*

A. *That's what he was telling me; that it was normal.*

(Emphasis added.) Regarding this testimony, the trial court made the following finding of fact: "[T]he dealership's shop foreman drove the vehicle, [and] determined that there was a shimmy and a clicking which he attributed to the anti-lock brakes . . . ." Defendant did not except to this finding; and, in any event, we find it supported by the evidence. Thus, it is binding on appeal.

The communications between plaintiff and one or more employees of Maxwell indicate that the shimmy and clicking experienced by the plaintiff were caused by the anti-lock braking system. These statements also lead to a strong inference that the shimmy and clicking were caused by problems relating to the manufacture, or the design, of the braking system itself, rather than by any wear or any particular use by the plaintiff. The shop foreman stated that the problems plain-

tiff experienced with the car were "normal," were caused by the type of braking system used on plaintiff's model, and could not be fixed. Further, the numerous unsuccessful attempts to remedy the problem, which included rotating tires, changing brake pads and resurfacing the rotors, indicate the shimmy and clicking were due to the braking system itself and tend to negate any implication that the problem was caused by the ordinary wear of parts. Evidence of shimmying and clicking, extant on the day of purchase when the car had only 700 miles, which defendant's authorized dealer identifies with the braking system on the car, which defendant's authorized dealer states "cannot be fixed," and which persisted after the replacement of worn parts, is sufficient to support a finding that these problems were caused by a "defect" and not by abuse, wear, or maladjusted settings.

Thus, although the plaintiff has not shown the precise mechanical defect within his braking system, he has produced enough evidence to establish that the shimmy and clicking were caused by a "defect" in the braking system. Since, according to defendant's former regional parts and service manager, the warranty covered shimmying and clicking caused by a "defect," as opposed to worn, consumed, abused, or maladjusted parts, plaintiff's evidence is sufficient to support the trial court's finding that the shimmy and clicking constitute a nonconformity to, or breach of, the warranty.

We also note that in discussing this issue plaintiff refers to a statement made by an employee of Maxwell that "they would correct the problem" if it persisted. Since we have found the other evidence sufficient to support the trial court's finding imposing liability under the Act, we need not decide this issue on that statement. Nevertheless, we agree with plaintiff that, when viewed in the light most favorable to him, this is some evidence that the continued clicking and shimmying constituted a nonconformity with the warranty which would support liability under the Act. We do not, however, treat this statement by Maxwell's employee as creating additional warranties above those created by Volvo.[2]

2. If the employee of Maxwell created a warranty as to the vehicle, it is binding only as to Maxwell, and not as to defendant, unless Maxwell had the authority to bind defendant. *Commercial Solvents, Inc. v. Johnson*, 235 N.C. 237, 69 S.E.2d 716 (1952) (statements by purported agent held inadmissible against principal to modify contract where it was not established that the agent had the actual or apparent authority to modify the contract). There is, however, no evidence that defendant expressly authorized Maxwell to alter the warranty, and plaintiff has introduced no evidence, or even argued, that Maxwell had either actual or apparent authority to modify defendant's warranty. *See Black v. Ford Motor Co.*, 600 So. 2d 1029, 1033 (Ala. App. 1992) (state-

III.

[5] Defendant next challenges the determination by the trial court that it unreasonably refused to comply with sections 20-351.2 & 20-351.3 of the Act.

Section 20-351.8 of the Act provides that "damages shall be trebled upon a finding that the manufacturer unreasonably refused to comply with G.S. 20-351.2 or 20-351.3." Sections 20-351.2 and 20-351.3 of the Act pertain to the manufacturer's duty to "make, or arrange to have made, repairs necessary to conform the vehicle to express warranties" and its duty to replace the vehicle or provide a refund if a nonconformity persists after a reasonable number of attempts to conform the vehicle.

The evidence was that defendant had returned his car to Maxwell on numerous occasions complaining of shimmying and clicking. Despite his efforts to have these problems fixed, the problems with the vehicle persisted. In July Taylor attempted to return the car to Maxwell and cancel the lease; Maxwell, however, refused to accept the car. On 11 September 1989 plaintiff's attorney sent a letter to defendant stating the following:

> As attorney for Curtis Wilson Taylor, the Lessee from Maxwell Volkswagen, Inc., 2919 North Church Street, Burlington, N.C. 27215, on 27 December 1988, I am herewith notifying you, pursuant to North Carolina General Statutes, Section 20-351 [New Motor Vehicles Warranties Act (Lemon Law)], as the manufacturer of the above-leased automobile, that he, as consumer, has reported non conformities [sic] to your manufacturer's warranty to the dealer on some ten occasions, without satisfaction, and that pursuant to that statute, you are required to make, or arrange to have made, repairs necessary to conform the vehicle to your express warranties.
>
> My client feels that he has made a reasonable number of attempts to conform this motor vehicle to your express warranty and, having failed to achieve satisfaction, elects to replace the vehicle with a comparable new motor vehicle or to receive refund of his full contract price, collateral charges, finance charges, and incidental damages and monetary consequential damages.

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ment of car dealer relating to warranty inadmissible against manufacturer unless plaintiff establishes that dealer was agent of manufacturer or that dealer was given authority to modify warranty); *compare Volkswagen of America, Inc. v. Harrell*, 431 So. 2d 156, 162 (Ala. 1983) (since evidence showed that dealership had authority to impose additional conditions to warranty, it had authority to extend manufacturer's warranty).

> The primary complaint has been with regard to the brakes and the shaking of the vehicle, which have resulted in the wearing out of tires. I would be glad to detail with your manufacturer's representatives the other complaints.
>
> This notice is given you to allow a reasonable period, not to exceed fifteen (15) calendar days, for you to correct the non conformity [sic] or series of non conformities [sic]. After that period of time, failing in satisfaction, the client intends to pursue his remedies under G.S. 20-351.1.8. I look forward to your early reply.

This letter was not received by defendant until 10 October 1989 due to an incomplete address. Defendant conferred with Volvo Finance about the matter. It then made one unsuccessful attempt to contact plaintiff's counsel. Defendant took no other action regarding plaintiff's letter. On 25 October 1989 Volvo Finance repossessed plaintiff's vehicle.

Material to its conclusion that defendant unreasonably refused to comply with the Act is this finding by the trial court:

> 8. On 10 October 1989, defendant acknowledges receipt of plaintiff's counsel's 11 September 1989 letter, whereby both defendant and Volvo Finance of North America, Inc. were notified under G.S. 20-351 et seq., and between then and 25 October 1989, defendant attempted only one telephone call, which was unsuccessful, and it took no further action to attempt to remedy the non-conformity [sic] in its warranty or to attempt to repair the subject vehicle. Plaintiff attempted to return the car to defendant's dealer, and the dealer refused to accept the car.

Other than the implication in this finding that the vehicle did not conform to the warranty, defendant did not except to this finding. The issue before us is whether the finding supports the trial court's conclusion of law that defendant "unreasonably refused to comply with the requirements of G.S. 20-351.2 and 351.3."

Defendant argues that while it may have failed to comply with sections 20-351.2 and 20-351.3 of the Act, there was no evidence that it "refused" to do so. In support of its contention that there is a distinction between failing and refusing, defendant refers to the provision that attorneys' fees shall be awarded when the manufacturer "unreasonably failed or refused" to resolve the matter. N.C.G.S. § 20-351.8(3)(a).

We agree that there is a distinction between refusing to comply and failing to comply with the Act. The trial court's finding number 8, however, and the evidence upon which it rests support the trial court's conclusion that defendant unreasonably refused to comply. The evidence and the finding establish: Plaintiff believed his vehicle failed to conform to the express warranty. Plaintiff had been to Maxwell several times regarding the problems. Defendant had certain obligations under the Act, and plaintiff was asserting his rights under the Act. In response to plaintiff's assertion of rights under the Act defendant did nothing more than to attempt to make one phone call to plaintiff's attorney, which failed. Since the trial court's conclusion, that defendant unreasonably refused to comply with the Act, is supported by the findings and the findings are supported by the evidence, the trial court's decision that plaintiff was entitled to treble damages pursuant to N.C.G.S. § 20-351.8(3)(a) was correctly affirmed by the Court of Appeals.

IV.

[6] Defendant next contends that even if plaintiff were entitled to treble damages, the manner in which the trial court computed those damages was error. We agree.

The trial court found that plaintiff was due a refund under the Act in the sum of the lease payments made, security deposit and repairs, which sum the trial court found to be $4511.95. It trebled that amount, to $13,535.85, and then reduced that amount by a reasonable allowance for plaintiff's use of the vehicle, which it found to be $5429. Thus, the final judgment awarded plaintiff was $8106.85. We are of the opinion that the reasonable allowance for plaintiff's use of the vehicle should have been deducted from the refunds due as found by the trial court before they were trebled.

Our conclusion is based on our understanding of the interplay between the "Replacement or refund" section of the Act, N.C.G.S. § 20-351.3, and the "Remedies" section of the Act, § 20-351.8. The "Replacement or refund" section of the Act defines, among other things, the monetary obligations of the manufacturer under the circumstances set out in subsection (a) of this section. These monetary obligations provide that, in the case of a lessee, the manufacturer must refund:

> a. All sums previously paid by the consumer under the terms of the lease;

b. All sums previously paid by the consumer in connection with entering into the lease agreement . . .; and

c. Any incidental and monetary consequential damages.

These refunds, under subsection (c) of this section, "shall be reduced by a reasonable allowance for the consumer's use of the vehicle." Thus, under the "Replacement or refund" section of the Act, the net amount recoverable by a lessee entitled to a refund is the sum of the refundable amounts less a reasonable allowance for the lessee's use of the vehicle.

Under the "Remedies" section of the statute, a court is authorized to grant several forms of relief. They are "injuncti[ve] or other equitable relief"; monetary damages "as fixed by the verdict"; and attorney's fees under the circumstances defined by this section. N.C.G.S. § 20-351.8. The remedies section also provides that the damages fixed by the verdict shall be trebled if the manufacturer unreasonably refused to comply with the "Replacement or refund" section of the Act or with section 20-351.2. The "Remedies" section permits the jury to consider in its award of damages the items listed for refund in the "Replacement or refund" section.

The question is, considering both the "Replacement or refund" section of the Act and the "Remedies" section, in pari materia, what did the legislature intend by its reference in the "Remedies" section to "[m]onetary damages . . . fixed by the verdict," which are subject to trebling. We think the legislature intended to refer to the net sum due to an injured lessee from the manufacturer pursuant to the provisions of the "Replacement or refund" section. This sum, as we have shown, is figured by totalling the refunds, which include consequential damages, due to the consumer less the reasonable allowance for the consumer's use of the vehicle. Our conclusion is based on the reasons which follow.

Damages to which an injured party is entitled should ordinarily reflect the harm actually sustained by the injured party. To the extent that a claimant under the Act receives a benefit through the use of the vehicle, his damages are lessened. This is the policy underlying the "Replacement or refund" section of the Act.

The policies underlying the treble damages provision provide further support for our interpretation. Treble damages within Chapter 75, regarding unfair and deceptive acts affecting commerce, are designed to encourage private enforcement of violations of Chapter

75 and to encourage settlements. *Marshall v. Miller*, 302 N.C. 539, 549, 276 S.E.2d 397, 403-04 (1981). We believe the treble damages provision within the Act before us is designed to accomplish similar purposes. Trebling of the damages encourages private settlement by providing incentive to those who, arguably, have violated remedial statutes like Chapter 75 and the Act before us. It also provides incentive for private enforcement to arguably injured consumers. We also believe, however, that the legislature intended the encouragement of private enforcement and settlement be directly proportional to the actual harm suffered by the consumer. This leads us to the conclusion that the legislature intended that, pursuant to the Act, only the net loss to the consumer should be trebled.

Our interpretation is in accord with the only cases found to have addressed this issue. Wisconsin has a statute similar to ours that provides that if a nonconformity is not repaired after a reasonable number of attempts, the manufacturer must accept return of the vehicle and, at the consumer's option, either replace the vehicle or refund "the full purchase price plus any sales tax, finance charge, amount paid by the consumer at the point of sale and collateral costs, less a reasonable allowance for use." Wis. Stat. Ann. §§ 218.015(2)(a), (b)(1), & (b)(2) (1994). A consumer who establishes a violation of the Act shall be awarded "twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorneys fees, and any equitable relief the court determines appropriate." Wis. Stat. Ann. § 218.015(7). The Wisconsin Court of Appeals interpreted this statutory scheme to require that the allowance for use be deducted prior to doubling the award, reasoning that "the consumer suffers pecuniary loss in the amount of the refund he should have received." *Nick v. Toyota Motor Sales, U.S.A., Inc.*, 466 N.W.2d 215, 219-20 (1991). This same method of computation was applied in *Voorhees v. General Motors Corp.*, 1990 WL 29650 (E.D. Pa. 1990), a case involving Pennsylvania's statute which is substantially similar to our own, to determine whether the amount in controversy met the jurisdictional requirement. *See also Smith v. Baldwin*, 611 S.W.2d 611, 617 (Tex. 1980) (within Texas' Deceptive Trade Practices Act, statute entitling plaintiff to "three times the amount of actual damages" refers to the "total loss sustained" and thus "[a]llowable setoffs will necessarily reduce the actual damages and hence the sum subject to trebling").

Plaintiff argues for the contrary interpretation based on the language of section 20-351.8(2) of the Act that "[t]he jury may consider as damages all items listed for refund under G.S. 20-351.3." While this

language does not expressly state that the allowance is to be deducted from damages prior to trebling, it does not expressly prohibit the deduction. In light of the Act's requirement that a manufacturer refund damages less a reasonable allowance for use and in light of the policies of the Act, we do not interpret the language referred to by plaintiff to implicitly limit the calculation of damages to the aggregate of the "items listed for refund under G.S. 20-351.3." We think the legislature was enumerating certain forms of damages which could be considered and did not intend to define the computation of damages to be trebled.

The "Remedies" section of the Act makes no explicit provision for the reasonable allowance for use and we think this supports our interpretation of this section. The parties agree the manufacturer is entitled to an allowance equal to the plaintiff's use of the vehicle, the question being the point at which that allowance is taken into account. That the "Remedies" section does not explicitly provide for consideration of the reasonable allowance for plaintiff's use is a strong indication that the legislature understood the reasonable allowance for use to have already been taken into account in the "amount fixed by the verdict," which is the amount to be trebled.

Thus, the trial court erred in trebling damages without having deducted the reasonable allowance for use. In this case, the lease payments and other expenditures totalled $4511.95 and the trial court found a reasonable allowance for use to be $5429. On these facts there are no damages remaining to be trebled.

Plaintiff, aware that such would be the result if the allowance is deducted prior to trebling, asserts that under such a method of computation "there could be no real damage ever to a lessee, since payments would generally stay abreast of usage." We disagree. First, while it may be generally true that lease payments would correlate with use of a vehicle, that does not take into account the other forms of damages allowed under the Act, such as other amounts paid in connection with entering the lease agreement and any incidental or consequential damages. N.C.G.S. § 20-351.3(b)(1). Second, the allowance for reasonable use of the vehicle does not include any time during which the vehicle is out of service because of repair, N.C.G.S. § 20-351.3(c), and takes into account that the value of the vehicle to the consumer is substantially impaired. The reasonable allowance for use in this case exceeded plaintiff's damages probably because plaintiff drove the vehicle more than twice the distance allowed by the

lease agreement. We also note that the plaintiff may be awarded attorneys' fees where the manufacturer unreasonably fails or refuses to resolve the matter. N.C.G.S. § 20-351.8(3)a. In reaching a contrary conclusion on the treble damages issue, the Court of Appeals relied in part on *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 363 S.E.2d 643, *disc. rev. denied*, 322 N.C. 113, 367 S.E.2d 917 (1988) and *Washburn v. Vandiver*, 93 N.C. App. 657, 379 S.E.2d 65 (1989), which dealt with treble damages arising under Chapter 75. We believe the two statutes are not comparable on this issue. The Act before us specifically provides for the damages, i.e. refunds, to a consumer to be reduced by a reasonable allowance for the vehicle's use. Chapter 75 has no such offsetting provisions.

Furthermore, both cases relied on by the Court of Appeals are distinguishable. In *Seafare* the Court of Appeals was faced with whether amounts received by a plaintiff from a third party in settlement should be reduced from his damages prior to trebling. *Seafare*, 88 N.C. App. at 416, 363 S.E.2d at 652. In this context, it could not be fairly said that the injury, or damage, plaintiff sustained as a result of defendant's conduct was reduced to the extent that another person compensated plaintiff for that injury. Such a result would jeopardize the result intended by the legislature in providing for treble damages. *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397-98 (9th Cir.), *cert. denied*, 355 U.S. 835, 2 L. Ed. 2d 46 (1957). *See also Blankenship v. McKay*, 534 N.E.2d 243, 246 (Ind. App. 1989) (where plaintiff sought treble damages for embezzlement and prior criminal proceeding against defendant resulted in restitution order that defendant repay plaintiff, proper method of calculation is to treble damages regardless of any payments made pursuant to restitution order).

In *Washburn* the plaintiff purchased a used truck from defendant who had tampered with the truck's odometer. 93 N.C. App. at 658, 379 S.E.2d at 66. Plaintiff paid part of the purchase price immediately and agreed to pay the remainder in bi-weekly installments. When plaintiff discovered the odometer tampering and demanded a refund of his money and compensation for expenses incurred on the truck, defendant refused. Plaintiff sued under state and federal odometer statutes and under Chapter 75; defendant counterclaimed for the balance of the purchase price still owing. *Id.* at 658, 660, 379 S.E.2d at 66, 67. The Court of Appeals was faced with whether the debt should be deducted before or after trebling plaintiff's damages. *Id.* at 664, 379 S.E.2d at 69. The Court ruled that, considering the legislative intent, the amount due on the debt should be deducted after trebling. Again,

in such a situation, it could not be fairly said that plaintiff's damages should be reduced by amounts owing on a debt for which plaintiff remained liable.

Washburn in fact recognizes that any benefit received by the plaintiff is to be deducted prior to trebling under Chapter 75. *Washburn* states:

> The evidence discloses that plaintiffs paid $2,000.00 for the vehicle, signed a note for an additional $782.50 and invested an additional $300.00 for tires less than one month after purchase. The jury concluded that they had been damaged in the amount of $1,300.00 pursuant to the unfair trade practices claim. The trial court then followed the mandate of G.S. sec. 75-16 and trebled this amount.

Id. at 664, 379 S.E.2d at 69. Thus, the jury in computing damages did not merely total the plaintiff's expenses in connection with the truck; it clearly reduced that sum by some amount to arrive at the plaintiff's actual damages to be trebled under Chapter 75. While the opinion does not set forth clearly what that amount consisted of, presumably that amount represented the benefit the plaintiff received in the transaction, and most likely that was the value of the truck.

Thus, we conclude the trial court improperly calculated plaintiff's recovery by failing to reduce plaintiff's damages by the reasonable allowance for use before trebling damages under N.C.G.S. § 20-351.8(2) and the Court of Appeals decision affirming this calculation should be reversed. Since the allowance for plaintiff's use of the vehicle exceeded his damages, plaintiff recovers no damages on his claim under the Act. Defendant's obligation to pay attorneys' fees, as ordered by the trial court and discussed above in Issue II, remains unaffected.

V.

Finally, defendant argues that the trial court improperly adjudicated the rights of Volvo Finance of North America, Inc., a non-party to the litigation. On this issue we agree with the Court of Appeals' decision that if Volvo Finance is a separate corporation from defendant, as argued by defendant, then defendant has no standing to raise this issue on the behalf of Volvo Finance.

The result is as follows: The decision of the Court of Appeals affirming the trial court's findings on the warranty issues is affirmed.

The decision of the Court of Appeals affirming the trial court's method of trebling damages is reversed and this case is remanded to the Court of Appeals for further remand to Superior Court, Guilford County, for the entry of a judgment consistent with this opinion.

Accordingly, the decision of the Court of Appeals is

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

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

STATE OF NORTH CAROLINA v. EDDIE CARSON ROBINSON

No. 261A92

(Filed 30 December 1994)

1. Jury § 142 (NCI4th)— capital sentencing—voir dire examination—previous first-degree murder conviction—consideration of life sentence—attempt to "stake out" jurors

The trial court did not err by refusing to permit defendant to ask two of the jurors who sat on his jury in a capital sentencing proceeding for three murders whether they could follow the court's instructions and weigh the aggravating and mitigating circumstances and consider life imprisonment as a sentencing option if they were to find that defendant had a previous first-degree murder conviction since the question was an improper attempt to "stake out" the jurors as to their answers to legal questions before they were informed of legal principles applicable to their sentencing recommendation. Assuming that the question was a proper inquiry as to whether the jurors could follow the law, defendant failed to show that he was prejudiced by the court's ruling since the fact that the jury was not automatically disposed to return a death sentence because defendant had a prior, unrelated first-degree murder conviction was shown by its recommendation of a life sentence for one of the murders for which defendant was being sentenced, and since defendant could have requested to reopen questioning of these two jurors when the trial court reconsidered the previous ruling and permitted defense counsel to pose this question to the remaining potential jurors.

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.

2. Criminal Law § 1363 (NCI4th)— capital sentencing—voluntary confession—mitigating value—finding as to one victim but not others

The jury in a capital sentencing proceeding for three murders did not arbitrarily refuse to consider established mitigating evi-

dence when it found that the nonstatutory mitigating circumstance that defendant voluntarily confessed to the crimes without counsel had mitigating value in the murder of the male victim but not in the murders of the two female victims where it is a reasonable conclusion that one or more jurors found defendant's confession to have mitigating value in the murder of the male victim because defendant stated that his companion murdered this victim and the physical evidence supported defendant's statement, and it is an equally reasonable conclusion that a juror or jurors found defendant's statement concerning the murders of the female victims to lack mitigating value since defendant was not truthful as to who actually killed the female victims.

Am Jur 2d, Criminal Law §§ 598, 599.

3. Criminal Law § 1316 (NCI4th); Evidence and Witnesses § 897 (NCI4th)— capital sentencing—prior conviction—search warrant and affidavit

The State's inadvertent introduction of a search warrant and its supporting affidavit, along with the judgment documents pertaining to defendant's 1969 murder conviction in Colorado, in defendant's capital sentencing proceeding did not violate defendant's right of confrontation since the warrant and affidavit related to a prior conviction and not the conviction for which defendant was being sentenced; the warrant and affidavit were not admitted during the guilt-innocence phase of the trial; and the warrant and affidavit were admissible during the sentencing proceeding to prove the circumstances of the prior felony conviction. Assuming *arguendo* that the introduction of these documents violated defendant's right of confrontation, this error was harmless beyond a reasonable doubt where (1) defendant does not dispute the Colorado conviction for first-degree murder; (2) although the affidavit contains a statement by the victim's daughter, the prosecutor's closing argument that there are children in the world today who are motherless because of defendant readily applies to the motherless child resulting from these three murders; and (3) substantially equivalent evidence was brought out during the cross-examination of defendant's mental health expert.

Am Jur 2d, Criminal Law §§ 598, 599; Evidence § 662.

4. Jury § 141 (NCI4th)— capital sentencing—jury voir dire—parole eligibility—questions properly excluded

The trial court properly denied defendant's motion to permit questioning of prospective jurors in a capital sentencing proceeding regarding parole eligibility where defendant would be eligible for parole if he received a life sentence.

Am Jur 2d, Jury § 197.

5. Criminal Law § 1325 (NCI4th)— capital sentencing—mitigating circumstances—instructions—use of "may"

The trial court's use of the word "may" in issues three and four in a capital sentencing proceeding did not permit each juror, in his or her discretion, to decide whether to consider in mitigation evidence which that juror had already found to exist in issue two.

Am Jur 2d, Trial §§ 1441 et seq.

6. Criminal Law § 461 (NCI4th)— capital sentencing—jury argument not supported by evidence

The trial court properly sustained the prosecutor's objection to defense counsel's closing argument in a capital sentencing proceeding that capital defendants usually put their mothers on the stand during the sentencing proceeding since there was no evidence before the jury to support this assertion.

Am Jur 2d, Trial §§ 609 et seq.

7. Criminal Law § 454 (NCI4th)— capital sentencing—improper argument urging life sentence

The trial court properly sustained the prosecutor's objection to defense counsel's closing argument in a capital sentencing proceeding asking the jurors to disregard the facts, "speak from [their] heart(s)," and find "some reason on earth" to recommend a life sentence rather than the death penalty because this argument improperly urges the jurors to base their decision on reasons not based on the mitigating and aggravating evidence presented at the sentencing proceeding.

Am Jur 2d, Trial §§ 572 et seq.

8. Criminal Law § 1373 (NCI4th)— death sentences not disproportionate

Sentences of death imposed upon defendant for two first-degree murders were not excessive and disproportionate to the

penalty imposed in similar cases, considering both the crimes and the defendant, where defendant was convicted of the premeditated and deliberate murders of three members of one family but received a life sentence for one murder; the jury found the prior violent felony, avoidance of arrest and course of conduct aggravating circumstances; defendant and his accomplice coldly calculated plans of attack on the victims; defendant abandoned a helpless one-year-old child in a flooded automobile with the body of her mother; the four-year-old victim suffered fear and physical pain as she was rudely awakened, placed in a car with a stranger, driven to a field, and repeatedly hit with a pipe until losing consciousness; defendant's motive for committing the second and third murders was to avoid apprehension for the first murder, which was committed for financial gain; and defendant had a prior conviction for first-degree murder.

Am Jur 2d, Criminal Law § 628.

Validity of death penalty, under Federal Consitution, 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 two sentences of death and one sentence of life imprisonment entered by Britt, J., at the 4 May 1992 Criminal Session of Superior Court, Sampson County, upon jury verdicts finding defendant guilty of three counts of first-degree murder. Execution was stayed by this Court pending defendant's appeal. Heard in the Supreme Court 6 December 1993.

Michael F. Easley, Attorney General, by G. Patrick Murphy, Special Deputy Attorney General, for the State.

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

PARKER, Justice.

Defendant was charged in indictments, proper in form, with three counts of first-degree murder. The case initially was tried capitally at the 15 October 1984 Criminal Session of Superior Court, Bladen County, before Judge Hamilton H. Hobgood, and defendant was found guilty as charged on all counts. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended the death

penalty for all three murders. On appeal, this Court found no error in the guilt-innocence phase of the trial but granted defendant a new capital sentencing proceeding based on the ruling of the United States Supreme Court in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402 (1990).

Judge Joe Freeman Britt granted defendant's motion for change of venue to Sampson County and presided at the new capital sentencing proceeding. Upon the recommendation of the jury, defendant was sentenced to death for the murders of Shelia Denise Worley and Psoma Wine Baggett and to life imprisonment for the murder of James Elwell Worley. Defendant again appeals as of right to this Court. For the reasons discussed herein, we conclude that defendant's second sentencing proceeding was free from prejudicial error.

Briefly, the evidence adduced at the sentencing proceeding tended to show the following. On 26 March 1984 at approximately 2:00 a.m., Dan Alford, a volunteer firefighter who lived in the White's Creek Community of Bladen County, noticed a fire down the highway from his residence. Upon investigation, he found that the interior of a small car, which was parked on the right shoulder of the highway, was in flames. Alford left and immediately returned with a fire truck and another volunteer. After the two men extinguished the flames, they found a badly burned body in the passenger area of the car. The resulting autopsy, conducted at the Office of the Medical Examiner in Chapel Hill, revealed that James Worley had been shot twice in the left chest and was dead at the time of the fire. Forensic testing later established that clothing scraps found in the car contained gasoline.

Early on the morning of 30 April 1984, Kent Allen, while driving towards White's Creek in the Lisban Community, noticed an automobile sitting off the road at the bridge with the rear end of the car on the creek bank and the front tires in the water. Allen found a woman's body floating faceup in the creek beside the car and a small child in diapers standing in the front seat of the car looking at the body and crying for her mother. After law enforcement officers arrived at the scene, the body of a young girl was found floating in the creek downstream from the vehicle. Autopsies were conducted at the Chief Medical Examiner's office in Chapel Hill, and each autopsy indicated death by drowning secondary to blunt trauma of the head.

Following the arrest of Elton McLaughlin, authorities arrested defendant on 9 May 1984. On 10 May 1984, defendant, after waiving

his *Miranda* rights, gave a statement describing the murder of James Worley. Defendant indicated he first met McLaughlin in March of 1984 in a pool hall in Elizabethtown, North Carolina. McLaughlin told defendant he had been hired by a woman to kill her husband and needed defendant to assist him. McLaughlin later told defendant he would receive between fifteen hundred and three thousand dollars for his participation in the murder.

The two men first attempted to kill James Worley on the Sunday after they met. McLaughlin had a .22 rifle, a plastic jug of gasoline, and a metal pipe. He told defendant the gasoline was to set Worley's car on fire. After driving to Worley's residence in New Town, they parked on a dirt road and walked towards the house. The plan was aborted when an automobile pulled up across the street from Worley's house and the driver sat in the car for several minutes with the lights on. The next Sunday night, the two again drove to Worley's home but did not stop because McLaughlin decided that something was wrong. The following Saturday, the two men met at McLaughlin's trailer and discussed a revised plan. McLaughlin told defendant he had spoken with the victim's wife and that she would leave the back door of the house open the next evening. On Sunday, 26 March 1984, McLaughlin and defendant drove to Worley's home at approximately 11:30 p.m. After parking along the dirt road, they walked towards the house and entered through the back door. Upon locating the bedroom, McLaughlin fired two shots into Worley's chest; he tried to fire again but the rifle jammed. The victim's wife got out of bed and waited in the hallway while McLaughlin and defendant removed the body and placed it in the passenger side of Worley's Volkswagen. Following McLaughlin, defendant drove the Volkswagen to the Lisban area where they doused the vehicle with gasoline and ignited it.

Defendant also described the events leading up to and including the murders of Denise Worley and Psoma Baggett. Defendant stated that late in April 1984, McLaughlin told him the victim's wife had been talking to the authorities and that they needed to kill her. After initially telling the officers that Denise Worley was already dead when he arrived at McLaughlin's trailer on 29 April 1984, defendant admitted he actually hid in a bedroom of the trailer and waited for Denise Worley to arrive at McLaughlin's trailer. At some point, McLaughlin showed defendant a metal pipe and told him that, once the lights were turned out, defendant was to kill Denise using the pipe. When the lights went out, defendant found McLaughlin and Denise standing in the hallway kissing. Defendant hit her twice in the back of the head

with the pipe and then dragged her to the bathroom where he held her head underwater in the bathtub for five to ten minutes. After cleaning up the blood, the two men placed the body in the trunk of her own car. They awakened her two children, Alicia and Psoma, who were asleep in the living room, and drove to a field approximately a half mile from White's Creek bridge. Having decided to kill Psoma because she was old enough to identify them, McLaughlin struck the child twice from behind with a pipe and then placed her body in the front seat of her mother's car. They moved Denise's body from the trunk and placed it beside Psoma. Psoma's feet continued to move so McLaughlin handed defendant the pipe and instructed him to hit her yet a third time. The baby Alicia, was placed unharmed in the car with the bodies of her mother and sister. Defendant then drove the automobile to the edge of the embankment near the bridge and let it roll into the creek. Defendant pulled Denise Worley's body out of the car and threw Psoma out of the car into the water.

The State presented the physical evidence and then rested its case after introducing State's Exhibit No. 42, a certified copy of the judgment entered in Colorado on 28 October 1969 wherein defendant was sentenced to life imprisonment upon his plea of guilty to the charge of first-degree murder.[1]

On defendant's behalf, Dr. Patricio Lara, a psychiatrist at Dorothea Dix, testified he had examined defendant in 1984 pursuant to a court order. Relying on several personal interviews, a previous psychiatric report compiled in Colorado, medical records, school records, and psychological tests, Dr. Lara testified defendant had the equivalent of a seventh grade education and an IQ of 82, which is in the low average or dull normal range of intelligence. When defendant was two years old, his mother left him in the care of relatives; he never knew his father. Dr. Lara noted that the psychological effect of separating a young child from its mother at such a young age is particularly damaging. Testing revealed that defendant suffered from a personality disorder characterized by aggressive action. Generally, personality disorders may be described as persistent maladaptive patterns of behavior substantially affecting the way the individual deals with stress and interacts with other people.

Detective Little testified that defendant had been very cooperative with investigating authorities and that he was not given a deal for

1. The transcript initially reflects that the document the prosecutor tendered was State's Exhibit No. 41. However, when the court admitted the document, it was identified as State's Exhibit No. 42.

testifying in the murder trial of Elton McLaughlin. The parties stipulated that defendant testified truthfully on behalf of the State in McLaughlin's prosecution.

With respect to the murders of Denise Worley and Psoma Baggett, three aggravating circumstances were submitted to the jury: (i) defendant was previously convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3); (ii) the murder was committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4); and (iii) the murder was part of a course of conduct in which defendant engaged and which included the commission of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11). The jury found the existence of all three circumstances in these two murders.

Six statutory mitigating circumstances were submitted with respect to the murders of Denise Worley and Psoma Baggett. The jury found two: (i) the murder was committed while defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), and (ii) defendant testified truthfully on behalf of the prosecution in another prosecution of a felony, N.C.G.S. § 15A-2000(f)(8). Of the nine nonstatutory mitigating circumstances submitted, the jury found only one to have mitigating value, that defendant's low IQ was in the borderline mentally retarded range of intelligence.

Pursuant to N.C.G.S. § 15A-2000(b)(2), the jury determined that the mitigating circumstances found were insufficient to outweigh the aggravating circumstances found and recommended that defendant be sentenced to death for the murders of Denise Worley and Psoma Baggett.

In the murder of James Worley, two aggravating circumstances were submitted to the jury: (i) 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 (ii) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). The jury found the existence of both circumstances.

Of the six statutory mitigating circumstances submitted, the jury found four: (i) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (ii) the murder was actually committed by Elton McLaughlin and defendant was only an accomplice in the murder and

his participation was relatively minor, N.C.G.S. § 15A-2000(f)(4); (iii) defendant acted under the domination of another person, N.C.G.S. § 15A-2000(f)(5); and (iv) defendant testified truthfully on behalf of the prosecution in another prosecution of a felony, N.C.G.S. § 15A-2000(f)(8).

Nine nonstatutory mitigating circumstances were also submitted. Of these, the jury found only two to have mitigating value: (i) defendant voluntarily confessed to the crimes without asking for or without the assistance of counsel and (ii) defendant's low IQ placed him in the borderline range of mental retardation. In this case, the jury found that the mitigating circumstances found were sufficient to outweigh the aggravating circumstances found and recommended that defendant be sentenced to life imprisonment for the murder of James Worley.

I. Sentencing Issues

[1] In his first assignment of error, defendant contends the trial court abused its discretion during *voir dire* by not allowing him to ask seven prospective jurors whether or not they could follow the law as instructed by the court knowing that defendant had a prior conviction for first-degree murder. After a careful reviewing of the transcript of the *voir dire*, we find this assignment to be without merit.

During *voir dire*, after the prosecutor passed the first group of twelve jurors to the defendant, defendant asked the first juror

> [c]onsidering the facts that we have discussed again that the defendant has previously been convicted of three counts of first[-]degree murder and that one of those victims is a very young child, if it were to appear from the evidence presented in this sentencing hearing that the defendant had a previous murder conviction besides the ones that the three [sic], that we are talking about here, would you be able under that circumstance to follow the instructions of the Court and weigh the aggravating and mitigating circumstances and consider life imprisonment as a sentencing option?

The State objected to this question, but the objection was overruled. Over the State's objection, defendant was allowed to ask four other jurors this same question. The fifth juror asked this question was successfully challenged for cause.

Defendant then asked the remaining seven jurors (from the first group passed) as a group if

> [c]onsidering the facts that we have discussed and that is that Mr. Robinson has previously been convicted of three first[-]degree murders, one of which was a small child, if you were to also find during the sentencing hearing that the defendant had a previous first[-]degree murder conviction prior to the murders for which he is being sentenced this week, could you still follow the Court's instructions and weigh the aggravating and mitigating circumstances and consider life imprisonment as a sentencing option.

The court sustained the State's objection to this question, but allowed defendant to ask the general question if the witnesses could listen to the instructions of the Court and render a fair and impartial verdict. Later in *voir dire*, defense counsel was allowed to ask, over the State's objection:

> Considering what the judge has told you and I have told you the facts, that is, that this is a sentencing hearing because the defendant has been convicted of killing three people one of those was a child, if you were to also find out during this sentencing hearing that the defendant had a previous first[-]degree murder conviction other than the ones we're here for this week, could you still follow the judge's instructions? Could you still weigh the aggravating and mitigating circumstances and could you still consider life imprisonment as a sentencing option?

Defendant was allowed to ask every other potential juror this question. The State continued to object to this particular question, but the Court continued to overrule the objection. Two of the seven jurors who were not given the opportunity to answer defendant's question regarding the effect of a previous first-degree murder conviction sat on defendant's jury.

Defendant argues that the trial court erred when it did not permit defendant to ask two of the jurors who sat on his jury, if they could follow the law if defendant had been previously convicted of an additional first-degree murder. Defendant argues this error requires that he receive a new sentencing proceeding.

Defendant was properly allowed to ask each prospective juror if he or she would automatically vote for death based solely upon one or more convictions of first-degree murder. *See Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992). However, defense counsel's

own stated purpose for the question at issue here was to determine if, under a given set of facts, a prospective juror would automatically vote against a life sentence. During a *voir dire* hearing after defendant attempted to ask the first group of seven jurors the question noted above, defense counsel stated:

> I believe that we should know in advance that it, if under these facts and circumstances a juror would automatically be precluded from giving life or would automatically return a penalty of death.

Based on this argument, the court did not allow defendant to ask the question. We find the question to be an improper attempt to "stake out" the jurors as to their answers to legal questions before they are informed of legal principles applicable to their sentencing recommendation.

"Counsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. . . . Jurors should not be asked what kind of verdict they would render under certain named circumstances." *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980). *See also State v. Yelverton*, 334 N.C. 532, 434 S.E.2d 183 (1993). The question posed here does not amount to a proper inquiry as to whether the juror could follow the law as instructed by the trial judge. *See State v. Skipper*, 337 N.C. 1, 23, 446 S.E.2d 252, 263-64 (1994) (example of permissible inquiry as to whether a juror could follow the law and consider both death and life imprisonment). Rather, the question is an attempt to determine whether or not a juror will be unable to consider a life sentence once he or she learns that defendant had been convicted of a prior murder. The fact that the court allowed the question to be asked of some potential jurors, but not others, does not alter our decision.

Moreover, assuming *arguendo* that the question as posed was a proper inquiry as to whether the jurors could follow the law, defendant has still failed to show how he was prejudiced by the ruling. Defendant was convicted of first-degree murder in each of the three deaths; however, defendant received a life sentence in the murder of James Worley. Manifestly, the jury was not automatically disposed to return a death sentence where the defendant had a prior, unrelated, first-degree murder conviction. Furthermore, when the trial court reconsidered its previous ruling and allowed defense counsel to pose the question to the remaining potential jurors, defendant could have

requested to reopen the questioning of the two jurors who had been seated without the opportunity to be asked the question. We find this assignment of error to be without merit.

[2] Defendant next contends he is entitled to a new capital sentencing proceeding because a juror or jurors arbitrarily refused to consider established mitigating evidence. We also find this assignment of error to be without merit.

After his arrest on 9 May 1984, defendant, who was advised of his rights and did not request assistance of counsel, cooperated with his arresting officers and gave two statements concerning the three murders. As a nonstatutory mitigating circumstance in each case, the trial court submitted to the jury that "[t]he defendant voluntarily confessed to the crimes without asking for or without the assistance of counsel." The jury found the circumstance to have mitigating value in the murder of James Worley but not in the murders of the two female victims. Defendant contends there is no basis to show that defendant's confession had mitigating value in only one offense because the mitigating value of the circumstance is based on defendant's conduct after arrest, not during the commission of the crimes.

In *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), the United States Supreme Court held "that the sentencer . . . [may] not be precluded from considering *as a mitigating factor* . . . [any evidence which] the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 57 L. Ed. 2d at 990. The sentencer also may not refuse to consider any relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114, 71 L. Ed. 2d 1, 11 (1982). "However, neither *Lockett* nor *Eddings* requires that the sentencer must determine that the submitted mitigating circumstance has mitigating value." *State v. Fullwood*, 323 N.C. 371, 396, 373 S.E.2d 518, 533 (1988), *judgment vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 329 N.C. 233, 404 S.Ed.2d 842 (1991).

If the jury determines that a statutory mitigating circumstance exists, it must consider the circumstance in its deliberations even though "[t]he weight any circumstance may be given is a decision entirely for the jury." *State v. Kirkley*, 308 N.C. 196, 220, 302 S.E.2d 144, 158 (1983), *overruled on other grounds*, *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). However, it is entirely "for the jury to determine whether submitted nonstatutory mitigating circumstances have mitigating value." *Fullwood*, 323 N.C. at 396, 373 S.E.2d at 533. Once the trial court has submitted all requested nonstatutory mitigat-

ing circumstances supported by the evidence which the jury could reasonably deem to have mitigating value, the jury must determine if the evidence supports the existence of the circumstance and if it has mitigating value. *Id.* "Although evidence may support the existence of the nonstatutory circumstance, the jury may decide that it is not mitigating." *Fullwood*, 323 N.C. at 397, 373 S.E.2d at 533.

In the present case, it is a reasonable conclusion that one or more jurors found defendant's statement to law enforcement officers to have mitigating value in the murder of James Worley because defendant stated that McLaughlin murdered Worley and the physical evidence tended to support defendant's statements. In the opinion of the medical examiner, defendant did not inflict any wounds on James Worley while Worley was alive. It is an equally reasonable conclusion that a juror or jurors found defendant's statement concerning the murders of Denise Worley and Psoma Baggett lacking mitigating value since defendant was not truthful as to who actually killed the two female victims. Defendant initially told the officers that McLaughlin had already killed Denise Worley when defendant arrived at McLaughlin's trailer; however, the evidence introduced at trial revealed that defendant personally inflicted fatal blows on Denise Worley and Psoma Baggett while they were alive. One or more jurors could view the murders of the female victims as being the more aggravated and rationally conclude that the nature of defendant's May 1984 statement possessed mitigating value in the murder of James Worley but not in the murder of the female victims. Accordingly, we reject defendant's argument.

[3] Defendant next argues that the trial court erred in allowing the State to introduce inadmissible hearsay evidence concerning defendant's 1969 murder conviction in Colorado. Prior to resting its case, the State, over objection, read the judgment from State's Exhibit No. 42 to the jury. The entire exhibit was then published to the jury without objection. Although the exhibit was nineteen pages in length, only five pages actually were related to the judgment. One of the pages not related to the judgment was an affidavit in support of a search warrant. The first paragraph of the affidavit states:

> On April 11, 1969, around 10:00 p.m. Jacqueline Anna Bennett was shot and killed at the little Red Barn, 3830 East Pikes Peak Avenue, Colorado Springs, Colorado. Her daughter, Theresa Bennett, observed the subject who had shot her mother, run from the store, and described the suspect as: A young negro male,

> round face, about 5'8" tall, wearing black 3/4 length coat, dark trousers, and black shoes.

Defendant contends the admission into evidence of the affidavit violated his right to confront adverse evidence because it contained hearsay and the affiant, Theresa Bennett, was unavailable for cross-examination. Defendant further contends the admission of this evidence was highly prejudicial in that it educated the jury that the victim in the earlier crime had children and that at least one of her children witnessed her murder. Defendant points out that the prosecutor relied on this information in his closing argument, stating that "[t]here are children in this world today that are without mothers because of [defendant]." We find no merit in this assignment of error.

We note first that only a general objection was lodged against the admission into evidence of State's Exhibit No. 42. Defendant stated no basis for and, after twice being asked by the court if he wanted to be heard, proffered no argument in support of the objection. As such, the objection is insufficient to preserve this issue for appellate review. However, in light of our inherent authority pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure and in an effort to prevent manifest injustice to a party, we elect to consider the merits of defendant's constitutional claims. *State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981).

Defendant's argument relies on previous opinions of this Court holding that:

> It is error to allow a search warrant together with the affidavit to obtain search warrant to be introduced into evidence because the statements and allegations contained in the affidavit are hearsay statements which deprive the accused of his rights of confrontation and cross-examination. See *State v. Oakes*, 249 N.C. 282, 106 S.E.2d 206 [1958].

State v. Spillars, 280 N.C. 341, 352, 185 S.E.2d 881, 888 (1972). *See also State v. Edwards*, 315 N.C. 304, 337 S.E.2d 508 (1985); *State v. Jackson*, 287 N.C. 470, 215 S.E.2d 123 (1975). While this is still the law, the facts of these cases are distinguishable from the instant case. In each of these cases, the search or arrest warrant and its supporting affidavit related to the actual crime for which defendant was presently being tried. In these cases, each of these documents alluded to defendant's duplicity in the crime for which he was charged prior to his conviction for the crime. Also, in each case the warrant and affi-

davit were offered into evidence during the guilt-innocence phase of the trial. Under these circumstances, the defendants' right of confrontation was violated.

In comparison, here, the search warrant and affidavit in support of the warrant related to a prior conviction, not the conviction for which defendant presently was being sentenced. Furthermore, State's Exhibit No. 42 was entered into evidence during the sentencing proceeding, not the guilt-innocence phase. While the record does not affirmatively show that the search warrant and affidavit were published to the jury, we will presume that the contents of the entire exhibit were made known to the jury. *State v. Spillars*, 280 N.C. at 352, 185 S.E.2d at 888. In contrast to the evidence in *Edwards*, *Spillars*, *Oakes*, and *Jackson* which potentially affected the jury's determination of a defendant's guilt or innocence, the evidence here was relevant during the capital sentencing proceeding to prove the aggravating circumstance that "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). "[E]vidence of the circumstances of prior crimes is admissible to aid the sentencer." *State v. Roper*, 328 N.C. 337, 364, 402 S.E.2d 600, 615-16, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991).

In *Roper*, the State was allowed to present the out-of-court statement of an eyewitness to a previous killing to which defendant pled guilty to voluntary manslaughter and the out-of-court statement of a stepniece that defendant had raped her to which defendant pled guilty to attempted second-degree rape. *State v. Roper*, 328 N.C. at 366, 402 S.E.2d at 617. We held that these statements were admissible to prove the circumstances of the crimes for which defendant previously had been convicted. Therefore, it follows that the State properly could have introduced the search warrant and the supporting affidavit in this case into evidence during the sentencing proceeding to prove the circumstances of the prior felony conviction, had it wished. The fact that the documents were inadvertently introduced into evidence, without objection, along with the judgment documents, does not constitute error.

Assuming *arguendo* that the documents were admitted into evidence in violation of defendant's right of confrontation, it was harmless beyond a reasonable doubt as required by N.C.G.S. § 15A-1443(b). Based on the overwhelming inculpatory evidence presented in the proceeding, the error, if any, could not have prejudiced

defendant. First, defendant does not dispute his conviction in Colorado of first-degree murder. Second, the comment by the prosecutor during his closing statement, that there are children in the world today who are motherless because of defendant, readily applies to the motherless child resulting from these three murders as well. Victim impact evidence is admissible in capital sentencing proceedings. *Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720 (1991). We note that defendant not only did not object when the entire exhibit was entered into evidence, but no objection was made when the prosecutor commented during his closing argument about the orphaned children. Finally, substantially equivalent evidence was brought out during the cross-examination of defendant's expert witness, Dr. Lara. This Court has long held that when evidence is later admitted without objection, the benefit of any previous objection is lost. *State v. Maccia*, 311 N.C. 222, 229, 316 S.E.2d 241, 245 (1984). This assignment of error is overruled.

[4] Defendant next assigns as error the trial court's denial of his motion to permit questioning of prospective jurors regarding parole eligibility. While acknowledging that this Court has long held that parole eligibility is not relevant in a capital sentencing proceeding, defendant asks us to reconsider our position. *State v. Jones*, 336 N.C. 229, 443 S.E.2d 48, *cert. denied*, — U.S. —, 130 L. Ed. 2d 423, 63 U.S.L.W. 3386 (1994), *reh'g denied*, — U.S. —, 130 L. Ed. 2d 676 (1995); *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, — U.S. —, 126 L. Ed. 2d 341 (1993), *reh'g denied*, — U.S. —, 126 L. Ed. 2d 707 (1994); *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600; *State v. Conner*, 241 N.C. 468, 85 S.E.2d 584 (1955). Recently, in *Simmons v. South Carolina*, — U.S. —, 129 L. Ed. 2d 133 (1994), the United States Supreme Court held that in a capital sentencing proceeding where the state law provides that a defendant sentenced to life imprisonment will not be eligible for parole, 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. This Court stated in *State v. Price*, 337 N.C. 756, 448 S.E.2d 827 (1994), that 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.

Id. at 763, 448 S.E.2d at 831. This Court has determined that *Simmons* does not control if a defendant would be eligible for parole under North Carolina law. *See State v. Payne*, 337 N.C. 505, 516-17, 448 S.E.2d 93, 99-100 (1994); *State v. Bacon*, 337 N.C. 66, 98, 446 S.E.2d 542, 558-59, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1994); *State v. Skipper*, 337 N.C. at 44, 446 S.E.2d at 275-76 (1994). In this case, as in *Payne*, *Bacon*, and *Skipper*, defendant would be eligible for parole if he received a life sentence. *See* N.C.G.S. § 15A-1371(a1) (1988).

We conclude that *Simmons* is not applicable to this case because defendant could have been eligible for parole, and because the particular issue in the present case is whether jurors can be questioned about parole eligibility. We continue to adhere to our previous decisions on this point and determine that no questioning of prospective jurors regarding parole eligibility is required in this case to satisfy due process. This assignment of error is without merit.

[5] By his next assignment of error, defendant argues that the trial court's use of the word "may" in issues three and four on the "ISSUES AND RECOMMENDATION FORM" permitted each juror, in his or her discretion, to decide whether or not to consider in mitigation evidence which that juror had already determined to exist in issue two. Defendant contends the instruction as given allows a juror to arbitrarily ignore mitigating evidence in violation of N.C.G.S. § 15A-2000.

In instructing the jury on issue three, the trial court instructed substantially as follows in all three cases:

> Issue three is do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by one or more of you is or are insufficient to outweigh the aggravating circumstance or circumstances found by you? If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. 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.

With regard to issue four, the trial court instructed substantially as follows in all three cases:

> Issue four is do you [find] unanimously 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're not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by one or more of you. When making this comparison each juror may consider any mitigating circumstance or circumstances that juror determine[d] to exist by a preponderance of the evidence.

Since defendant failed to object to the instruction, this assignment of error is reviewable only under plain error analysis. *See State v. Syriani*, 333 N.C. at 376, 428 S.E.2d at 132. To prevail, "defendant must [demonstrate] not only that the trial court committed error, but that 'absent the error, the jury probably would have reached a different result.' " *State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994) (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)).

In *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547, *cert. denied*, — U.S. —, 130 L. Ed. 2d 162, 63 U.S.L.W. 3264, *reh'g denied*, — U.S. —, 130 L. Ed. 2d 162, 63 U.S.L.W. 3422 (1994), defendant advanced a similar argument and we held that "[t]he jury charge given in [that] case did not preclude the jurors from giving effect to all mitigating evidence they found to exist." *Id.* at 287, 439 S.E.2d at 570. The jury charge given in this case is virtually identical to the one in *Lee*. Defendant offers no new or additional arguments and fails to persuade us to reverse or alter our recent precedent. *See also State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, — U.S. —, 130 L. Ed. 2d 547, 63 U.S.L.W. 3437 (1994). This assignment of error is overruled. Accordingly, since defendant has failed to demonstrate error, we need not undergo plain error analysis.

[6] Finally, defendant contends the trial court erred in sustaining the prosecutor's objections to certain portions of defendant's jury argument. Defendant argues that this restriction violated his right to effective assistance of counsel. We disagree.

The scope of closing argument is governed by N.C.G.S. § 15A-1230 which provides, in pertinent part:

> (a) During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the

> guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, 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). While "[c]ounsel is given wide latitude to argue the facts and all reasonable inferences which may be drawn therefrom," *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977), "the conduct of arguments of counsel to the jury must necessarily be left largely to the sound discretion of the trial judge." *State v. Whiteside*, 325 N.C. 389, 398, 383 S.E.2d 911, 916 (1989).

In the first instance, defense counsel argued:

> This man has had no one. He didn't have a mother, a father to come in and testify for him during the sentencing hearing and, you know, usually that is a major part of any sentencing hearing is to put the mother—

The trial court sustained the prosecutor's objection and allowed the motion to strike. There was no evidence before the jury to support the argument that capital defendants usually put their mothers on the witness stand during the sentencing proceeding in a capital case. The trial court did not abuse its discretion in disallowing defense counsel's assertion.

[7] In the second instance, defense counsel argued:

> This is not something where we're strictly trying to determine guilt or innocence. This has already been decided. There you look at the facts, but here you're allowed to speak from your heart. Is there not one among the twelve of you that has a kind heart? Mr. Womble and I do think so. That's why we picked you people as jurors. I'm sure I don't have to remind you of all the long tedious process we went through selecting jurors and we felt that you people had the most open minds and the kindest hearts of all those people we questioned and we have confidence in you. If there is any one of you sitting here that believes for some reason on earth, I don't know what reason it be, some reason known only to you and your God why he shouldn't be put to death and should be allowed to live, then you can hold to that conviction.

Although the trial court sustained the prosecutor's objection, he noted that "[y]ou may argue that point but you will have to argue it in another fashion, please."

In essence, the argument asks the jurors to disregard the facts, "speak from [their] heart[s]," and find "some reason on earth" to recommend a life sentence rather than the death penalty. Each request improperly urges the jurors to base their decision on reasons not based on the mitigating and aggravating evidence presented at the sentencing proceeding. *See California v. Brown*, 479 U.S. 538, 543, 93 L. Ed. 2d 934, 941 (1987). Under these circumstances we find no abuse of discretion. This assignment of error is overruled.

II. Preservation Issues

Defendant raises three additional issues which he concedes have been decided against him by this Court: (i) that the definition of mitigation as given precluded consideration of the evidence in mitigation not rooted in the circumstances of the crime; (ii) that the trial court erred in permitting jurors to reject nonstatutory mitigating circumstances as having no mitigating value; and (iii) that defendant's right to counsel was violated when the trial court refused to permit him to question each juror challenged for cause by the State regarding his feelings about capital punishment. We have examined defendant's argument on each of these issues and find no compelling reason to alter our prior rulings. We overrule these assignments of error.

III. Proportionality

Having reviewed defendant's capital sentencing proceeding and having found it to be free of error, the capital sentencing statute next requires us to review the entire record to determine whether: (i) it supports the jury's finding of aggravating circumstances; (ii) the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (iii) the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. N.C.G.S. § 15A-2000(d)(2); *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 895, *reh'g denied*, — U.S. —, 129 L. Ed. 2d 924 (1994); *State v. Robbins*, 319 N.C. 465, 526, 356 S.E.2d 279, 315, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

The jury found in aggravation in the murders of Denise Worley and Psoma Baggett that: (i) defendant had previously been convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3); (ii) the murder was committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4); and (iii) the murder was part of a course of conduct which included other

crimes of violence committed by defendant against additional victims, N.C.G.S. § 15A-2000(e)(11). The record supports the jury's finding of each of these aggravating circumstances and nothing in the record, transcripts, or briefs submitted by the parties suggests that the two death sentences were imposed under the influence of passion, prejudice, or any other arbitrary factor.

[8] Turning to our final statutory duty, we must determine "whether the sentence of death 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, 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). First, we look at similar cases in a pool consisting of

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

Id. We have recently clarified the composition of the proportionality pool, noting:

> 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.

State v. Bacon, 337 N.C. at 107, 446 S.E.2d at 564.

The pool includes only cases found to be free of error in both the guilt-innocence and penalty phases.

> 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.

McCollum, 334 N.C. at 239, 433 S.E.2d at 161 (quoting *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985)). When our review reveals that juries have consistently returned death sentences in those similar cases, a strong basis exists for concluding that the death sentence under consideration is not excessive or disproportionate. However, if juries have consistently returned life sentences in these similar cases, a strong basis exists for concluding that the sentence being reviewed is excessive or disproportionate. *State v. Syriani*, 333 N.C. at 400, 428 S.E.2d at 146.

Defendant was convicted of all three first-degree murders based upon the theory of premeditation and deliberation. As to the murder of James Worley, the jury found both aggravating circumstances submitted: (i) defendant had previously been convicted of a felony involving the use of violence, and (ii) the murder was committed for pecuniary gain. In mitigation, the jury found six of the fifteen circumstances submitted: (i) the murder was committed while defendant was under the influence of a mental or emotional disturbance, (ii) this particular murder was actually committed by a codefendant and defendant was only an accomplice in the murder and his participation was relatively minor, (iii) defendant acted under the domination of another person, (iv) defendant testified truthfully on behalf of the prosecution in another prosecution of a felony, (v) defendant voluntarily confessed to the crimes without asking for or without the assistance of counsel, and (vi) defendant's IQ is low in that it is within range of borderline mentally retarded to low-average/dull normal. After weighing the aggravating and mitigating circumstances, the jury returned a life sentence. As a result, our review of this sentence need go no further.

In the murders of Denise Worley and Psoma Baggett, the jury found all three aggravating circumstances submitted: (i) defendant had been previously convicted of a felony involving the use of vio-

lence, (ii) the murder was committed for the purpose of avoiding or preventing a lawful arrest, and (iii) the murder was part of a course of conduct which included other crimes of violence committed by defendant against additional victims. In mitigation of each murder, the jury found only three of the fifteen circumstances submitted: (i) the murders were committed while defendant was under the influence of a mental or emotional disturbance, (ii) defendant testified truthfully on behalf of the prosecution in another prosecution of a felony, and (iii) defendant's IQ is low in that it is within a range of borderline mentally retarded to low-average/dull normal.

Significant characteristics of defendant's case include (i) premeditated and deliberate murder of three members of a family; (ii) coldly calculated plans of attack by defendant and his accomplice; (iii) the conscienceless abandonment of a helpless one-year-old child in a flooded automobile with the body of her mother; (iv) fear and physical pain and suffering on the part of the four-year-old victim, Psoma Baggett, as she was rudely awakened, placed in a car with a stranger, driven to a field, and repeatedly hit with a pipe until losing consciousness; (v) defendant's motive for committing the second and third murders was to avoid apprehension for having murdered James Worley for financial gain; and (vi) defendant's prior conviction for first-degree murder.

This Court has found the death penalty to be disproportionate on seven occasions. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). Of these cases, none involved three aggravating circumstances and none involved a multiple homicide. *See State v. Roper*, 328 N.C. at 373-76, 402 S.E.2d at 621-22. We conclude the present case is significantly dissimilar from *Benson*, *Stokes*, *Rogers*, *Young*, *Hill*, *Bondurant*, and *Jackson*.

Defendant, however, relies on *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), where the jury recommended a life sentence for the codefendant as a basis for his argument that his death sentences are disproportionate. Defendant contends the overriding factor militating in favor of disproportionality in this case is that Elton McLaughlin, the mastermind of the crimes committed, received life sentences for murders for which defendant is sentenced to die. *Stokes* is readily distinguishable from the present case.

Significant dissimilarities between this case and *Stokes* include: (i) defendant Stokes was convicted of one murder; defendant Robinson was convicted of three; (ii) defendant Stokes was seventeen years old at the time of the murders; defendant Robinson was approximately thirty-five; (iii) defendant Stokes was convicted on a felony-murder theory; defendant Robinson was convicted of premeditated and deliberate murder; (iv) the codefendant in *Stokes* did not receive the death penalty; Elton McLaughlin was sentenced to death for the murder of James Worley; and (v) in *Stokes* the jury found in mitigation of the crime that defendant's criminal record consisted only of property offenses and one assault committed as a juvenile; in the present case the jury found as an aggravating circumstance that defendant had been convicted of a prior felony involving the use of violence.

We find the more analogous cases to be *State v. Gibbs*, 335 N.C. 1, 436 S.E.2d 321 (1993), *cert denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994), and *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981). In *Gibbs*, defendant was convicted of three counts of first-degree murder under theories both of premeditation and deliberation and felony murder. Defendant murdered his mother-in-law, sister-in-law, and brother-in-law, after having made threats in the presence of his wife to harm the family. Defendant bound and gagged his victims before shooting them. As to each murder, the jury found all three aggravating circumstances submitted: (i) the capital felony was committed during a felony (burglary); (ii) the capital felony was especially heinous, atrocious, or cruel; and (iii) the murder was part of a course of conduct in which defendant committed other crimes of violence against other victims. During defendant Robinson's sentencing hearing for the murders of Denise Worley and Psoma Baggett, the jury also found three aggravating circumstances, including that the murders were committed as part of a course of conduct involving other violent crimes. The jury in *Gibbs* found three of the four submitted statutory mitigating circumstances to exist; in the present case, the jury deemed only two statutory mitigating circumstances to have mitigating value.

In *Hutchins*, defendant was convicted of murdering two deputy sheriffs and a state trooper in an effort to avoid being arrested for assaulting his daughter. The jury found in aggravation of the murders that they were committed during a course of conduct involving the

commission of other violent crimes, were committed to avoid a lawful arrest and were committed against law enforcement officers. In contrast to defendant Robinson's prior murder conviction, the State, in the prosecution of Hutchins, presented no evidence of any prior criminal history. In Robinson's sentencing proceeding for the murders of the female victims, the jury found two of these same aggravating circumstances and that defendant had a prior conviction of a felony involving violence. The Court in *Gibbs* and *Hutchins* found the death sentences given the respective defendants not to be excessive or disproportionate, considering both the crimes and the defendant.

We also note that this defendant not only committed multiple murders in the case now pending before the Court, but had previously been convicted of first-degree murder. We find this significant, as this Court has found the death penalty to be proportionate in other cases where a defendant has been convicted of a prior violent felony and the murder for which he was sentenced to death was part of a course of conduct in which defendant committed other crimes of violence against other victims. *See State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (defendant had previously been convicted of assault with a deadly weapon inflicting serious injury and received death sentences for shooting two people with premeditation and deliberation); *State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250, *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526 (1985) (defendant had previously been convicted of common law robbery, and during the murder for which he received the death sentence he had assaulted another with a deadly weapon, inflicting serious injury); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983) (defendant had previously been convicted of rape, and during the murder for which he received the death sentence, he assaulted another with a deadly weapon with intent to kill inflicting serious injuries).

Defendant Robinson was convicted of three first-degree murders; and the record clearly establishes a cold-blooded, calculated course of conduct on the part of defendant which amounts to a wanton disregard for the value of human life. In light of all the cases discussed hereinabove, we cannot say that the two death sentences were excessive or disproportionate, considering both the crimes and defendant.

IV. Conclusion

We hold that defendant received a fair sentencing proceeding, free from prejudicial error. The death sentences were not imposed under the influence of passion, prejudice, or any other arbitrary fac-

tor. The death sentences imposed are not disproportionate to the penalty imposed in similar cases.

NO ERROR.

STATE OF NORTH CAROLINA v. ERNEST WEST BASDEN

No. 159A93

(Filed 30 December 1994)

1. **Jury § 262 (NCI4th)— first-degree murder—jury selection—hesitancy over death penalty—peremptory challenge**

There was no error during jury selection for a first-degree murder where the trial court initially excluded a juror for cause at the State's request, then agreed to strike its prior ruling and allow the State to exclude her through a peremptory challenge. A prosecutor may exercise a peremptory challenge to excuse a juror due to his hesitancy over the death penalty.

Am Jur 2d, Jury §§ 233 et seq.

2. **Jury § 226 (NCI4th)— first-degree murder—jury selection—opposition to death penalty—rehabilitation**

The trial court did not err during jury selection for a first-degree murder by granting the prosecutor a challenge for cause without permitting defendant to attempt to rehabilitate the potential juror where the juror's answers were unequivocal that she could not impose the death penalty and defendant failed to show that additional questioning would have resulted in 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.

3. **Jury § 127 (NCI4th)— first-degree murder—jury selection—asking jurors if they were qualified—no error**

There was no error during jury selection in a first-degree murder prosecution where the court asked, or permitted the prosecutor to ask, potential jurors whether they were "qualified." The question was asked to assist the trial court in making the final

determination as to the potential jurors' ability to serve, the trial court asked numerous questions of each venireperson, and at no time did the trial court simply rely upon the venireperson's own assessment of his or her qualifications to serve in determining if that person could sit on the jury.

Am Jur 2d, Jury §§ 201, 202.

4. Constitutional Law § 309 (NCI4th)— first-degree murder—effective assistance of counsel—admission of second-degree murder or manslaughter

There was no error in a first-degree murder prosecution where defendant's attorney admitted in his opening statement, without getting defendant's consent, that defendant was guilty of second-degree murder or voluntary manslaughter but defendant consented on the record just prior to closing arguments to his attorney's decision to concede guilt to second-degree murder or voluntary manslaughter. Defendant's consent amounted to ratification of defense counsel's earlier statement and cured any possible error.

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.

Waiver or estoppel in incompetent legal representation cases. 2 ALR4th 807.

5. Criminal Law § 461 (NCI4th)— first-degree murder—prosecutor's argument—expert witness—hourly rate

There was no error requiring the trial court to intervene *ex mero motu* in the prosecutor's argument in a first-degree murder prosecution where defendant contends that the prosecutor grossly misrepresented the facts when he said that a defense witness was being paid $200 an hour, but, while the witness said that he had put more time into this case than the hours alluded to by the prosecutor, he never said how much additional time was involved and the prosecutor's estimate was therefore within the record. Moreover, even if the prosecutor's estimate was substantially higher than the actual amount, it was not so grossly improper as to require intervention *ex mero motu*.

Am Jur 2d, Trial §§ 554 et seq.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

6. Criminal Law § 432 (NCI4th)— first-degree murder—prosecutor's argument— reference to defendant as "just like in Nazi Europe"

The trial court did not err in a first-degree murder prosecution by not intervening *ex mero motu* where the prosecutor referred to defendant as "just like in Nazi Europe." The prosecutor was analogizing defendant's argument that he was easily led to kill the victim to Nazis who defended their killings by arguing that they were simply following orders.

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.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

7. Criminal Law § 1320 (NCI4th)— first-degree murder—sentencing—instructions—consideration of aggravating circumstance

The trial court did not err in a first-degree murder sentencing hearing by giving what defendant contended was a peremptory instruction on the one aggravating circumstance in the case. The court did not instruct the jury that it had to find that the State's evidence established the aggravating circumstance, but said that the jury would consider the State's evidence at sentencing as evidence which the State contends aggravates defendant's crime. The subsequent instruction that the jury must find the existence of the aggravating circumstance beyond a reasonable doubt cured any possible error.

Am Jur 2d, Trial §§ 1441 et seq.

8. Criminal Law § 1360 (NCI4th)— first-degree murder—sentencing—mitigating circumstance—impaired capacity

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury to find the mitigating circumstance of impaired capacity if defendant suffered from major depression, chronic pain from health problems, and substantial drug use where defendant requested the instruction, did not object to it, and stated that he was satisfied with it. Furthermore, read in its entirety, the instruction is not misleading.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

9. Criminal Law § 1363 (NCI4th)— first-degree murder—sentencing—nonstatutory mitigating circumstance—instruction

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury that they could refuse to consider the nonstatutory mitigating circumstance of good conduct in jail if they deemed the evidence to have no mitigating value. *Skipper v. South Carolina*, 476 U.S. 1, does not require the North Carolina Supreme Court to overrule its precedents holding that jurors are allowed to reject any nonstatutory mitigating circumstance which they do not deem to have mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

10. Criminal Law § 454 (NCI4th)— first-degree murder—sentencing—prosecutor's argument as to mitigating circumstances

There was no error in a first-degree murder sentencing hearing requiring intervention *ex mero motu* where defendant contended that the prosecutor's argument misstated the law governing mitigating circumstances and belittled defense counsels' role in the sentencing phase of trial.

Am Jur 2d, Trial §§ 572 et seq.

11. Criminal Law § 454 (NCI4th)— first-degree murder—sentencing—prosecutor's argument

There was no error in a first-degree murder sentencing hearing where defendant contended that the prosecutor improperly argued that the jury could prevent defendant from killing again

only by giving the death penalty, but that argument has been held to be proper; defendant contended that the prosecutor improperly referred to defendant as a "mad dog killer," but that comment was in rebuttal of defendant's position that he was a nonviolent person who was easily dominated and easily led and the statement was not grossly improper; and defendant argued that the prosecutor mocked defendant's procedural and substantive rights and penalized him for exercising his rights, but a very similar argument has been held to be proper.

Am Jur 2d, Trial 572 et seq., 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.

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

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

12. Criminal Law § 447 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—victim's family

There was no error in a first-degree murder sentencing hearing where defendant contended that the prosecutor improperly injected the law that the State could not call any of the victim's family as witnesses. In light of *State v. McCollum*, 334 N.C. 208, in which the prosecutor referred to the victim and the victim's family in a far more severe manner than the statements in this case, the argument was not grossly improper.

Am Jur 2d, Trial §§ 664 et seq.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3d 8.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

13. Criminal Law § 447 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—victim

There was no impropriety in the prosecutor's argument in a first-degree murder sentencing hearing that the jury step into the shoes of the victim.

Am Jur 2d, Trial § 648.

14. Constitutional Law § 371 (NCI4th)— death penalty—constitutional

The North Carolina death penalty is constitutional.

Am Jur 2d, Criminal Law § 628.

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

15. Criminal Law § 1323 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—value

The trial court did not err in a capital sentencing hearing by permitting the jurors to reject nonstatutory mitigating circumstances as having no mitigating value.

Am Jur 2d, Trial §§ 1441 et seq.

16. Criminal Law § 1323 (NCI4th)— capital sentencing—instructions—mitigating circumstances

The trial court did not err in a first-degree murder sentencing hearing by instructing that each juror may consider any mitigating circumstance found in sentencing issue two when answering issues three and four.

Am Jur 2d, Trial §§ 1441 et seq.

17. Criminal Law § 1335 (NCI4th)— capital sentencing—length of jury deliberation—motion for life sentence denied

The trial court did not err in a capital sentencing hearing by denying defendant's motion that a life sentence be imposed where defendant argued that the jury had deliberated more than a reasonable time and had asked if it could sentence defendant to life without parole.

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1886.

18. Criminal Law § 1373 (NCI4th)— death sentence—not disproportionate

A death sentence was not disproportionate where the evidence supported the finding of the sole aggravating circumstance that the murder was committed for pecuniary gain, there is nothing to suggest that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and the proportionality pool includes two cases in which the Court upheld death sentences for contract killings committed under remarkably similar circumstances.

Am Jur 2d, Criminal Law § 628.

Validity of death penalty, under Federal Consitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Stevens, J., at the 15 March 1993 Criminal Session of Superior Court, Duplin County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for conspiracy to commit murder was granted 7 April 1994. Heard in the Supreme Court 10 October 1994.

Michael F. Easley, Attorney General, by Clarence J. DelForge III, Assistant Attorney General, for the State.

J. Kirk Osborn for defendant-appellant.

PARKER, Justice.

Defendant was tried capitally on an indictment charging him with the first-degree murder of Billy Carlyle White. The jury returned a verdict finding defendant guilty of first-degree murder on the theory of premeditation and deliberation. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death. The jury also found defendant guilty of conspiracy to commit murder and the trial court sentenced defendant to ten years, such sentence to be served after the death sentence. For the reasons discussed herein, we conclude the jury selection, guilt-innocence phase, and sentencing proceeding were free from prejudicial error and the death sentence is not disproportionate.

The State's evidence tended to show Sylvia White wanted to kill her husband, Billy White, for at least a year. She unsuccessfully tried to poison him with wild berries and poisonous plants. She also enlisted the help of Linwood Taylor, defendant's nephew. Taylor then approached defendant and told him he needed a hit man and asked defendant if he wanted the job. Defendant initially thought the idea was crazy and refused. Later, when defendant got into financial difficulty he asked Taylor if the offer still stood and agreed to kill White.

Taylor developed a scheme to lure White, who was an insurance salesman, to a location where he could be killed. Taylor pretended to be a wealthy businessman from out of town who had bought property in Jones County and wanted to buy insurance. Taylor arranged for White to meet him in a wooded rural area at 8:30 p.m. Sunday, 20 January 1992. On the day of the murder, Taylor and defendant drove to the designated spot and waited for White.

When White arrived, Taylor got out of his car and introduced himself to White as Tim Conners. Then Taylor said he needed to use the bathroom and stepped to the other side of the road. Defendant got out of the car and picked up a twelve-gauge shotgun he had placed on the ground beside the driver's side of the car. Defendant pointed the gun at White and pulled the trigger. The shotgun did not fire because defendant had not cocked the hammer back. Defendant then cocked the hammer and fired. White was knocked to the ground. Defendant removed the spent shell casing and loaded another shell into the shotgun. Defendant then approached White, who was lying faceup on the ground, and while standing over White, shot him again. At trial the pathologist testified that White bled to death from massive shotgun wounds to the right upper chest and left lower abdomen. Although his aorta was nearly severed from his heart, White did not die instantly but would have remained conscious for some period of time and would have felt pain.

Defendant and Taylor drove back to Taylor's house after the shooting. Taylor said he thought he left a map at the crime scene so they returned and went through White's pockets taking a blank check, wallet, and gold ring. They then returned to Taylor's house and burned all their clothing in the backyard. They also sawed the shotgun into three or four pieces with a hacksaw, put the pieces into a bucket of cement, and threw it over a bridge into the Neuse River. Taylor gave defendant three hundred dollars.

Prior to defendant's arrest, police officers retrieved two metal base portions of spent shotgun shells which were found in ashes from the fire in Taylor's backyard. Forensic examination indicated they were consistent with twelve-gauge shotgun shells and could have been fired from the same weapon. Officers also went to defendant's repair shop in Kinston and retrieved a man's gold-tone ring with three diamond settings from defendant, who had it in his pocket.

Taylor and Sylvia White were arrested for murder on 12 February 1992. Defendant went to the Jones County Sheriff's Department where Taylor told defendant that he had confessed. Taylor advised defendant to turn himself in and talk to SBI Agent Eric Smith. Defendant was interviewed by Agent Smith and Detective Simms of the Lenoir County Sheriff's Department. After giving some preliminary background information, defendant told the officers that he shot White. The officers immediately read defendant his *Miranda* rights and defendant signed a written waiver of his rights. Defendant then gave a detailed confession and stated that he killed White because he needed the money.

Defendant presented evidence that he suffered from depression, arthritis, kidney problems, pancreatitis, and drug and alcohol abuse. He is the youngest of ten children. He was extremely close to his mother, who was killed in a car accident when he was fourteen years old, and he never really recovered from her death. Defendant had been married once for about five years and was a good father to his stepchildren. Defendant was considered by friends and family to be a loner.

Dr. J. Don Everhart, a clinical psychologist, testified that defendant has a dependent personality disorder; he is lacking in self-confidence and clings to stronger people, performing unpleasant tasks for them to retain their support. Dr. Everhart further testified that defendant has an avoidance personality disorder; he is shy and uncomfortable in social settings and is easily isolated. Finally, defendant has a schitzotypal personality disorder, with feelings of being disembodied and disassociated from life events.

Additional facts will be presented as necessary for an understanding of the issues.

JURY SELECTION ISSUES

[1] Defendant first contends the trial court erred by excusing potential juror Jarman for cause because of her views on the death penalty.

A review of the transcript shows that while the trial court initially excluded Mrs. Jarman for cause, at the State's request, the trial court agreed to strike its prior ruling and allow the State to exclude her through a peremptory challenge. A prosecutor may properly exercise a peremptory challenge to excuse a juror due to his hesitancy over the death penalty. *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994). Following *Robinson*, we hold that the trial court did not err in allowing the prosecutor to peremptorily excuse prospective juror Jarman.

[2] Defendant also contends the trial court erred by excluding potential juror Pearsall for her feelings about the death penalty.

The standard for determining whether a prospective juror may be properly excused for cause for his views on capital punishment is whether those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985); *see also State v. Brogden*, 334 N.C. 39, 42, 430 S.E.2d 905, 907 (1993) (reiterating *Witt* standard).

In the instant case, the transcript reveals that Mrs. Pearsall clearly and unequivocally stated she could not impose the death penalty even though she acknowledged some crimes were bad enough to warrant capital punishment.

> Q. . . . Can you tell me in your own words how you feel about the death penalty?
>
> A. Well, I don't really know. I'm against the death penalty.
>
> . . . .
>
> Q. Have you had that feeling about all of your adult life, Mrs. Pearsall?
>
> A. Yes.
>
> . . . .
>
> Q. Mrs. Pearsall, are you saying then that you would vote against any verdict that would mean the death penalty, is that right?
>
> A. Yes.
>
> Q. Are you saying also, Mrs. Pearsall, then that in no event and under no circumstances could you vote to return a verdict that would mean the death penalty regardless of the evidence and the law in the case, is that correct, ma'am?

A. Well, if the evidence was there, it would be different, you know. If the evidence proved that he was guilty, it would be different.

Q. Uh, huh. Well, let me ask you this, Mrs. Pearsall. Let me put it to you this way. Do you think that there are some cases that are bad enough that the death penalty ought to be imposed?

A. Yes.

. . . .

Q. Well, let me ask you this, Mrs. Pearsall. Not talking about this case in particular, because you don't know anything yet about the evidence in this case, but just as a general proposition, do you think that you could sit on a jury and in an appropriate case, could you yourself vote to give somebody the death penalty? Could you do that?

A. No, I don't think so.

Q. You could not? So regardless of what your feelings were about the case, in other words and even though you say it may be appropriate in some cases, you're saying, ma'am, then that you yourself could not vote to give somebody the death penalty, is that right?

A. Yes.

Defendant contends that his counsel should have been allowed to rehabilitate juror Pearsall with further questions about her feelings on the death penalty. However, "where the record shows the challenge is supported by the prospective juror's answers to the prosecutor's and court's questions, absent a showing that further questioning would have elicited different answers, the court does not err by refusing to permit the defendant to propound questions about the same matter." *State v. Gibbs*, 335 N.C. 1, 35, 436 S.E.2d 321, 340 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994). Pearsall's answers were unequivocal that she could not impose the death penalty and defendant has failed to show that additional questioning would have resulted in different answers.

On these facts and applying the foregoing principles, we conclude the trial court did not err in granting the prosecutor's challenge for cause without permitting defendant to attempt to rehabilitate Pearsall.

[3] Defendant next contends the trial court erred when it continually asked, or permitted the prosecutor to ask, potential jurors whether they were "qualified" when juror qualification is a matter of law vested exclusively with the trial court.

A review of the transcript shows that the trial court and the prosecutor only asked some of the venirepersons if they felt they were qualified. This was done to assist the trial court in making the final determination as to their ability to serve. Furthermore, the trial court asked numerous questions of each venireperson. At no time did the trial court simply rely upon the venireperson's own assessment of his or her qualifications to serve in determining if that person could sit on the jury. Therefore, we hold the trial court did not abdicate its responsibility for seating qualified jurors by asking venirepersons whether they felt they were qualified.

GUILT-INNOCENCE PHASE ISSUES

[4] Defendant's first contention is that he was denied effective assistance of counsel under the North Carolina and United States Constitutions when, without getting defendant's consent, his attorney admitted in opening statement that defendant was guilty of second-degree murder or voluntary manslaughter.

In *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986), this Court recognized "that ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507-08. However, the instant case is distinguishable from *Harbison* in that just prior to closing arguments defendant consented on the record to his attorney's decision to concede guilt to second-degree murder or voluntary manslaughter. As per se error is based on a defendant not consenting to his counsel's admission of his guilt, we conclude that defendant's consent prior to the closing arguments amounted to ratification of defense counsel's earlier statement and cured any possible error in this case. Accordingly, this assignment of error is overruled.

[5] Defendant next contends the prosecutors denied him a fair trial by an argument which travelled well beyond the trial record and invited the jury to convict the defendant on the basis of irrelevant and prejudicial matters.

When arguing to the jury, a prosecutor may not make statements based upon matters outside the record, but may, based on "his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230 (1988); *State v. Brown*, 327 N.C. 1, 18, 394 S.E.2d 434, 444 (1990). Trial counsel are allowed wide latitude during argument to the jury, control of which is left to the sound discretion of the trial court. *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991). Moreover, when defense counsel fails to object to a prosecutor's arguments, the remarks "must be gross indeed for this Court to hold that the trial court abused its discretion in not recognizing and correcting *ex mero motu* the comments regarded by defendant as offensive only on appeal." *State v. Brown*, 327 N.C. at 19, 394 S.E.2d at 445, citing *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979). *See also State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994).

On appeal defendant complains Mr. Butler grossly misrepresented the facts when he said the defendant's expert witness, Dr. Everhart, was being paid $200 per hour. During cross-examination, Dr. Everhart testified regarding his fee as follows:

> Q. [Prosecutor] $1500 for the five and a half hours and I believe you had another hour and a half?
>
> A. [Dr. Everhart] Well, I've had and how about—
>
> Q. And coming into court?
>
> A. How about the hours that I've been here and the hours putting the reports together and—
>
> Q. That's for all the whole thing, is that correct?
>
> A. It's probably less than a good junior attorney would make for the amount of time.

Even though Dr. Everhart testified that he had put more time into this case than the seven hours which the prosecutor alluded to, he never said how much additional time was involved. Therefore, the prosecutor's $200 per hour estimate was within the bounds of the trial record. However, even if the $200 per hour estimate was substantially higher than the actual amount paid to Dr. Everhart, the prosecutor's argument was not so grossly improper as to require the trial court to intervene *ex mero motu* in the absence of an objection.

[6] Next defendant complains Mr. Butler used an inflammatory and fundamentally unfair reference to defendant as "just like in Nazi

Europe." In the instant case, the prosecutor was analogizing defendant's argument that he was easily led by Linwood Taylor to kill the victim to the Nazis who defended their killings by arguing that they were simply following orders. Again, defendant did not object to this reference, and we do not believe that the prosecutor's isolated analogy to a Nazi in Germany was so grossly improper as to require the trial court to intervene *ex mero motu.*

Accordingly, this assignment of error is overruled.

SENTENCING PROCEEDING ISSUES

[7] Defendant first contends the trial court erred when it peremptorily instructed the jury at the beginning of the sentencing hearing that the State's aggravating circumstances "will be considered by the jury as such."

The challenged instruction reads as follows:

> THE COURT: All right, Mr. District Attorney, will there be any further presentation or evidence by the state that should be regarded as aggravating factors as it were?
>
> MR. ANDREWS: Your honor, we would re-introduce the evidence that we have already introduced and we would rely upon that and with that, Your Honor, the state would rest.
>
> THE COURT: The Court will receive that evidence that has been heretofore introduced in the evidence as aggravating factors, the state contends are in aggravation of this crime which will be considered by the jury as such.

Defendant argues that this instruction amounted to a peremptory instruction on the one aggravating circumstance in this case, namely, that defendant committed this crime for pecuniary gain. We disagree.

In this case, the trial court did not instruct the jury it had to find the State's evidence established the aggravating circumstance of pecuniary gain. Instead, the trial court said the jury will consider the State's evidence at sentencing as evidence which the State contends aggravates defendant's crime. Furthermore, the trial court's subsequent instruction that the jury must find the existence of the aggravating circumstance beyond a reasonable doubt cured any possible error. In *State v. Young*, 324 N.C. 489, 498, 380 S.E.2d 94, 99 (1989), the Court held that a trial court's statement that evidence tended to show defendant had confessed to the crime did not amount to expres-

sion of opinion by the trial court, where evidence had been introduced which showed defendant confessed to the crime charged, and where the trial court's statement was immediately followed by the instruction: "Now, *if you find* that the defendant made that confession, *then* you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight which you will give to it." *Id.* at 498, 380 S.E.2d at 99. Therefore, we overrule this assignment of error.

[8] Defendant next contends the trial court erred by conditioning consideration of the statutory mitigating circumstance in N.C.G.S. § 15A-2000(f)(6) on a finding that defendant was suffering from major depression, chronic pain from health problems, and substantial substance abuse. Defendant argues the trial court should have instructed the jury to find the mitigating circumstance if a juror found defendant was impaired by depression or chronic pain or drug abuse. We are not persuaded by defendant's argument.

The statutory mitigating circumstance in N.C.G.S. § 15A-2000(f)(6) (1988) requires the jury to determine whether "[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 trial court's instruction reads in pertinent part as follows:

> You would find this mitigating circumstance, ladies and gentlemen, if you find that Ernest West Basden suffered from major depression, chronic pain from health problems, and substantial drug use including the day this crime was committed and that this impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law.

Defendant in this case not only did not object to the challenged instruction, but in fact, requested it and stated he was satisfied with it. Moreover, in arguing to the jury, defendant presented all three factors as a whole to the jury in support of his diminished capacity defense. During closing argument defense counsel stated the following:

> You remember the testimony that was presented last week by Dr. Everhart who is an expert in psychology testified that based on the chronic pain, substantial drug use and major depression, that [defendant] was suffering from a mental or emotional distress or disturbance and that this did affect his ability or his thinking in the participation of this crime.

Having invited the error, defendant cannot now claim on appeal that he was prejudiced by the instruction. N.C.G.S. § 15A-1443(c). *See State v. Williams*, 333 N.C. 719, 728, 430 S.E.2d 888, 893 (1993).

Furthermore, read in its entirety the jury instruction is not misleading. The trial court had already informed the jury that defendant's "capacity to appreciate does not need to have been totally obliterated," and "defendant need not wholly lack all capacity to conform." Reading the jury instruction as a whole, we cannot say as a matter of law that the error, if any, rose to the level of plain error such that there is a reasonable probability that the result would have been different had the error not occurred. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

[9] Defendant also contends the trial court erred by instructing the jury that it could refuse to consider the nonstatutory mitigating circumstance of good conduct in jail if it deemed the evidence had no mitigating value. Defendant argues that good adjustment to prison is a mitigating circumstance, which has mitigating value as a matter of law according to *Skipper v. South Carolina*, 476 U.S. 1, 90 L. Ed. 2d 1 (1986). Therefore, the jury had no discretion to deny it has mitigating value. We disagree.

In *Skipper*, the United States Supreme Court stated:

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

476 U.S. at 4, 90 L. Ed. 2d at 6. This Court recently noted that "[i]t is thus apparent that the fact that the jury in *Skipper* was not allowed to hear the evidence at all was of concern to the Supreme Court." *State v. Robinson*, 336 N.C. 78, 113, 443 S.E.2d 306, 323.

In the instant case, however, the record shows defendant was allowed to present evidence concerning his good behavior in prison. Chief Deputy of the Duplin County Sheriff's Department, Louis Glenn Jernigan, testified that defendant had been incarcerated at the Duplin County Jail for two or three months. During that time defendant never violated any of the prison rules and always behaved himself. In addition, Reverend Croom testified that he met defendant while making one of his regular visits to the Jones County Jail. Reverend Croom thereafter met with defendant on a regular basis and noticed a great

change in him once he was saved. According to Reverend Croom, defendant counseled other inmates in the jail. Reverend Croom felt that defendant could be very useful in prison by serving the Lord and helping inmates.

Defendant was allowed, in accordance with *Skipper*, to place evidence of his good behavior in jail before the jury for consideration. *Skipper* does not require this Court to overrule its precedents holding that jurors are allowed to reject any nonstatutory mitigating circumstance which they do not deem to have mitigating value. *See 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 (1993); *State v. Hill*, 331 N.C. 387, 418, 417 S.E.2d 765, 780 (1992), *cert. denied*, — U.S. —, 123 L. Ed. 2d 503 (1993). We conclude the trial court did not err in its instruction on the nonstatutory mitigating circumstance of good conduct in jail. Accordingly, this assignment of error is overruled.

[10] Defendant also contends the trial court erred by permitting the prosecutors to make grossly improper arguments to the jury which included incorrect statements of the law and personal opinions about matters not in evidence.

Because defendant did not object to the State's closing argument at trial, "review is limited to the narrow question of whether the prosecutor's statements were so grossly improper as to require the trial judge to correct them *ex mero motu*." *State v. Olson*, 330 N.C. 557, 567, 411 S.E.2d 592, 597 (1992).

Defendant assigns error to the following arguments:

> Now, some of these mitigating circumstances, ladies and gentlemen, really border on the ridiculous, but the law says that we have to put in here any mitigating circumstances that his lawyer can think of that they can put on any evidence to support. . . .
>
> . . . .
>
> . . . Mr. Andrews earlier told you about battle ships, our battle ships and they're row boats. And he told you that I would be talking about what they called the mitigating circumstances and I wanted to discuss them a little bit. I'm going down them one by one and discuss each of those things and quite frankly some of those row boats have leaks in them and I think when you look at them, you'll take them for what they're worth, but the law requires that they, that we submit all the mitigating factors that they want to submit.

Defendant contends that these arguments misstated the law governing mitigating circumstances and belittled defense counsels' role in the sentencing phase of trial. The trial court must submit any relevant mitigating circumstances supported by substantial evidence which could be a basis for a sentence less than death. N.C.G.S. § 15A-2000(b) (1988); *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256 (1989). Therefore, the prosecutor's description of the law of mitigating circumstances was not so grossly improper as to require the trial court to intervene *ex mero motu*.

Furthermore, as to the comment that some of defendant's mitigating circumstances "border on the ridiculous," prosecutors may legitimately attempt to deprecate or belittle the significance of mitigating circumstances. In *State v. Robinson*, the prosecutor argued defendant's mitigating circumstances could be categorized into two groups as "[s]ociety made me do it" or "[m]y family made me do it" and the mitigating evidence was nothing more than an "evasion of responsibility." 336 N.C. at 128, 443 S.E.2d at 331. This Court held the arguments were not an improper denegation of mitigating evidence but constituted legitimate argument on the weight of defendant's evidence. *Id.* at 129, 443 S.E.2d at 332.

[11] Defendant's next contention is the prosecutor impermissibly argued his own personal beliefs based on facts not in evidence. First, defendant contends the prosecutor improperly argued the only way the jury could prevent defendant from killing again was to give him the death penalty. In *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547, *cert. denied*, — U.S. —, 130 L. Ed. 2d 162, 63 USLW 3264, *reh'g denied*, — U.S. —, 130 L. Ed. 2d 532, 63 USLW 3422 (1994), this Court held that this exact argument was proper. Accordingly, defendant's assignment of error on this ground is overruled.

Second, defendant contends the prosecutor improperly referred to defendant as a "mad dog killer." This comment, however, was in rebuttal of defendant's position that he was a nonviolent person who was dominated and easily led into committing the murder by Linwood Taylor. We do not believe that the statement was grossly improper. *See State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991) (no prejudice from prosecutor's reference to defendant as an "animal").

Third, defendant contends the prosecutor inflamed the jury by mocking defendant's procedural and substantive constitutional rights. The inflammatory language reads as follows:

> That man is getting every right in the book. He's been fed. He's had a warm place to stay. He's had the best health care money can buy. He's not got one lawyer, but he's got two lawyers to defend him. He has a $200 an hour psychologist. And all the visits from family and friends he can stand. He's been having all of that for the last fourteen months. . . . [The victim] never had the opportunity to be presumed innocent. He never had a trial that lasted four weeks and had two phases. He never had the lawyers, two lawyers to plead for his life. Billy White never had an opportunity to stand here as Ernest Basden did and tell you that he was sorry and in effect plead for his life. Billy White never had that opportunity. He didn't have a judge out there on that dirt road in Jones County to make sure that Billy White had a fair trial. And there weren't twelve of you out there to decide his fate. There was just one person. He had no sentencing hearing like we're doing right now.

Defendant argues that this argument penalized defendant for exercising his constitutional rights to the presumption of innocence, the assistance of counsel, to a trial by jury, and to the assistance of an expert upon a proper showing. In *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547, 1994 WL 557502 (1994), we held that an argument very similar to this one was not improper. In light of *Green*, we conclude no gross impropriety occurred here.

[12] Fourth, defendant contends the prosecutor improperly injected the law that the State could not call any of the victim's family as witnesses into the jury's consideration. This was irrelevant to the sentencing decision and was only done to invoke sympathy for the victim, the very reason such evidence is excluded. In *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895, *reh'g denied*, —— U.S. ——, 129 L. Ed. 2d 924 (1994), the prosecutor made reference to the victim and the victim's family in a far more severe manner than the statements in this case. In *McCollum*, the prosecutor repeatedly asked the jury during the capital sentencing proceeding to imagine the eleven-year-old victim as their own child and emphasized that the child's father wanted revenge. This Court found that the argument was not grossly improper. In light of *McCollum*, we conclude that the prosecutors' arguments were not grossly improper.

[13] Fifth, defendant contends the prosecutor improperly asked the jury to step into the shoes of the victim by arguing the following:

> 30 pieces of silver taken from the bible was all it took for him to turn over and end Billy White's life and the scary thing, the dangerous thing about that man right there is that it could have just as easily been any of you if somebody was willing to pay the price. Any one of you.

In *State v. Jones*, 336 N.C. 229, 443 S.E.2d 48, *cert. denied*, — U.S. —, 130 L. Ed. 2d 423, 1994 WL 512611 (1994), *reh'g denied*, — U.S. —, 130 L. Ed. 2d 676 (1995), the prosecutor argued during a capital sentencing proceeding that the victim, who was killed during a convenience store robbery, was "[a]n innocent customer, innocent people like you and like me were not going to deter him. . . . It could have been anybody. . . . [C]ould have been you, if you had been in that store." *Id.* at 251, 433 S.E.2d at 59. This Court found no gross impropriety because "[t]he argument sought to illustrate the cold, calculated thought processes and actions displayed by the defendant." *Id.* at 252, 433 S.E.2d at 59. Based on our decision in *Jones*, we find no impropriety with the prosecutor's argument.

Finally, defendant contends the prosecutor improperly argued to the jury that defendant had a $200 an hour psychologist. Based on our conclusions under the guilt-innocence phase issues above, this argument has no merit. Accordingly, defendant is not entitled to relief on this ground.

PRESERVATION ISSUES

[14] Defendant raises four additional issues which he concedes have been decided against him by this Court. First, defendant contends the trial court erred when it failed to rule that the North Carolina death penalty statute is unconstitutional. Defendant acknowledges that this issue was decided against him in *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).

[15] Next defendant contends the trial court erred by permitting jurors to reject nonstatutory mitigating circumstances as having no mitigating value. This Court held to the contrary in *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306; *State v. Gay*, 334 N.C. 467, 434 S.E.2d 840; and *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765.

[16] Defendant also contends the trial court erred when it instructed that each juror "may" consider any mitigating circumstance found in sentencing issue two when answering issues three and four. Defendant argues that this instruction made consideration of established mitigation discretionary with the capital sentencing jurors in violation of the Eighth Amendment. We have recently addressed and

rejected arguments identical to those made by defendant in support of this assignment of error. *State v. Green*, 336 N.C. 142, 443 S.E.2d 14; *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547.

[17] Finally, defendant contends the trial court erred in denying defendant's motion that a life sentence be imposed. Defendant argues the jury had deliberated more than a reasonable amount of time and had asked if it could sentence defendant to life without parole. Defendant acknowledges that this issue was decided against him in *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (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).

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

Finally, we note that defendant has raised three assignments of error based on his petition for writ of certiori filed contemporaneous with the Record on appeal, that the trial court improperly amended the trial transcript on appeal. Defendant briefs these issues as if the transcript was not amended on appeal. As we have denied defendant's petition for certiori arguing that the transcript was improperly amended, we do not address defendant's issues based on the transcript prior to its being amended.

PROPORTIONALITY

[18] Having found defendant's trial and capital sentencing proceeding free of prejudicial error, we are required by statute to review the record and determine (i) whether the record supports the jury's finding of the aggravating circumstances upon which the court based its sentence of death; (ii) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. Sexton*, 336 N.C. 321, 376, 444 S.E.2d 879, 910-11, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429, 1994 WL 571603 (1994).

In this case, the jury found the sole aggravating circumstance that the murder was committed for pecuniary gain. N.C.G.S. § 15A-2000(e)(6). We conclude the evidence supports the jury's finding of this aggravating circumstance. After thoroughly reviewing the record, transcripts, and briefs submitted by the parties, we further

conclude there is nothing to suggest the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

We turn now 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 compare similar cases from a pool of

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

State v. Williams, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). The pool, however, includes only those cases which have been affirmed by this Court. *State v. Stokes*, 319 N.C. 1, 19-20, 352 S.E.2d 653, 663 (1987). We have also recently clarified the composition of the pool so that it accounts for post-conviction relief awarded to death-sentenced defendants. *See 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 107, 446 S.E.2d at 564. "[A] conviction and death sentence affirmed on direct appeal is presumed to be without error, and . . . a post-conviction decision granting relief to a convicted first-degree murderer is not final until the State has exhausted all available appellate remedies." *Id.* at 107 n.6, 446 S.E.2d at 564 n.6.

This Court has held the death penalty to be disproportionate in only seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). Of these seven cases, three involved the pecuniary gain aggravating circumstance in a robbery murder: *State v. Benson*, *State v. Young*, and *State v. Jackson*. However, none of these cases is similar to the present case.

In *Benson*, the victim died of a cardiac arrest after being robbed and shot in the legs by defendant. The jury found the aggravating circumstance that the crime was committed for pecuniary gain. This Court found the death penalty disproportionate because 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. Further, defendant pleaded guilty during the trial and acknowledged his wrongdoing before the jury. In the present case, defendant was convicted on the theory of premeditation and deliberation. Defendant planned the murder well in advance to collect a share of the victim's life 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. The jury found as aggravating circumstances that the murder was committed for pecuniary gain and during the course of a robbery or burglary. We find it significant that the defendant in *Young* was only nineteen years old at the time of the crime, whereas defendant here was forty. In addition, as noted above, defendant planned this murder well in advance of the crime and the motive was not to rob but to obtain money as the consequence of the death.

In *Jackson*, the defendant waived down the victim as the victim passed in his truck. The victim was later discovered in his 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. In finding the death sentence disproportionate, we emphasized the fact that there was "no evidence of what occurred after defendant left with [the victim]" in his automobile. 309 N.C. at 46, 305 S.E.2d at 717. Here, by contrast, the evidence tended to show that defendant carefully planned and executed the killing to collect life insurance proceeds.

For all the foregoing reasons, we conclude that this case is not similar to any of the above cases, where the death penalty was found to be disproportionate.

Defendant relies on a case in which a contract killer received a life sentence. *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986). In *Lowery*, the defendant was hired by James Small to kill Small's wife. Defendant strangled and stabbed the victim to death. The jury found the aggravating circumstances that the murder was committed for pecuniary gain and that the murder was especially heinous, atrocious, or cruel. In mitigation, the jury found defendant's capacity to appreciate the criminality of his conduct was impaired under N.C.G.S. § 15A-2000(f)(6). In the present case, however, the jury specifically rejected the (f)(6) mitigating factor thereby finding defendant could and did appreciate the criminality of his conduct.

In the present case the jury found two statutory and five nonstatutory mitigating circumstances, namely, (i) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (ii) defendant acted under the domination of another person, N.C.G.S. § 15A-2000(f)(5); (iii) defendant has expressed remorse and concern for the death of the victim and is repentant; (iv) defendant willingly assumed responsibility for his conduct; (v) defendant exhibited religious beliefs and practices since incarceration; (vi) defendant was under stress at the time he committed the offense; (vii) defendant confessed to law enforcement officers at an early stage of the investigation; (viii) defendant cooperated with law enforcement officers at an early stage of the investigation; and (ix) defendant's character and prior conduct were inconsistent with the crime. The jury rejected two statutory mitigating circumstances and six nonstatutory mitigating circumstances.

In comparing this case to similar cases in the pool, however, we emphasize that the proportionality analysis is not merely a mathematical comparison of the number of aggravating and mitigating circumstances in each case. *State v. Payne*, 337 N.C. 505, 540, 448 S.E.2d 93, 114. Furthermore, "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, 46-7. Instead, this Court compares each case with "roughly similar" cases focusing on "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).

The proportionality pool currently includes two cases in which this Court has upheld death sentences for contract killings committed under remarkably similar circumstances. *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542; *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988), *sentence vacated and case remanded in light of McKoy*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 330 N.C. 501, 411 S.E.2d 806 (death sentence reinstated, *McKoy* error deemed harmless), *cert. denied*, —— U.S. ——, 120 L. Ed. 2d 913 (1992).

In *Bacon*, the defendant and Bonnie Sue Clark planned to murder Clark's husband for the purpose of collecting his life insurance proceeds. Clark enticed the victim into a car where defendant stabbed him sixteen times with a knife. The jury found the only aggravating circumstance submitted, that the murder was committed for pecuniary gain. The jury also found nine mitigating circumstances but refused to find that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired. This Court found the death sentence proportionate and emphasized that the case "involve[d] a cold, calculated, unprovoked killing, committed for the purpose of collecting life insurance proceeds." 337 N.C. at 108, 446 S.E.2d at 565.

Similarly, in this case the jury found only one aggravating circumstance, that the murder was committed for pecuniary gain, and nine mitigating circumstances. The jury here also rejected the (f)(6) mitigating circumstance, finding defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was not impaired. Furthermore, as in *Bacon*, the

defendant here planned and committed a cold, calculated, unprovoked killing, in the hope of receiving a portion of the victim's life insurance proceeds.

In *Hunt*, the defendant had also been hired by a woman to kill her husband. Defendant killed the husband by shooting him with a pistol. Hunt also murdered a second person within a week of the first murder. At sentencing, the jury found as aggravating circumstances that the defendant had previously been convicted of a felony involving the threat of violence to the person and that the murder was committed for pecuniary gain. This Court upheld the death sentence and emphasized that the murder was a contract killing. 323 N.C. at 436, 373 S.E.2d at 418. Therefore, both *Bacon* and *Hunt* recognize the death penalty as a proportionate punishment for a contract killing.

We hold defendant received a fair trial and capital sentencing proceeding free of prejudicial error and that the death penalty is not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. JESSIE JAMES CORBETT

No. 372A93

(Filed 30 December 1994)

1. Evidence and Witnesses §§ 1694, 1710 (NCI4th)— noncapital first-degree murder—photographs of victim and crime scene—admissible

The trial court did not err in a noncapital first-degree murder prosecution by allowing into evidence twenty gruesome photographs of the crime scene and the victim and in allowing the photographs to be held in front of the jury where the display of the photographs was not unnecessarily repetitious and they were used to illustrate competent testimony.

Am Jur 2d, Evidence §§ 974, 975.

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

2. Evidence and Witnesses § 1235 (NCI4th)— noncapital first-degree murder—defendant's statements—no custodial interrogation

The trial court did not err in a noncapital first-degree murder prosecution by admitting defendant's inculpatory statements where defendant contended that they were illegally obtained during a custodial interrogation but the evidence supported the trial court's findings that defendant was on his own premises and free to go about his business during the first two interviews, and, at the third interview, also at defendant's home and at the crime scene, the SBI agents' manner was not threatening, their language not coercive, defendant was not forced to take the agents to the scene of the crime, and defendant was repeatedly told that he was not under arrest and would be taken home any time he requested. These findings compelled the court's conclusion that defendant was not "in custody" for *Miranda* purposes as a reasonable person in defendant's position would have concluded he was free to terminate the interviews if he so chose.

Am Jur 2d, Criminal Law §§ 793, 794; Evidence § 749.

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

3. Evidence and Witnesses § 1218 (NCI4th)— noncapital first-degree murder—defendant's statements—voluntary

The trial court did not err in a noncapital first-degree murder prosecution by admitting defendant's inculpatory statements where defendant contended that the statements were not made knowingly, intelligently, or voluntarily, but none of the evidence presented suggests that defendant's mental capacity was in any way impaired, that his will was overpowered, or that the officers attempted to physically or psychologically torture defendant to evoke a confession, the court found that "defendant was never promised anything, was never threatened, and had no offers of reward or of assistance with any prosecution in the event he did cooperate with the officers," and defendant made a correction in the written statement. Applying the totality of the circumstances standard, there was no error in concluding that defendant's constitutional rights were not violated and that the statements were admissible.

Am Jur 2d, Evidence §§ 719 et seq.

4. Criminal Law § 382 (NCI4th)— noncapital first-degree murder—court's questions to medical examiner—no error

The trial court did not err in a noncapital first-degree murder prosecution by asking the medical examiner questions which defendant contended were irrelevant and placed undue emphasis on the wound, but the questions were intended to clarify the medical examiner's description of the position of the bullet which caused the victim's death and did not intimate the judge's opinion regarding the witness's credibility, defendant's guilt, or any factual controversy to be resolved by the jury.

Am Jur 2d, Trial §§ 274, 275.

5. Criminal Law § 380 (NCI4th)— noncapital first-degree murder—court's impatience with defense counsel—no impropriety

There was no impropriety and no prejudice in a noncapital first-degree murder prosecution where defendant asked to view an SBI agent's notes which had been relied upon during direct examination, the State responded that the notes were in the evidence locker, and the court told defense counsel that had the district attorney been notified that the defense wished to use the document during its cross-examination of the witness, arrangements could have been made to have them in the courtroom when they were needed. Read in context, the court's remarks are not overly critical or unfairly derogatory of defense counsel and contain no hint of partiality or favoritism.

Am Jur 2d, Trial §§ 302 et seq.

Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal. 62 ALR2d 166.

6. Criminal Law § 387 (NCI4th)— noncapital first-degree murder—admonition to defendant to speak up—no error

There was no error in a noncapital first-degree murder prosecution where the court asked defendant to speak up during his testimony and remarked, "If he's saying something, it has to go in the record."

Am Jur 2d, Trial § 299.

7. Criminal Law § 372 (NCI4th)— noncapital first-degree murder—sustaining objection—no expression of opinion

The trial court in a noncapital first-degree murder prosecution did not express an opinion in sustaining an objection.

Am Jur 2d, Trial § 284.

8. Evidence and Witnesses § 2507 (NCI4th)— noncapital first-degree murder—testimony of officers—personal knowledge

The trial court did not err in a noncapital first-degree murder prosecution by permitting an SBI agent to testify that the local doctor had said that the fatal bullet was .38 caliber, that defendant had told the officer that he shot the victim with a .38 caliber pistol at a point in the investigation when no one had informed defendant of the caliber of the gun used to kill the victim, and that no one else would have known the caliber other than the person who shot the victim. Although defendant contends that the officer could not have known whether the doctor told anyone else of the caliber or whether anyone overheard the doctor stating the caliber, the testimony that the doctor and the defendant made these statements directly to the officer establishes his personal knowledge of the subject and the State was properly allowed to use the testimony to draw an inference that defendant could not have known the caliber of the murder weapon at the time he made his statement unless he was the murderer. Defendant was free to cross-examine about other individuals with knowledge of the caliber.

Am Jur 2d, Witnesses §§ 75, 76.

9. Evidence and Witnesses § 2507 (NCI4th)— noncapital first-degree murder—testimony of officers—personal knowledge

There was no error in a first-degree murder prosecution where the trial court allowed an SBI agent to testify about a drill and bit seized from defendant and tested unsuccessfully to determine whether the shavings on the bit came from a drilled out gun barrel, and that the effect of the drilling was to eliminate the agent's ability to determine whether the fatal bullet was fired from the gun and the distance between the gun and the victim. Although defendant contended that the State had no evidence that the fatal bullet was fired from defendant's gun, that defend-

ant had drilled out the barrel, or that the barrel was drilled with defendant's drill and bit, and that the sole evidence relating to defendant's barrel was defendant's testimony that the barrel had been drilled when he bought the gun, the evidence was relevant and fell within the personal knowledge of the witness, a forensic firearms and tool marks examiner with the SBI. Defendant was free to challenge the witness's conclusions on cross-examination.

Am Jur 2d, Witnesses §§ 75, 76.

10. Evidence and Witnesses § 876 (NCI4th)— noncapital first-degree murder—hearsay statements of victim—state of mind—admissible

The trial court did not err in a noncapital first-degree murder prosecution by admitting testimony that the victim, a practical nurse, had told a person at whose house she worked that defendant was the father of her child and that she feared for her life if she went to court to obtain child support from defendant. The scope of the conversation related directly to the victim's state of mind and emotional condition, the victim's state of mind was relevant as it related directly to circumstances giving rise to a potential confrontation with defendant on the day she was murdered, and the probative value of this evidence was not outweighed by unfair prejudice. N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Evidence § 866.

Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declarant's mental, emotional, or physical condition. 75 ALR Fed. 170.

11. Evidence and Witnesses § 867 (NCI4th)— noncapital first-degree murder—statement as to defendant's location—explanation of subsequent conduct

The trial court did not err in a noncapital first-degree murder prosecution by admitting the testimony of an S.B.I. agent that defendant's wife had said that defendant was at his father's home on the day defendant had promised to give the agent his gun. The testimony was not offered to prove the truth of the matter asserted but rather to explain the agent's actions after he was unable to retrieve the gun from defendant although defendant had promised to deliver the gun to the police that morning.

Am Jur 2d, Evidence § 666.

12. Evidence and Witnesses § 84 (NCI4th)—noncapital first-degree murder—cross-examination of defendant—motivation for lying

The trial court did not err in a prosecution for noncapital first-degree murder by allowing the State to cross-examine defendant concerning the motivations a person may have for lying where defendant contended that this line of questioning was irrelevant. This line of questioning was relevant to show that defendant had a motive to lie and possibly to murder in avoiding paying child support and protecting his family from the embarrassment of being publicly regarded as the father of the victim's child.

Am Jur 2d, Evidence §§ 307 et seq.

13. Homicide § 262 (NCI4th)— first-degree murder—felony murder—evidence sufficient

The evidence was sufficient to carry charges of first-degree murder and discharging a firearm into an occupied vehicle to the jury in a first-degree murder prosecution which resulted in a conviction based on felony murder where testimony was offered by the State from numerous witnesses tending to show that the victim accused defendant of fathering her child; intended to seek court-ordered child support from defendant; argued intensely with defendant several days before her death; admitted to her minister that she feared for her life; died as a result of a gunshot wound to her head, inflicted as she sat in her car; the medical examiner removed a .38-caliber bullet from the victim's scalp; defendant twice denied owning a pistol, but police officers subsequently recovered a .38-caliber pistol from defendant; the barrel of defendant's gun had been drilled out; defendant owned a drill and drill bit and had access to his father's drill between the time of the murder and when his gun was taken by the police; defendant washed his hands with gasoline after agreeing to, but before submitting to, a gunshot residue test; and defendant's inculpatory statement was previously determined to be admissible.

Am Jur 2d, Homicide § 442.

14. Homicide § 556 (NCI4th)— first-degree felony murder—refusal to instruct on second-degree murder and manslaughter—alibi defense

The trial court did not err in a prosecution for first-degree murder and discharging a firearm into a vehicle by refusing to

instruct on second-degree murder and manslaughter where defendant's defense was an alibi. Defendant cannot tell the jury that he was innocent of the crime because he was elsewhere when it occurred and that the inculpatory statements were not true and also demand to have the jury instructed on second-degree murder and manslaughter based on portions of his inculpatory statements which were favorable to him when taken out of context.

Am Jur 2d, Homicide §§ 525 et seq.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

15. Criminal Law § 496 (NCI4th)— first-degree felony murder— request of jury to view transcript—denied

The trial court did not abuse its discretion in a prosecution for first-degree murder and discharging a firearm into a vehicle by denying the jury's request to review the transcript during its deliberation where the jury's request was ambiguous, the jury foreman at no point specified the clarifications they desired, the questions they had, or the pieces of evidence they wished to review, and the court explained that it would not be fair to give the jury only portions of the testimony taken out of context when the foreman asked to review the transcript in general. The trial court exercised its discretion and complied with the requirements of N.C.G.S. § 15A-1233(a).

Am Jur 2d, Trial §§ 1685 et seq.

Right to have reporter's notes read to jury. 50 ALR2d 176.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Llewellyn, J., at the 12 April 1993 Criminal Session of Superior Court, Pender County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment entered for discharging a firearm into occupied property was allowed 20 September 1993. Heard in the Supreme Court 11 May 1994.

Michael F. Easley, Attorney General, by Thomas F. Moffitt, Special Deputy Attorney General, for the State.

Margaret Creasy Ciardella for defendant-appellant.

PARKER, Justice.

In a noncapital proceeding, defendant was convicted of the first-degree murder of Katie M. Hansley under the felony-murder rule and of discharging a firearm into an occupied vehicle. The trial court sentenced defendant to life imprisonment for the murder conviction and arrested judgment on the felony conviction since it served as the predicate felony for the felony-murder conviction.

The State presented evidence at trial tending to show that on the morning of 16 April 1992, the victim's body was discovered by Walter Tompkins, a local farmer. Victim's body was in her automobile on the shoulder of Highway 210 in Pender County. Tompkins testified he turned off the ignition, searched for a pulse, and, finding none, left to call the authorities. The first officer on the scene, Pender County Deputy Sheriff Charles Rollins, found a young black female, dressed in a nurse's uniform, seated in the driver's seat of a car, slumped to her right. Blood and cerebral fluid were flowing down her neck and back forming a puddle behind the driver's seat. The officer found no evidence of a struggle.

An autopsy was performed at Onslow Memorial Hospital in Jacksonville, North Carolina, by Dr. Walter Gable. Dr. Gable testified he found an entrance wound on the left side of the victim's nose with powder burns around it. The powder burns revealed that the gun had been fired from a very close range. Dr. Gable surmised that the victim died as the result of a gunshot wound to her head.

Reverend Vinella Evans testified that the victim had consulted with him several days before her death. The victim claimed that defendant was the father of her child and that she feared for her life if she went to court to obtain child support from defendant. The victim's daughter, Charonda Martin, testified that her mother and defendant argued angrily several days before the day of the murder about child support for LaQuan, Charonda's half brother.

On the evening of 16 April 1992, SBI Agent Bruce Kennedy and Detectives Douglas Blose and James Ezzell of the Pender County Sheriff's Department went to defendant's residence. Defendant told the officers his daughter had informed him that a woman had been killed earlier that day and he assumed they had come to discuss it with him. Defendant informed the officers that he had recently heard a rumor that he was "going with" the victim and had fathered one of her children. While sitting in Agent Kennedy's vehicle, defendant

denied the allegation but admitted to having had sexual relations with the victim on two occasions several years before. He further denied owning a handgun or ever having argued with the victim concerning child support. Defendant said he left his house that morning at approximately 8:30 a.m. to drive to Burgaw to cut grass for Bertha Nixon; he also told the officers he waved to the victim in her front yard at 8:00 a.m. as he drove by but denied driving down Highway 210 at any time during the day. After consenting to a gunshot residue test, defendant washed his hands in gasoline on the opposite side of the car from where Agent Kennedy was preparing the test. The test had negative results. Defendant claimed he accidentally spilled the gasoline on himself.

After learning from defendant's daughter that defendant owned a handgun, the officers again interviewed defendant. Defendant again denied owning a handgun. He reiterated his previous story but stated he actually left the house at 7:30 a.m.

The next day the officers returned to defendant's home with SBI Agent Kelly Moser. Defendant consented to a search of his home. During the search, Agent Moser asked defendant to step outside with him. While standing in the front yard, Agent Moser told defendant he had just become involved with the case but that it appeared to be a domestic dispute which had simply gotten out of hand. Agent Moser added that he was interested only in the truth and that he didn't believe defendant had been honest during the initial interviews. At first defendant denied any involvement in the murder, but later asked what would happen to him if he admitted killing the victim. Agent Moser stated he just wanted the facts and that defendant would not be arrested that day. When the two men returned to the house, defendant told his wife he was going to show the officers the route he had taken the previous day.

Defendant then directed the officers to the Jesus Christ Worship Center Church on Highway 210 near where the victim's body had been found. Defendant told the officers that early on the morning of 16 April 1992 the victim passed him on the highway and motioned for him to pull over. He parked behind her car and walked up to the driver's side. As he approached the car, he mentioned he had been on his way to see her and the victim replied, "I bet you were, m————————," and drew back her right hand as if to slap him. Defendant pulled his .38-caliber Smith and Wesson pistol from his

pocket and shot the victim in the face. Defendant told the officers he fled the scene without knowing whether he had injured the victim.

After this confession, defendant told the officers he intended to lie to his wife and tell her he had been pressured into making the statements. Defendant refused to sign a written version of his statements and was taken home by the officers after assuring them he would retrieve the murder weapon for them by the next day.

On 18 April 1992, the officers returned for the weapon. Defendant informed the men he had talked with a lawyer and that he had only confessed to the crime "to get [them] off of his back." Defendant asserted he was not guilty of anything and handed over his handgun to Agent Kennedy. After leaving the Corbett home, Kennedy noticed that the lands and grooves had been drilled out of the barrel of the gun. The agents returned that afternoon and seized a drill and drill bit from a tool box in defendant's truck. Fresh metal shavings were on the drill bit. Defendant was arrested later that afternoon.

In his own defense, defendant testified he worked for the City of Wilmington, had been married for twenty years, had an eighteen-year-old daughter and had known the victim most of his life. He denied fathering one of the victim's children and denied having been approached by her to pay child support. On the morning of 16 April 1992, he left his home early to go to Atkinson, North Carolina, to pick up a carburetor but on the way remembered that he had agreed to mow Mrs. Nixon's lawn. He returned home at 7:40 a.m. and left again at 8:20 a.m. with his lawn mower. Defendant arrived at Mrs. Nixon's home in Burgaw, North Carolina, around 9:00 a.m. He mowed the lawn and left at 1:30 p.m.

Defendant further stated, that although he was under extreme pressure from the police, he consistently denied killing the victim. Finally he gave up and said, "whatever you want to say, say it." Defendant testified he did not know that gasoline would remove gunshot residue from his hands, and he denied drilling out the barrel of his handgun to prevent identification. He added that he told the officers during the initial interview that he owned a handgun but they did not ask him for it. Defendant concluded his testimony by denying he had been to the victim's home several days before the murder and suggested that Charonda Martin had lied about the argument.

Bertha Nixon testified that on the morning of 16 April 1992, defendant arrived at her home between 8:45 a.m. and 9:00 a.m., and

did not leave until 1:30 p.m. Larry Wooten, a farmer serving on the Pender County Board of Education, testified that defendant had a good reputation in the community and that he had not heard the rumor that defendant was the father of one of the victim's children.

Additional evidence introduced at trial will be discussed where pertinent to the various issues raised by defendant.

[1] Defendant first contends the trial court committed plain error by allowing into evidence twenty gruesome photographs of the crime scene and the victim. Relying on *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988), defendant argues that when an excessive number of inflammatory photographs are repeatedly shown to the jury, the prejudicial effect outweighs the probative value.

The State introduced twenty photographs to illustrate the testimony of Tompkins and Deputy Sheriff Charles Rollins, the first officer to arrive at the scene of the crime. During his testimony, Tompkins was asked to identify the first nine photographs. He was then asked to illustrate his testimony with the photographs. Over objection, Tompkins was allowed to leave the witness stand and stand in front of the jury box to finish his testimony. As he mentioned each photograph, he walked the length of the jury box displaying the picture to each juror. Deputy Sheriff Rollins also identified the first nine photographs from the witness stand but then moved in front of the jury to identify the next eleven. He continued to stand in front of the jury box while he illustrated his testimony with the photographs. Defendant contends that the cumulative effect of this repeated display of the photographs in front of the jury by both Tompkins and Rollins served only to inflame the passions of the jury, thus entitling defendant to a new trial.

In *Hennis*, this Court set out the criteria for determining the admissibility of photographic evidence as follows:

> 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. What a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies—these are all factors

the trial court must examine in determining the illustrative value of photographic evidence and in weighing its use by the state against its tendency to prejudice the jury.

323 N.C. at 285, 372 S.E.2d at 527. We further held that "[p]hotographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526.

State's Exhibits 1 through 20 depicted the exterior of the automobile, the area surrounding the automobile, the contents of the interior of the vehicle (not focusing on the body), and the position of the body inside the vehicle. Only nine of the photographs focused on the victim's body. Four of these nine photographs illustrated the path of blood from the lethal wound to the floorboard and were relevant to show the angle from which the gun was fired into the window of the vehicle. Another photograph which showed very little blood was relevant to illustrate the head and neck area of the victim that Tompkins touched while searching for a pulse. Three of the nine photographs showed the position of the victim's hands and feet. These exhibits were relevant to show that the victim held no weapon or object with which to strike her assailant and that no struggle had occurred prior to the fatal shooting. The final photograph, taken during the autopsy, illustrated the gunshot wound to the victim's nose which was not depicted in any of the other photographs.

While the subject matter of the photographs was gruesome, the number of photographs and the circumstances surrounding their presentation were such that we cannot conclude that their admission into evidence had no rational basis and was for the purpose of inflaming the jury. The display of the photographs was not unnecessarily repetitious and they were used to illustrate competent testimony by either Tompkins or Rollins. The trial court did not abuse its discretion in permitting the photographic evidence to be used to illustrate the testimony of the State's witnesses and to be held in front of the jury. This assignment of error is overruled.

[2] Next, defendant contends the trial court erred in admitting defendant's inculpatory statements for the reason that they were illegally obtained during a custodial interrogation in violation of his right under the Fifth and Fourteenth Amendments to remain silent and to have counsel present during custodial interrogation. *Edwards v.*

Arizona, 451 U.S. 477, 68 L. Ed. 2d 378 (1981); *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Following a *voir dire*, the trial court determined that defendant was not under arrest when he confessed to the murder and that the statement was not made as a result of a custodial interrogation. The trial court further determined that although defendant was never read his *Miranda* rights, the warning was not necessary. The State was allowed to introduce defendant's statements into evidence. Considering the totality of the circumstances surrounding defendant's confession, we find the evidence supported the trial court's findings of fact which, in turn, supported the legal conclusion that defendant's confession was admissible.

"The rule of *Miranda* requiring that suspects be informed of their constitutional rights before being questioned by the police and the rule of *Edwards* guaranteeing the right to remain silent and the presence of counsel during such questioning apply only to *custodial* interrogation." *State v. Medlin*, 333 N.C. 280, 290, 426 S.E.2d 402, 407 (1993). The question of whether a person is "in custody" for purposes of *Miranda*, that is, "whether a reasonable person in the suspect's position would feel free to leave at will or feel compelled to stay," is determined objectively through a case-by-case analysis. *Medlin*, 333 N.C. at 290-91, 426 S.E.2d at 407.

During *voir dire* on defendant's suppression motion, SBI Agents Kelly Moser and Bruce Kennedy testified concerning the circumstances surrounding defendant's statements. Defendant presented no evidence. Agent Kennedy testified that on the evening of 16 April 1992, several law enforcement officers went to defendant's home where defendant met them in the front yard. Defendant said, "well, I believe I know what you want to talk to me about," and then explained that he had heard a woman had been killed that day. Defendant then sat in the police car and talked to the officers. Defendant denied talking or arguing with the victim about child support, denied fathering her youngest child but admitted to previous sexual relations with her years before, denied owning a pistol or having fired a gun in the last few days, and agreed to take a gunshot residue test. Agent Kennedy testified that defendant was not under arrest during this interview. Defendant was free at any time to get out of the car which was sitting in defendant's driveway.

Based on further information Agent Kennedy reinterviewed defendant that same evening. This interview also took place in Agent Kennedy's car in defendant's driveway. Defendant again denied own-

ing a pistol but admitted he had a date planned with the victim for the evening of 17 April 1992. As before, defendant was free to terminate the interview at any point; defendant had not been placed under arrest and was on his own property.

Agent Moser testified that on the afternoon of 17 April 1992, officers again went to defendant's home and this time with defendant's consent searched it. During a private conversation in the front yard between Agent Moser and defendant, Agent Moser informed defendant that the statements he had given to Agent Kennedy the previous day appeared to be incorrect. Defendant, at this point, was not under arrest, was standing in his own yard, and was free to walk away. Defendant initially denied any role in the crime but then asked Agent Moser what would happen to him if he admitted killing the victim. Agent Moser responded that the district attorney could bring charges against him ranging from manslaughter to murder. The two men returned to the house, and defendant told his wife he was going to show the officers where he had been the previous day. Agent Moser assured Mrs. Corbett that defendant was not under arrest at this time.

Defendant directed the agents to the crime scene without prompting or instructions from either agent. As they passed the Jesus Christ Worship Center Church on Highway 210, defendant pointed to where the killing took place. After defendant confessed fully to the killing, Agent Moser informed defendant he would be asked to turn himself in after the officers consulted with the district attorney. Defendant refused to sign a written statement prepared by Agent Kennedy. Agent Moser further testified that defendant was not under arrest when the statements were made, and defendant was not coerced into making the statements or into showing the officers the crime scene. Agent Kennedy added that had defendant asked he would have been taken home.

Based upon this evidence, the trial court found that defendant was on his own premises and free to go about his business during the first two interviews. During the third meeting, the court found that Agent Moser's and Agent Kennedy's manners were nonthreatening, their language was not coercive, they did not force defendant to take them to the scene of the crime, and defendant was repeatedly told he was not under arrest and would be taken home any time he so requested. The trial court then concluded that the statements given to the officers were not the product of a custodial interrogation, that

defendant's constitutional rights had not been violated, and that the statements could be admitted into evidence.

In reviewing the trial court's findings, we find each to be supported by competent and substantial evidence and thus binding on this Court. These findings compelled the court's conclusion that defendant was not "in custody" for *Miranda* purposes as a reasonable person in defendant's position would have concluded he was free to terminate the interviews if he so chose. *See Medlin*, 333 N.C. at 292, 426 S.E.2d at 408; *State v. Mahaley*, 332 N.C. 583, 593, 423 S.E.2d 58, 64 (1992), *cert. denied*, — U.S. —, 130 L. Ed. 2d 649 (1994); *State v. Phipps*, 331 N.C. 427, 444-45, 418 S.E.2d 178, 187 (1992).

[3] Additionally, defendant argues his confession must be suppressed because it was not made knowingly, intelligently, or voluntarily. "Whether or not *Miranda* warnings are required or given, the Fourteenth Amendment requires that a statement be voluntary in order to be admissible." *State v. Wiggins*, 334 N.C. 18, 28, 431 S.E.2d 755, 761 (1993). The State has the burden of proving, by a preponderance of the evidence, that the statement, examined in context with the totality of the circumstances, was voluntary. *State v. Cheek*, 307 N.C. 552, 557, 299 S.E.2d 633, 636-37 (1983). In the present case, nothing in the evidence, when viewed in its totality, suggests that the confession was involuntary. None of the evidence presented suggests that defendant's mental capacity was in any way impaired, that his will was overpowered, or that the officers attempted to physically or psychologically torture defendant to evoke a confession. In addition to the findings noted above which support that defendant was not in custody, the trial court found that "defendant was never promised anything, was never threatened, and had no offers of reward or of assistance with any prosecution in the event he did cooperate with the officers." The trial court also found that defendant made a correction in the written statement. Applying the totality of the circumstances standard, the trial court did not err in concluding that defendant's constitutional rights were not violated and that the statements were admissible. This entire assignment of error is overruled.

[4] In his next assignment of error, defendant contends the trial court erred by expressing opinions which denigrated defendant in front of the jury in violation of N.C.G.S. § 15A-1222. Defendant maintains that the court's consistent expression of opinions, throughout the trial,

imparted judicial favoritism towards the State and entitles him to a new trial before an impartial judge and an unbiased jury.

N.C.G.S. § 15A-1222 provides that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." Even the slightest "intimation of contempt for a party or for counsel may be highly deleterious to that party's position in the eyes of the jury." *State v. Staley*, 292 N.C. 160, 162, 232 S.E.2d 680, 682 (1977). However, the trial court is permitted to "interrogate witnesses, whether called by itself or by a party," N.C.G.S. § 8C-1, Rule 614(b) (1992), "in order to clarify confusing or contradictory testimony," *State v. Ramey*, 318 N.C. 457, 464, 349 S.E.2d 566, 571 (1986).

In the first instance, defendant points to the court's behavior during the State's direct examination of the medical examiner. After Dr. Gable testified he found the fatal bullet lodged under the victim's scalp, the court asked if he meant "that the only thing that kept the bullet from being a clean or a through and through wound was actually the skin of the scalp?" When the doctor replied in the affirmative, the court then asked if "[t]he skull had been penetrated?" Defendant argues that this questioning by the court was irrelevant and placed undue emphasis on the wound.

The purpose behind the court's questions was to clarify the medical examiner's description of the position of the bullet which caused the victim's death. Neither question intimated the judge's opinion regarding the witness' credibility, defendant's guilt, or any factual controversy to be resolved by the jury.

[5] Defendant further contends the trial court improperly expressed its impatience and displeasure with defense counsel for causing a delay in the presentation of evidence. Prior to cross-examining SBI Agent Kennedy, defense counsel asked to view the interview notes which the agent had relied upon during direct examination. When the State responded that the notes were still in the evidence locker, the trial court told defense counsel that had the district attorney been notified that the defense wished to use the document during its cross-examination of the witness, arrangements could have been made to have them in the courtroom when they were needed.

"Jurors respect the judge and are easily influenced by suggestions, whether intentional or otherwise, emanating from the bench. Consequently, the judge 'must abstain from conduct or language

which tends to discredit or prejudice the accused or his cause with the jury.' " *State v. Holden*, 280 N.C. 426, 429, 185 S.E.2d 889, 892 (1972) (quoting *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951)). However, in the case now before us, the trial court communicated no opinion about the evidence or the testimony of the witness. Read in context, the court's remarks are not overly critical or unfairly derogatory of defense counsel. The court's comments contain no hint of partiality or favoritism. "Unless it appears 'with ordinary certainty that the rights of the prisoner have been in some way prejudiced by the remarks or conduct of the court, it cannot be treated as error.' " *Holden*, 280 N.C. at 430, 185 S.E.2d at 892 (quoting *State v. Browning*, 78 N.C. 555, 557 (1877)). Our reading of the record reveals no impropriety by the trial court and defendant has failed to show any prejudice.

[6] In the third instance, defendant contends the trial court chastised defendant for not speaking loudly during his testimony, thus denigrating the importance of his case. The trial court merely asked defendant to speak up and then remarked: "If he's saying something, it has to go in the record." Defendant's argument that this innocuous statement denigrated his case before the jury is wholly without merit.

[7] Finally, defendant contends the trial court further denigrated the value of his case by sustaining the State's objection to the following exchange:

> Q. You hadn't told them about the rifle because he only asked you about the house, is that right?
>
> A. Right, that's right. Of course, when I went to pull the rifle out of the truck and when I got back there in the back, which he wasn't around there at that time, I went to get the rifle out of the truck, I told the guy I wanted to get it out because I didn't want them to think I was trying to get a gun or something to shoot them or something. I said, well, I'm fixing to get my rifle out of this truck. That's when they said, okay, and one of them got where he would be looking right dead at me, how I come out with it. Y'all have to excuse me if I get kind of like with him or him or whatever. We's looking at something like four different trips to my house at this time, and during this time, it's hard for me to remember exactly.
>
> MR. SPIVEY: I object. The defendant is making a jury argument. He's not answering the question.

THE COURT: Sustained.

We have previously held that "a trial court generally is not impermissibly expressing an opinion when it makes ordinary rulings during the course of the trial." *State v. Weeks*, 322 N.C. 152, 158, 367 S.E.2d 895, 899 (1988). The judge's ruling on the State's objection does not violate N.C.G.S. § 15A-1222.

We conclude that none of the aforementioned instances constitute impermissible expressions of opinion by the trial court. This assignment of error is overruled.

[8] In his next assignment of error defendant contends the trial court erred in permitting State's witnesses, SBI agents Trochum and Kennedy, to testify as to matters about which they lacked personal knowledge in violation of Rules 401 and 602 of the North Carolina Rules of Evidence. We disagree.

The North Carolina Rules of Evidence state that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." N.C.G.S. § 8C-1, Rule 602 (1992). The Commentary to Rule 602 further provides that the "foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception."

After testifying that the local doctor had said the fatal bullet was a .38-caliber, Agent Kennedy was allowed to testify, over objection, that defendant told him he shot the victim with a .38-caliber pistol. At that point in the investigation no one had informed defendant what caliber gun had been used to kill the victim. Agent Kennedy responded, "No," when asked: "[W]as there any way that anyone on earth, other than the person who shot Katie Hansley, would have known what caliber weapon was used to shoot her?" Defendant maintains that Agent Kennedy impermissibly testified to matters beyond his personal knowledge since he could not know if the doctor had told anyone else or if anyone had overheard the doctor stating that the murder weapon was a .38-caliber pistol.

Agent Kennedy's testimony that the doctor and defendant made these statements directly to him establishes his personal knowledge of the subject. *See State v. Riddick*, 315 N.C. 749, 756-57, 340 S.E.2d

55, 59-60 (1986). The State was properly allowed to use Agent Kennedy's testimony to draw an inference that defendant could not have known the caliber of the murder weapon at the time he made his inculpatory statement unless he was the murderer. Defendant was, of course, free to cross-examine Agent Kennedy and Dr. Gable about other individuals who may have obtained knowledge of the caliber of the murder weapon.

[9] Agent Trochum, on cross-examination, was asked: "[W]hat was the purpose of the drill and the drill bit being sent to your office?" Agent Trochum explained that he attempted to determine if the metal shavings on the drill bit came from the gun barrel that had been drilled out. Trochum concluded that he could not "make [a] comparison on whether the metal [on the] drill bit was consistent with the metal from the barrel." On redirect, Trochum was allowed to explain that the effect of drilling lands and grooves from the barrel of the gun eliminated his ability to determine whether the fatal bullet was fired from the gun. It also eliminated his ability to determine the distance between the gun and the victim when the victim was shot; if in fact, the victim had been shot with that particular gun. Defendant contends that, besides having no evidence that the bullet removed from the victim was fired from defendant's gun, or that defendant drilled out the barrel of his .38-caliber pistol, the State also had no evidence that defendant's gun was drilled out with defendant's drill and bit. The sole evidence relating to the barrel of the gun came from defendant, and he testified that the barrel of the gun had already been drilled out when he purchased it years earlier. Defendant contends, therefore, that Agent Trochum's explanation of why the barrel had been drilled out went beyond the realm of his personal knowledge and entitles defendant to a new trial. Again, we disagree.

"[E]vidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Hannah*, 312 N.C. 286, 294, 322 S.E.2d 148, 154 (1984). The evidence at issue tended to show that defendant, in an effort to cover up the murder, had a motive to drill out the barrel of his .38-caliber pistol. This evidence is relevant and falls within the personal knowledge of Agent Trochum, a forensic firearms and tool marks examiner with the SBI. Again, defendant was free to challenge Agent Trochum's conclusions during cross-examination. This assignment of error is without merit.

[10] Defendant next contends the trial court erred in admitting the hearsay testimony of Reverend Vinella Evans and SBI Agent Kennedy.

In the first instance, Reverend Evans testified that shortly before the victim's death, defendant came to Evans' house where the victim worked as a practical nurse and talked with the victim outside the house. When she came inside, the victim was in tears and told Evans that defendant was the father of her child and that she feared for her life if she went to court in an effort to obtain child support from defendant. Defendant contends these statements were hearsay and failed to fall within a recognized exception to the exclusion.

Rule 803 of the North Carolina Rules of Evidence provides, in pertinent part, as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health).

N.C.G.S. § 8C-1, Rule 803(3) (1992). The scope of the conversation between the victim and Evans related directly to the victim's state of mind and emotional condition. "Evidence tending to show the victim's state of mind is admissible so long as the victim's state of mind is relevant to the case at hand." *State v. Stager*, 329 N.C. 278, 314, 406 S.E.2d 876, 897 (1991). The victim's state of mind was relevant as it related directly to circumstances giving rise to a potential confrontation with defendant on the day she was murdered. The probative value of this evidence is not outweighed by unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (1992). This contention is without merit.

[11] In the second instance, Agent Kennedy testified that defendant had told him that defendant had given his .38-caliber pistol to a friend but that he would give it to Agent Kennedy the next day. When Agent Kennedy called defendant's residence the next day which was Saturday, 18 April 1992, defendant's wife told the officer her husband was at his father's home in Atkinson. Agent Kennedy left his pager number for defendant to call him when he returned. Later, when Agent Kennedy confronted defendant with the fact that he could have used his father's drill on that occasion to drill out the barrel of his gun, defendant denied he had been at his father's home. Defendant con-

tends the statement of defendant's wife, repeated by Agent Kennedy, is inadmissible hearsay.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1992). "[W]henever an extrajudicial statement is offered for a purpose other than proving the truth of the matter asserted, it is not hearsay." *State v. Maynard*, 311 N.C. 1, 15-16, 316 S.E.2d 197, 205, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). Here, the testimony was not offered to prove the truth of the matter asserted but rather to explain Agent Kennedy's actions after he was unable to retrieve the gun from defendant although defendant had promised to deliver the gun to the police that morning. *See State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56-57 (1990) (holding that statements of one person to another, offered to explain the subsequent conduct of the person to whom the statement was made, are admissible as nonhearsay). Defendant's wife's statement to Agent Kennedy was not hearsay for the purpose for which it was admitted. This entire assignment of error is overruled.

[12] Defendant next contends the trial court erred in allowing the State to cross-examine defendant with an irrelevant line of questions concerning different motivations a person may have for lying. Defendant argues the questions were used solely to elicit responses showing that defendant was unworthy of belief and to thus arouse the passions and prejudices of the jury.

During his cross-examination, defendant admitted that (i) he knew the victim believed him to be the father of her child; (ii) he knew she had successfully obtained court-ordered child support from the fathers of her other illegitimate children; (iii) his wife was aware of the rumor that he was the father of the victim's child; (iv) he told his wife he was not the father; and (v) he had lied to his wife on occasion, that "[e]verybody ha[s] a tendency to tell a lie to their wife," and that "it's just natural for a man to just tell a lie, I mean to his wife." The prosecutor then asked questions of defendant concerning whether or not people would lie rather than lose money or to protect loved ones.

As noted above, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). The

line of questioning challenged by defendant is relevant to show that defendant had a motive to lie and possibly to murder. By lying, defendant may have been able to avoid paying child support and protect his family from the embarrassment of his being publicly regarded as the father of the victim's child. *See State v. Meekins*, 326 N.C. 689, 700-01, 392 S.E.2d 346, 352 (1990) (holding that cross-examination of defendant concerning pending rape charge was relevant to prove that his motive for murder and robbery was to obtain the means to flee from pending charges). This assignment of error is without merit.

[13] Next, defendant contends the trial court erred in denying his motion to dismiss and motion for a directed verdict for lack of sufficient evidence. Defendant contends that, without defendant's illegally obtained inculpatory statement, not a scintilla of evidence existed to raise even a suspicion that defendant murdered the victim. Having previously determined that the trial court did not err in concluding that defendant's incriminating statements to police officers were not the product of custodial interrogation and were not involuntarily made, we disagree with defendant's contention.

The question before the trial court on defendant's motions was "whether, upon consideration of all of the evidence in the light most favorable to the State, there [was] substantial evidence that the crime charged in the bill of indictment was committed and that defendant was the perpetrator." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). The trial court need not be concerned with the weight of the evidence; it need only satisfy itself that sufficient evidence exists to present the case to the jury. *Id.* Our *corpus delicti* rule is that

> there [be] some *evidence aliunde* the confession which, when considered with the confession, will tend to support a finding that the crime charged occurred. The rule does not require that the *evidence aliunde* the confession prove any element of the crime. The *corpus delicti* rule only requires *evidence aliunde* the confession which, when considered with the confession, supports the confession and permits a reasonable inference that the crime occurred.

State v. Trexler, 316 N.C. 528, 532, 342 S.E.2d 878, 880 (1986). Essentially, under our rule of *corpus delicti*, if there is corroborating evidence other than the inculpatory statements, the State's case is properly submitted to the jury. *Franklin*, 327 N.C. at 173, 393 S.E.2d at 788.

In the present case, viewed in the light most favorable to the State, testimony was offered by the State from numerous witnesses tending to show that the victim (i) accused defendant of fathering her child; (ii) intended to seek court-ordered child support from defendant; (iii) argued intensely with defendant several days before her death; (iv) admitted to her minister that she feared for her life; and (v) died as a result of a gunshot wound to her head, inflicted as she sat in her car. Further testimony disclosed that (i) the medical examiner removed a .38-caliber bullet from the victim's scalp; (ii) defendant twice denied owning a pistol, but police officers subsequently recovered a .38-caliber pistol from defendant; (iii) the barrel of defendant's gun had been drilled out; (iv) defendant owned a drill and drill bit and had access to his father's drill between the time of the murder and when his gun was taken by the police; and (v) defendant washed his hands with gasoline after agreeing to, but before submitting to, a gunshot residue test. This evidence, taken together with the confession, permits the inference that the victim was murdered and that defendant was the perpetrator.

The State presented sufficient testimony to carry the case to the jury on the charges of first-degree murder and discharging a firearm into an occupied vehicle. The trial court thus did not err in denying defendant's motion to dismiss and motion for directed verdict.

[14] Defendant next contends the trial court erred in refusing to instruct the jury on the lesser-included offenses of second-degree murder and manslaughter. While conceding that this Court has held that a defendant is not entitled to have the jury consider a lesser offense when his sole defense is one of alibi, defendant asks this Court to modify its prior holdings. *State v. Annadale*, 329 N.C. 557, 566-68, 406 S.E.2d 837, 843-44 (1991); *State v. Warren*, 327 N.C. 364, 370, 395 S.E.2d 116, 120 (1990); *State v. Stevenson*, 327 N.C. 259, 262-63, 393 S.E.2d 527, 528-29 (1990); *State v. Shook*, 327 N.C. 74, 81, 393 S.E.2d 819, 823 (1990); *State v. Brewer*, 325 N.C. 550, 574-578, 386 S.E.2d 569, 583-85 (1989), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990). We decline to do so.

> In our review of this Court's previous holdings, we find that where a defendant's sole defense is one of alibi, he is not entitled to have the jury consider a lesser offense on the theory that jurors may take bits and pieces of the State's evidence and bits and pieces of defendant's evidence and thus find him guilty of a lesser offense not positively supported by the evidence. In *State v.*

> *Allen*, 297 N.C. 429, 255 S.E.2d 362 (1979), the defendant denied he was the victim's assailant and introduced evidence to support his defense of alibi and mistaken identity. This Court held that a defendant is not entitled to rely on the possibility that the jury may believe only a part of the State's evidence as a ground for submission of a lesser offense. In that circumstance, there is no positive evidence of a lesser offense and the jury need only decide whether defendant was the perpetrator of the crime charged.

Brewer, 325 N.C. at 576-77, 386 S.E.2d at 584.

Defendant's defense was an alibi established by the testimony of Bertha Nixon that indicated defendant had been at her home on the morning of the murder from 8:45 a.m. until 1:30 p.m. Defendant testified in his own defense that he did not make inculpatory statements to the investigating officers and that he did not kill the victim. Defendant cannot have it both ways. He cannot tell the jury that he was innocent of the crime because he was elsewhere when it occurred and that the inculpatory statements were not true and also demand to have the jury instructed on second-degree murder and manslaughter based on portions of his inculpatory statements which were favorable to him when taken out of context.

Since defendant limited himself to the defense that he was not in the vicinity of the shooting on the morning of 16 April 1992, the jury's decision was reduced to a factual determination of whether defendant was on Highway 210 near the Jesus Christ Worship Center Church and murdered the victim, as the State asserts, or was in Burgaw, North Carolina, mowing Mrs. Nixon's grass and was innocent of the murder, as defendant asserts. "Where the State's evidence is clear and positive as to each element of the offense charged and there is no evidence supporting a lesser offense, it is not error for a judge to refuse to provide instructions on that lesser charge." *Brewer*, 325 N.C. at 578, 386 S.E.2d at 585. We conclude that the trial court's instructions to the jury were proper as given and that the evidence did not warrant further instructions on second-degree murder and manslaughter.

[15] Finally, defendant contends the trial court erred in denying the jury's request to review the transcript during its deliberations. N.C.G.S. § 15A-1233(a) imposes two duties on the trial court when it receives a request from the jury to review testimony; the jurors must be present in the courtroom, and the court must exercise its discretion in determining whether to permit the requested evidence to be

read to or examined by the jury. *State v. Weddington*, 329 N.C. 202, 207, 404 S.E.2d 671, 675 (1991). The burden is on defendant to show that the court abused its discretion by acting so arbitrarily that the determination could not have been the result of a reasoned decision. *Weddington*, 329 N.C. at 209, 404 S.E.2d at 676.

During deliberations, the jury indicated it had a question and was returned to the courtroom. The following occurred:

> JURY FOREMAN: We, the jury, would like to know if we could look over some of the evidence so we can clarify our decision.
>
> THE COURT: What evidence is it you want to see?
>
> JURY FOREMAN: It's several things, it's not all been in one particular thing.
>
> THE COURT: I can't help you until you tell me what it is.
>
> JURY FOREMAN: It's not necessarily the pictures. I guess one at a time we can say. Each person is disagreeing on some things. Can we see a transcript?
>
> THE COURT: I see what you're saying. All right, have a seat. It is the request for a transcript of the testimony of the witnesses I would deny that to you. The reason being is unless we had a transcript of the witnesses for you . . . to read, it wouldn't be fair to, say, take part of the state's witnesses and part of the defense witnesses and not give it all to you, and all of you, all 12 of you together, have heard all of the evidence in this case. As I stated to you, your job is to weed through this evidence, assign weight to it and also to determine from your joint and collective recollections of the evidence, determine what the facts are. You deliberate with a view to reaching a verdict if it can be done without the surrender of an honest conviction, and that's what we're asking you to do, as best you can, to remember all the evidence and from that evidence determine what the facts are and render a verdict based upon your deliberations and the law as I have given it to you. I will not give you a transcript of any one witness, and I don't have the wherewithal or the facilities to give you a transcript of this entire trial. Now, do you have a question?

The jury's request was, at best, ambiguous. At no point did the jury foreman specify what clarifications they desired, what questions they had, or which pieces of evidence they wished to review. When the foreman finally asked to review the transcript in general, the

court explained it would not be fair to give the jury only portions of the testimony taken out of context of the whole trial. In instructing the jury to rely upon their individual recollections to arrive at a verdict, the trial court exercised its discretion and complied with the requirements of N.C.G.S. § 15A-1233(a). *See State v. Eason*, 328 N.C. 409, 431, 402 S.E.2d 809, 821 (1991) (holding that the trial court did not abuse its discretion by denying jury's request to review testimony because it did not want to give undue emphasis to the testimony of any particular witness); *State v. Lewis*, 321 N.C. 42, 51, 361 S.E.2d 728, 734 (1987) (holding that the trial court did not abuse its discretion by denying jury's request when it stated, "I just don't think that's the way to do things"). Similarly, we conclude that the trial court did not abuse its discretion in denying the jury's request in this case.

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

NO ERROR.

HALLIE K. HOLLOWAY, SUE HOLLOWAY, DAMIEN LEE HOLLOWAY, AND SWANZETT HOLLOWAY v. WACHOVIA BANK & TRUST COMPANY, N.A., AND JEAN DAWSON

No. 183A93

(Filed 30 December 1994)

1. Damages § 99 (NCI4th)— punitive damages—pleading not required

A plaintiff need not specially plead punitive damages as a prerequisite to recovering them at trial. Where a pleading fairly apprises opposing parties of facts which will support an award of punitive damages, they may be recovered at trial without having been specially pleaded. N.C.G.S. § 1A-1, Rules 8(a) and 54(c), when read together, reject any strict rule that a certain measure of damages must be specifically sought in the prayer for relief.

Am Jur 2d, Damages §§ 842 et seq.

2. Damages § 104 (NCI4th)— punitive damages—not specially pleaded—sufficiency of allegation

A complaint fairly advised defendants of facts which would support an award of punitive damages where the complaint alleged that Dawson intentionally pointed a gun at the plaintiffs

in an attempt to intimidate them while repossessing plaintiff Hallie Holloway's car; it also alleged that Dawson reached into Hallie's vehicle and struggled with her, making contact with plaintiffs Damien Holloway and Hallie in the process; the three torts alleged in the complaint (assault, battery, and intentional infliction of emotional distress) support punitive damages when accompanied by aggravation; only the claim based on the Debt Collection Act would not support punitive damages; and the use of the words "violently," "willfully," "forceful," and "aggressive" tend to put defendants on fair notice of facts which would support an award of punitive damages at trial. Although defendants contend that the omission of a claim for punitive damages and the inclusion of a specific claim for treble damages led to the reasonable assumption that punitive damages were not sought because a plaintiff may not recover both punitive and treble damages, a plaintiff must make an election only for purposes of actual recovery and is not precluded from seeking both punitive and treble damages. Plaintiffs' unsuccessful attempt to amend their complaint and to file a second suit requesting punitive damages involved only gross negligence in hiring defendant Dawson and in violating certain statutes and had no bearing on whether plaintiffs would seek punitive damages at trial for the assault, battery, and intentional infliction of emotional distress claims. Finally, defendants' assertion that it would have been unfair to submit punitive damages because they were not prepared was not persuasive.

Am Jur 2d, Damages §§ 842 et seq.

3. Intentional Infliction of Mental Distress § 2 (NCI4th)—repossession of automobile—summary judgment for defendant—threat of future harm

The trial court erred in an action arising from an automobile repossession by granting summary judgment for defendants on a claim for intentional infliction of emotional distress (IIED) based on the lack of a threat of future harm. *Dickens v. Puryear*, 302 N.C. 437, did not hold that a threat of future harm is a necessary element required to sustain the IIED claim. Even when the IIED claim arises from facts which would also sustain claims for assault and battery, which may or may not be barred by the statute of limitations, the elements of the IIED claim and the elements of the assault and battery claims remain the same. Where the assault and battery claims are barred by the statute of limita-

tions and the IIED claim remains viable, full recovery in the IIED claim may be had for all damages proximately caused by defendant's conduct upon which the IIED claim rests.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 4 et seq., 17.

Recovery by debtor, under tort of intentional or reckless infliction of emotional distress, for damages resulting from debt collection methods. 87 ALR3d 201.

Modern status of intentional infliction of mental distress as independent tort: "outrage." 38 ALR4th 998.

4. Intentional Infliction of Mental Distress § 2 (NCI4th)— repossession of automobile—summary judgment for defendants— forecast of severe emotional distress

Summary judgment for defendants was partially correct on a claim for intentional infliction of mental distress arising from the repossession of an automobile on the ground that plaintiffs have not forecast evidence of severe emotional distress where defendants demonstrated with the introduction of the deposition testimony of plaintiff Hallie Holloway that she did not suffer severe and disabling emotional distress; while plaintiffs assert that proof that defendant behaved outrageously may self-evidently support a finding of severe emotional distress, any inference of emotional distress to be drawn from defendants' outrageous conduct is not enough to withstand the motion for summary judgment in light of the deposition testimony. However, summary judgment was improper for the remaining plaintiffs because defendants did not affirmatively demonstrate the absence of a genuine issue.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 4 et seq., 17.

Recovery by debtor, under tort of intentional or reckless infliction of emotional distress, for damages resulting from debt collection methods. 87 ALR3d 201.

Modern status of intentional infliction of mental distress as independent tort: "outrage." 38 ALR4th 998.

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

Appeal of right by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 109 N.C. App. 403, 428 S.E.2d 453 (1993), reversing a ruling by Barnette, J., declining to submit an issue of punitive damages to the jury, made at the 3 June 1991 Session of Superior Court, Durham County.

Plaintiffs' petition for discretionary review of the Court of Appeals' decision affirming summary judgment for defendants on plaintiffs' claims for intentional infliction of emotional distress entered by Currin, J., at the 24 July 1989 Session of Superior Court, Durham County, allowed on 29 July 1993. Heard in the Supreme Court 18 November 1993.

Michaux and Michaux, by Eric C. Michaux, for plaintiff-appellant-appellees.

James T. Bryan, III, for defendant-appellant-appellee Jean Dawson.

Poe, Hoof & Reinhardt, by J. Bruce Hoof and James C. Worthington, for defendant-appellant-appellee Wachovia Bank & Trust.

EXUM, Chief Justice.

This is an action filed 27 April 1988 seeking recovery under the Debt Collection Act, Chapter 75, Article 2, of the General Statutes, for the torts of assault, battery, and intentional infliction of emotional distress. The claims arise out of an attempt on 28 June 1986 by defendant Dawson, allegedly acting as the agent of defendant Wachovia Bank and Trust Company (Wachovia), to repossess a vehicle owned by plaintiff Hallie Holloway which she had financed through Wachovia. The conduct of Dawson allegedly took place in the presence of all four plaintiffs. Sue Holloway is the mother of Hallie Holloway, and both were adults at the time of the incident. Damien Holloway is the son of Hallie Holloway, and at the time of the incident he was four months old. Swanzett Holloway is Hallie Holloway's niece, and at the time of the incident she was ten years old. Wachovia answered and counterclaimed against Hallie Holloway on the underlying debt, ultimately obtaining default judgment on the counterclaim.

After a hearing, Judge Currin on 22 August 1989 dismissed the assault and battery claims of the adult plaintiffs on the ground of the one-year statute of limitations, N.C.G.S. § 1-54(3), dismissed the Debt

Collection Act claims of all plaintiffs except Hallie Holloway and allowed summary judgment for defendants on all plaintiffs' claims for intentional infliction of emotional distress.[1]

Hallie Holloway's Debt Collection Act claim, Damien Holloway's assault and battery claim and Swanzett Holloway's assault claim came on for trial before Judge Barnette and a jury at the 3 June 1991 Session of Superior Court, Durham County. At the close of plaintiffs' evidence, the court granted defendants' motion for a directed verdict as to the assault claims and the battery claim. The court denied plaintiffs' request to submit an issue and an instruction on punitive damages, apparently on the ground plaintiffs had not prayed for punitive damages in their complaint. The jury found that defendant Dawson committed "an unfair act of debt collection" in violation of the Debt Collection Act and awarded Hallie Holloway $1000, the maximum penalty then allowed by this Act. *See* 1977 Sess. Laws ch. 747, § 4.[2] The court's judgment directed that the $1000 be applied as an offset against Wachovia's default judgment for $1933.75 against Hallie Holloway.

Plaintiffs appealed to the Court of Appeals. The Court of Appeals, in addition to ruling on various aspects of the case not now before us, affirmed the dismissal of Damien Holloway's assault claim, reversed the dismissal of Damien Holloway's claim for battery and reversed the dismissal of Swanzett Holloway's claim for assault. It remanded these claims for a new trial. The Court of Appeals also ruled that on retrial of these claims plaintiffs were entitled to an issue on punitive damages, concluding that failure to include punitive damages in the complaint's prayer for relief was not fatal to their recovery when such damages were otherwise supported by the complaint's factual allegations and proof at trial. Judge Lewis dissented as to this aspect of the Court of Appeals' decision. The Court of Appeals unanimously affirmed the trial court's summary judgment for defendants on plaintiffs' claims for intentional infliction of emotional distress.

Defendants appealed the Court of Appeals' decision on the punitive damages issue, and we granted the plaintiffs' petition for discre-

1. A number of other rulings were made at various times by the trial court denying plaintiffs' motions to amend pleadings to assert new claims, to add a prayer for punitive damages and dismissing a new action by plaintiffs arising out of the same incident but asserting new theories of recovery. Inasmuch as the correctness of these rulings is not before us, we will not discuss them except as may be helpful in understanding our decisions on the substantive issues before us.

2. The Act was amended in 1991 to increase the maximum penalty to $2000. 1991 Sess. Laws ch. 68, § 1 (codified at N.C.G.S. § 75-56 (1994)).

tionary review of the Court of Appeals' decision on the intentional infliction of emotional distress issue. We denied plaintiffs' petition for discretionary review of the other decisions of the Court of Appeals.

I.

The evidence at trial showed the following:

On Saturday 28 June 1986 Hallie Holloway, along with her mother Sue, her four-month-old son Damien, and her ten-year-old niece Swanzett, drove from Timberlake to Roxboro to do some shopping and the family laundry. Hallie drove her car, which had been purchased with a loan from Wachovia Bank and Trust. Hallie was in default on some of her payments at this time.

At about 1:00 p.m. Jean Dawson, who was employed by Wachovia to repossess cars, drove through Roxboro on her way to Virginia. Plaintiffs were inside the launderette when Dawson saw Hallie's car outside. Dawson recognized the car as one assigned to her for repossession. Sue exited the launderette to place clothes in the car and Dawson asked her who owned the car. Sue replied that Hallie owned the car and then returned to the launderette. Dawson returned to her car, drove to a phone booth, and called for a tow truck. She then drove her car into a position impeding Hallie's car.

Hallie, carrying Damien, and Swanzett then exited the launderette. Dawson stopped them, identified herself as an employee of Wachovia, and said that she was going to repossess the car due to the default on the loan. Hallie complained that if the car was repossessed she would be stranded in Roxboro. Hallie then entered the car with Damien and ordered Swanzett into the back seat. Dawson followed Hallie to the car. She stood at the door and told Hallie that she, Hallie, could not leave with the car. Hallie protested, whereupon Dawson reached through the open window in an attempt to get the keys. A struggle ensued in which Dawson made contact with Hallie and Damien. Sue then emerged from the launderette with more clothes. Noticing the struggle, she wedged herself between the car and Dawson and asked, "What's going on?"

Dawson then went to her car and retrieved a .22 caliber blue steel Astra pistol. Brandishing the sidearm, she returned to Hallie's car. According to plaintiffs, Dawson pointed the gun at Hallie and ordered the plaintiffs to leave the car and remove their belongings. According to Dawson, she merely held the gun by her side, in a holster, due to her fear of the plaintiffs; thus according to Dawson she never pointed

the gun at any plaintiff. Sue, who was in the passenger seat, offered to pay the money owed on the loan if Dawson would allow them to leave. A Roxboro police officer drove by, which distracted Dawson. Hallie took this opportunity to back up and drive around Dawson's car, grazing Dawson's bumper in the process. Dawson took chase in her vehicle, but soon lost sight of the car.

II.

There are two issues presented on appeal: (A) Whether at retrial plaintiffs are entitled to an instruction on punitive damages, and (B) whether summary judgment was proper as to plaintiffs' claims for intentional infliction of emotional distress.

A.

[1] The Court of Appeals panel below reversed the trial court's directed verdict in favor of defendants on Damien's battery claim and Swanzett's assault claim. The majority of the panel then held that Damien and Swanzett could at retrial seek punitive damages even though they had not expressly requested punitive damages in their pleadings.[3] Judge Lewis dissented from this part of the opinion on the ground that the failure to plead specially punitive damages is fatal to the recovery of such damages at trial. The issue before us is what must be contained in the pleading to entitle a plaintiff to have submitted to the jury the issue of punitive damages. Essentially, we agree with the majority of the Court of Appeals panel on this issue.

The complaint alleged that Wachovia "by and through said defendant employee [Dawson] did violently, willfully, and intentionally assault the plaintiffs by displaying and aiming a firearm at the plaintiffs intending by such act to put plaintiffs in apprehension of an immediate harmful contact." It further alleged that Dawson "batter[ed] them by pressing her elbow, forearm and then upper arm . . . against the arm, leg and head of plaintiff Damien Lee Holloway in a forceful, aggressive and intentional manner . . . causing him to cry."

3. When the case was submitted to the jury the only issue to be decided was Hallie's claim under the Debt Collection Act. As that claim will not support an award of punitive damages, *see Pinehurst, Inc. v. O'Leary Brothers Realty, Inc.*, 79 N.C. App. 51, 63, 338 S.E.2d 918, 925, *disc. rev. denied*, 316 S.E.2d 378, 342 S.E.2d 896 (1986), the jury had before it no claim which would support an award of punitive damages. The panel thus was not reviewing the trial court's decision whether to submit an issue of punitive damages on Damien's and Swanzett's claims, but solely whether punitive damages could be sought at retrial.

The complaint sought recovery for intentional infliction of emotional distress, assault, and violations of N.C.G.S. §§ 75-51 and 75-56, relating to threatening or coercive debt collection practices. In addition, plaintiffs Hallie and Damien alleged battery. The claims for relief did not specify any type of recovery. The prayer for judgment stated:

> WHEREFORE, Plaintiffs pray the Court as follows:
>
> 1. That a judgment be entered in favor of each individual plaintiff against the defendant.
>
> 2. That each judgment amount assessed be increased by treble the amount fixed.
>
> . . . .
>
> 5. For such other and further relief this Court may deem just and proper.

The complaint did not refer specifically to punitive damages.

We have twice stated in dictum that "it seems that punitive damages need not be specially pleaded by that name in the complaint." *Cook v. Lanier*, 267 N.C. 166, 172, 147 S.E.2d 910, 915 (1966); *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 344, 88 S.E.2d 333, 342 (1955). Although *Cook* and *Lutz Industries* predate our current Rules of Civil Procedure, we now affirm that dictum on this issue after examining it in light of our current Rules.

Rule 8(a) provides:

> A pleading . . . shall contain [a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions . . . intended to be proved showing that the pleader is entitled to relief, and [a] demand for judgment for the relief to which he deems himself entitled. . . .

Rule 54(c) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Rules 8(a) and 54(c), when read together, reject any strict rule that a certain measure of damages must be specifically sought in the prayer for relief. Rule 54(c) clearly contemplates that a party may recover damages which are not expressly requested. Even where a party requests the wrong measure of damages, the court may grant relief to the party entitled regardless of the error in the pleading. *Port*

Authority v. Roofing Co., 32 N.C. App. 400, 407-08, 232 S.E.2d 846, 852 (1977), *aff'd*, 294 N.C. 73, 240 S.E.2d 345 (1978) (plaintiff obtains relief even though complaint sought wrong measure of damages). The purpose of Rule 8(a) is to establish that the plaintiff will be entitled to some form of relief should he prevail on the claim raised by the factual allegations in his complaint; the purpose of Rule 54(c) is to provide plaintiff with whatever relief is supported by the complaint's factual allegations and proof at trial.

Further, as our rules are derived from the federal rules, which have been adopted by several other states as well, we look for guidance to authorities on the federal rules and decisions from other jurisdictions using the same rules. *See Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1975). One authority has stated:

> Because of the second sentence of Rule 54(c), the demand for judgment required by Rule 8(a)(3) loses much of its significance once a case is at issue. If defendant has appeared and begun defending the action, adherence to the particular legal theories of counsel that may have been suggested by the pleadings is subordinated to the court's duty to grant the relief to which the prevailing party is entitled, whether it has been demanded or not.

10 Charles A. Wright, *Federal Practice and Procedure* § 2664 (2d ed. 1983) (footnotes omitted). "[T]he prayer for relief does not determine what relief ultimately will be awarded." *Id.* Instead, "the court should grant the relief to which a party is entitled, whether or not demanded in his pleading." 6 James W. Moore et al., *Moore's Federal Practice* ¶ 54.60 (2d ed. 1994); *see also* W. Brian Howell, Howell's *Shuford North Carolina Civil Practice and Procedure* § 8-3 (4th ed. 1992) ("So long as some demand for relief is made, it apparently is not crucial that the wrong relief has been demanded.").

Defendants cite two cases in support of their contention that a plaintiff must specifically plead punitive damages. In *Campbell v. Thornton*, 644 F. Supp. 103, 105 (W.D. Mo. 1986), the court implicitly held the plaintiff could not recover punitives which were not demanded in the pleadings. The court, however, proceeded to state, "It bears emphasis that the complaint herein did not contain a prayer for punitive damages *nor* did it even allege that the defendants had acted willfully, maliciously, or with callous disregard for the plaintiff's rights." *Id.* (emphasis in original). By contrast, plaintiffs in the case at bar alleged conduct committed "willfully." Defendants also cite *Olson v. Shinnohon Kisen K.K.*, 25 F.R.D. 7 (E.D. Pa. 1960). In that case the

issue was not decided on the pleadings; instead "the Court rest[ed] its decision basically upon the proposition that once the issues are settled in pre-trial proceedings and by a pre-trial order, the case shall go to trial on the issues there determined." *Id.* at 9.

Thus, based on our Rules and on the persuasive authorities cited, we hold that a plaintiff need not specially plead punitive damages as a prerequisite to recovering them at trial. Rule 54(c), however, does not render the pleadings meaningless. The most fundamental tenet of modern pleading rules is that the pleadings should give "sufficient notice of the claim asserted 'to enable the adverse party to answer and prepare for trial . . . and to show the type of case brought.' " *See Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970) (quoting Moore's Federal Practice § 8.13 (2d ed. 1968)). The issue is thus not whether the plaintiff specifically demanded punitive damages, but whether "the complaint . . . gave sufficient notice of a claim . . . for punitive damages." *Henry v. Deen*, 310 N.C. 75, 85-86, 310 S.E.2d 326, 333 (1984).

Our decision is in accord with the majority of jurisdictions which have addressed this issue. It has been stated:

> If the facts alleged by the plaintiff in an action for damages show that the wrong complained of was inflicted with malice, oppression, or other like circumstances of aggravation, exemplary or punitive damages may be recovered without being specially pleaded, although there is other authority that a high degree of specificity is required in pleading punitive damages. However, the plaintiff may specifically demand those damages. In other words, *it is not necessary to claim exemplary damages by name if the facts alleged are such as to warrant their assessment.*

22 Am. Jur. 2d *Damages* § 842 (1988) (footnotes omitted) (emphasis added). In *Guillen v. Kuykendall*, 470 F.2d 745, 748 (5th Cir. 1972), for example, the court held that "[i]t is not necessary to claim exemplary damages by specific denomination if the facts" support a claim for exemplary damages. *See also Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1182 (Utah 1983) (holding that plaintiff "could claim punitive damages under Rule 54(c) [without having demanded them in the pleadings and] without a formal amendment to the pleadings"); 22 Am. Jur. 2d *Damages* § 842 n.82 (citing numerous cases).

We hold, therefore, that where a pleading fairly apprises opposing parties of facts which will support an award of punitive damages, they may be recovered at trial without having been specially pleaded.

[2] Applying this rule to the case before us, we conclude defendants were fairly apprised by the complaint of facts which would support an award of punitive damages at trial. The complaint alleged that Dawson intentionally pointed a gun at the plaintiffs in an attempt to intimidate them. It also alleged that Dawson reached into Hallie's vehicle and struggled with her, making contact with Damien and Hallie in the process. These are all intentional acts of the type giving rise to punitive damages. *See, e.g., Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964) (describing various assault and battery claims). *See Shugar v. Guill*, 304 N.C. at 338, 283 S.E.2d at 510 (in concluding that complaint was sufficient to support punitive damages, court emphasized that "there was sufficient information in the complaint from which defendant could take notice and be apprised of" the events underlying the claim for punitive damages); *Guillen*, 470 F.2d at 746, 748 (where plaintiff alleged that defendant shot him for drinking water from a well on plaintiff's father's land, the "complaint alleged malice and unwarranted excessive actions" and thus punitives were available even though not specially pleaded).

We note, too, that the three torts alleged in the complaint support punitive damages when accompanied by aggravation: assault, battery, and intentional infliction of emotional distress. *See, e.g., Shugar v. Guill*, 304 N.C. at 335, 283 S.E.2d at 509; *Wilson v. Pearce*, 105 N.C. App. 107, 121, 412 S.E.2d 148, 155, *disc. rev. denied*, 331 N.C. 291, 417 S.E.2d 72 (1992). Only the claim based on the Debt Collection Act would not support punitive damages. *See* N.C.G.S. § 75-16 (1988) (person injured by violation of Chapter 75 shall receive treble damages); *Pinehurst, Inc. v. O'Leary Brothers Realty, Inc.*, 79 N.C. App. 51, 63, 338 S.E.2d 918, 925, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986) (punitive damages not recoverable under Chapter 75). Therefore, the complaint fairly apprised defendants of facts which would support an award of punitive damages at trial. *Compare Warren v. Colombo*, 93 N.C. App. 92, 102, 377 S.E.2d 249, 255 (1989) (where punitives were not specifically sought in pleading, plaintiff could not ask for them at trial since his "allegation of willful and wanton conduct against [defendant] is buried among negligence allegations").

Other allegations in the complaint served to put defendants on notice of facts which would support an award at trial of punitive damages. The complaint alleged that Dawson assaulted plaintiffs by pointing the gun at them "violently" and "willfully" and that Dawson battered Damien in a "forceful" and "aggressive" manner. These words demonstrate the element of aggravation necessary to award

punitive damages for the torts of assault and battery. *See Hardy v. Toler*, 288 N.C. 303, 306, 218 S.E.2d 342, 345 (1975); Sam J. Ervin, Jr., *Punitive Damages in North Carolina*, 59 N.C. L. Rev. 1255 (1981). The word "willful," often used in conjunction with the word "wanton," is an established term of art alluding to conduct that supports an award of punitive damages. *See Bonaparte v. Fraternal Funeral Home*, 206 N.C. 652, 656, 175 S.E.2d 137, 139 (1934); *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 519, 361 S.E.2d 909, 914 (1987), *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). Moreover, these words are unnecessary to establish a claim for assault or battery. *Myrick v. Cooley*, 91 N.C. App. 209, 215, 371 S.E.2d 492, 496, *disc. rev. denied*, 323 N.C. 477, 373 S.E.2d 865 (1988). The use of the words "violently," "willfully," "forceful," and "aggressive" thus tend to put defendants on fair notice of facts which would support an award of punitive damages at trial.

Defendants argue that "[b]ecause a plaintiff may not recover both punitive and treble damages in such a case, Plaintiff-Appellees' specific request for treble damages, and their seemingly deliberate omission of a claim for punitive damages, reasonably led [us] to assume that punitive damages were not sought in this particular case." While we agree with defendants that the whole pleading must be examined to determine whether defendants were fairly put on notice of a claim for punitive damages, we nevertheless find this contention to be without merit.

A plaintiff is not precluded from seeking both punitive and treble damages; only for purposes of an actual recovery must an election between the two be made. *United Laboratories v. Kuykendall*, 335 N.C. 183, 188 n.3, 437 S.E.2d 374, 377 n.3 (1993). That the pleadings seek one form of relief does not automatically preclude recovery of another not specifically requested. Also, plaintiffs clearly were not entitled to treble damages on their debt collection claim as such claims are exempt from the treble damages provisions of Chapter 75. N.C.G.S. § 75-56. The trial court in fact granted defendants' motion to strike the demand for treble damages from the complaint nearly two years before trial.

Defendants also emphasize that on two occasions plaintiffs unsuccessfully attempted to amend their complaint to seek punitive damages and that plaintiffs unsuccessfully attempted to file a second suit requesting punitive damages. Defendants assert that these actions "further confirmed [our] conclusion [that] [t]his case did not

involve a punitive damages issue." These proposed amendments and the second complaint, however, asserted only claims for "gross negligence" in Wachovia's hiring and retention of Dawson and violations of particular statutes. Plaintiffs never attempted to amend the complaint, nor bring a second complaint, to request punitive damages for the claims for assault, battery, and intentional infliction of emotional distress. Thus the denials of the motions to amend and the dismissal of the second suit had no bearing on whether plaintiffs would seek punitive damages at trial for the assault, battery, and intentional infliction of emotional distress claims.

Finally, defendants assert that they had not prepared the case to be tried as one for punitive damages; therefore, it would have been unfair to submit an issue on punitive damages. Having concluded the complaint fairly apprised defendants of facts strongly supportive of punitive damages, we are not persuaded by this argument. What issues are to be submitted at trial should be settled in advance of trial at the pretrial conference memorialized by a pre-trial order. *See* N.C. R. Civ. P. 16; General Rules of Practice for the Superior and District Courts, Rule 7.[4]

Read as a whole, the complaint fairly advised defendants of facts which would support an award of punitive damages, and thus plaintiffs are entitled to an issue on punitive damages for their claims to be tried at retrial.

B.

[3] We next address the Court of Appeals' decision affirming the order of the trial court granting summary judgment against plaintiffs on their claims for intentional infliction of emotional distress (IIED). The Court of Appeals reasoned that under *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981), "the plaintiff must show that there was a threat of future harm." 109 N.C. App. at 412, 428 S.E.2d at 458. After reviewing the pleadings and depositions, the court concluded that plaintiffs had not alleged this element and that the forecast of evidence negated this element. Plaintiffs argue that the Court of Appeals' application of *Dickens* was error. Defendants argue that the Court of Appeals was correct in its reasoning; they further argue that summary judgment was proper since plaintiffs did not forecast evidence that they suffered severe emotional distress.

4. While the record before us in this case contains a pre-trial order, it refers to the parties' contentions as to the issues for trial by exhibit number. The exhibits are not part of the record before us.

Rule 56 provides that summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. R. Civ. P. 56(c). Summary judgment is appropriate where the movant proves that an essential element of the claim is nonexistent or that the opposing party cannot produce evidence to support an essential element of his claim. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). When the movant shows by either of these methods that there is no genuine issue of material fact, the non-movant, in order to avoid summary judgment against him, "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C. R. Civ. P. 56(e).

The essential elements of a claim for intentional infliction of emotional distress are "1) extreme and outrageous conduct by the defendant 2) which is intended to and does in fact cause 3) severe emotional distress." *Dickens v. Puryear*, 302 N.C. at 452, 276 S.E.2d at 335.

The forecast of evidence before the trial court at the summary judgment hearing consisted of the following: The complaint alleged that Dawson, an agent of Wachovia, aimed a gun at all plaintiffs, causing them apprehension and severe mental suffering, and made physical contact with Damien and Hallie, causing them emotional trauma. The complaint also alleged that defendants' actions constituted an intentional infliction of emotional distress. Defendants' answer denied these allegations. Further, defendants submitted the deposition testimony of Hallie Holloway, which is set forth in material part later in this opinion.[5]

1.

Defendants' first argument in support of summary judgment on the IIED claims is that pursuant to our holding in *Dickens*, plaintiffs must allege and prove a threat of future harm committed by defend-

5. The transcript reveals that defendants also deposed Sue and Swanzett Holloway. While the record on appeal contains one page of Sue's deposition testimony relating to whether she perceived a future threat, it contains no more of Sue's deposition and none of Swanzett's deposition. Since the portions of the depositions which are discernable from the transcript contain no forecast of evidence relating to Sue's or Swanzett's alleged emotional distress, they are immaterial to our disposition of the summary judgment issue.

ants. Since the forecast of evidence at the summary judgment hearing demonstrates that there was no such threat, defendants argue, summary judgment for them on this claim is proper. This was the position taken by the Court of Appeals. For the following reasons, we disagree.

This position is based on a misreading of *Dickens*. *Dickens*, like the present case, involved claims for assault, battery and IIED where the statute of limitations barred the assault and battery claims. In addition, however, to defendants' various batteries causing physical injuries to plaintiff and defendants' threats of immediate harm communicated to plaintiff in *Dickens*, there was also some evidence of defendants' threats of future harm to the plaintiff. The primary holding of *Dickens* was this: Since an assault requires a threat of imminent offensive contact as opposed to a threat of future contact, "threats for the future are actionable, if at all, not as assaults but as intentional inflictions of emotional distress." *Id.* at 446, 276 S.E.2d at 331.

When assault and battery claims and an IIED claim arise out of the same conduct and the assault and battery claims are barred by the statute of limitations, *Dickens* did not hold that a threat of future harm is a necessary element required to sustain the IIED claim. It held rather that under these circumstances the threat of future harm is actionable, if at all, not as an assault claim but only as an IIED claim. *Dickens* did not alter the elements of an IIED claim; these elements remain the same notwithstanding the factual context out of which the claim arises. Even when the IIED claim arises from facts which would also sustain claims for assault and battery, which may or may not be barred by the statute of limitations, the elements of the IIED claim as do the elements of the assault and battery claims remain the same. Whether plaintiff may recover on any or all of these claims depends on the extent to which the elements of any or all of them may be proved.

When, however, the assault and battery claims are barred by the statute of limitations, as they were in *Dickens* and as they are in the instant case as to the adult plaintiffs, we thought it advisable in *Dickens* to try to delineate the extent to which a plaintiff's recovery of damages in the viable IIED claim might be barred because they derive exclusively from the assault, or the battery, or both. In an effort to sort out the possible recoveries available to a plaintiff whose assault and battery claims are barred by the statute of limitations but who has a viable claim for IIED arising out of the same incident as the assault and battery, we said:

Here much of the factual showing at the hearing related to assaults and batteries committed by defendants against plaintiff. The physical beatings and the cutting of plaintiff's hair constituted batteries. The threats of castration and death, being threats which created apprehension of immediate harmful or offensive contact, were assaults. Plaintiff's recovery for injuries, mental or physical, caused by these actions would be barred by the one-year statute of limitations.

The evidentiary showing on the summary judgment motion does, however, indicate that defendant Earl Puryear threatened plaintiff with death in the future unless plaintiff went home, pulled his telephone off the wall, packed his clothes, and left the state. The Court of Appeals characterized this threat as being "an immediate threat of harmful and offensive contact. It was a present threat of harm to plaintiff . . . ." 45 N.C. App. at 700, 263 S.E.2d at 859. The Court of Appeals thus concluded that this threat was also an assault barred by the one-year statute of limitations.

We disagree with the Court of Appeals' characterization of this threat. The threat was not one of imminent, or immediate, harm. It was a threat for the future apparently intended to and which allegedly did inflict serious mental distress; therefore it is actionable, if at all, as an intentional infliction of mental distress. *Wilson v. Wilkins*, *supra*, 181 Ark. 137, 25 S.W.2d 428; Restatement 31, Comment a, pp. 47-48.

The threat, of course, cannot be considered separately from the entire episode of which it was only a part. The assaults and batteries, construing the record in the light most favorable to the plaintiff, were apparently designed to give added impetus to the ultimate conditional threat of future harm. Although plaintiff's recovery for injury, mental or physical, directly caused by the assaults and batteries is barred by the statute of limitations, these assaults and batteries may be considered in determining the outrageous character of the ultimate threat and the extent of plaintiff's mental or emotional distress caused by it.

Dickens, 302 N.C. at 454-55, 276 S.E.2d at 336.

At this point we inserted a footnote which read:

We note in this regard plaintiff's statement in his deposition that "[i]t is not entirely [the future threat] which caused me all of my emotional upset and disturbance that I have complained

> about. It was the ordeal from beginning to end." If plaintiff is able to prove a claim for intentional infliction of mental distress it will then be the difficult, but necessary, task of the trier of fact to ascertain the damages flowing from the conditional threat of future harm. Although the assaults and batteries serve to color and give impetus to the future threat and its impact on plaintiff's emotional condition, plaintiff may not recover damages flowing directly from the assaults and batteries themselves.

Id. at 455 n.11, 276 S.E.2d at 336 n.11.

While the footnote and, to a lesser extent, the accompanying text are not worded with optimum precision, properly understood this portion of *Dickens* means this: Where the assault and battery claims are barred by the statute of limitations and the IIED claim remains viable, full recovery in the IIED claim may be had for all damages proximately caused by defendant's conduct upon which the IIED claim rests. The only damages which may be barred are those damages which are recoverable, if at all, exclusively in the barred assault and the battery claims as, for example, damages resulting from certain physical injuries inflicted by the battery. The assault or the battery, or both, however, may amount to extreme and outrageous conduct which is intended to cause and which does cause severe emotional distress. If so, then they satisfy the elements of an IIED claim and all damages proximately flowing from plaintiff's severe emotional distress caused in turn by this conduct are recoverable. Such damages are not barred because they are proximately caused by conduct which also amounts to an assault or battery, or both, even when the assault and battery claims, themselves, are barred by the statute of limitations.

As *Dickens* does not require that plaintiffs allege and prove a threat of future harm in their claims for IIED, defendants' argument for summary judgment based on the lack of a threat of future harm is rejected.

2.

[4] We next address defendants' contention that summary judgment against plaintiffs was proper since plaintiffs have not forecast evidence of severe emotional distress. In *Waddle v. Sparks*, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992), we stated that the severe emotional distress required for IIED is the same as that required for negligent infliction of emotional distress, which is:

> any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so. [*Johnson v. Ruark Obstetrics & Gynecology Assoc.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990).]

Defendants contend that they are entitled to summary judgment on the ground that plaintiffs have not forecast evidence of severe emotional distress. As to plaintiff Hallie, we agree; as to the other plaintiffs, we disagree.

In support of their summary judgment motion, defendants submitted Hallie's deposition. The deposition contained the following exchange:

> Q. Okay. You haven't lost any income from any job because of this incident have you?
>
> A. No.
>
> Q. You haven't had any medical expenses that are related to this incident?
>
> A. No.
>
> Q. You haven't had any medical treatment or psychological treatment or anything like that because of this incident?
>
> A. No.
>
> . . . .
>
> Q. Now, since this incident occurred have you gone to see any psychiatrist or psychologist?
>
> A. No.
>
> Q. Have you gone to see any medical doctor about this incident?
>
> A. No.
>
> Q. Okay. Have you gone to see anybody for counseling, a minister or anybody at all?
>
> A. No.
>
> . . . .

Q. Well, have you been emotionally upset or have you had any mental-type problem because of this incident?

A. No.

We find that through introduction of this deposition testimony of plaintiff Hallie defendants demonstrated that an essential element of her claim was nonexistent. Specifically, defendants showed that Hallie did not suffer "severe and disabling" emotional distress.

Defendants' forecast of evidence on this point is similar to the forecast of evidence introduced by defendant in *Waddle*, in which we held summary judgment proper. In *Waddle* defendant's forecast of evidence showed plaintiff had not seen a psychiatrist or psychologist since more than ten years before the incidents. *Id.* at 85, 414 S.E.2d at 28. She had taken "nerve pills" after the incident, but that was for family-related stress. The only time she missed work during her employment with the defendant-employer related to family matters. Although the complaint alleged that she was continually upset and frequently cried, her deposition revealed only one such incident and that did not involve the defendant-supervisor. As here, plaintiff in *Waddle* forecast no evidence tending to show the existence of her severe emotional distress. "There is no forecast of any medical documentation of plaintiff's alleged 'severe emotional distress' nor any other forecast of evidence of 'severe and disabling' psychological problems within the meaning of the test laid down in *Johnson v. Ruark*." *Id.*

In an attempt to rebut defendants' forecast of evidence that the element of severe emotional distress was missing in Hallie's claim, plaintiffs assert, "Proof that the defendant behaved outrageously vis-a-vis plaintiff may be self-evident to support a finding that plaintiff suffered severe emotional distress." In support plaintiffs cite from the Restatement of Torts, "Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is itself important evidence that the distress has existed." Restatement (Second) of Torts § 46 cmt. j (1965). The Restatement, however, provides only that outrageous conduct may be some evidence of severe emotional distress, not that outrageous conduct can substitute for severe emotional distress. Any inference of emotional distress to be drawn from defendants' outrageous conduct is not enough to withstand the motion for summary judgment in light of Hallie's deposition testimony. We find the motion for summary judgment as to Hallie's claim for IIED controlled by our decision in

Waddle and affirm the decision of the Court of Appeals upholding the granting of summary judgment as to her claim.

As to plaintiffs Sue, Damien and Swanzett, however, summary judgment was improper. Defendants emphasize that "[t]he Plaintiff-Appellants in the case at bar did not forecast any such evidence [of severe emotional distress]." This may be true, but plaintiffs need not make such a forecast as defendants have not come forward with any documentation or other forecast of evidence required by Rule 56 to support a summary judgment as to plaintiffs Sue, Damien and Swanzett.[6] Rule 56(e) states:

> When a motion for summary judgment is made *and supported as provided in this rule*, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. (emphasis added).

"Only after a moving party meets this burden must the nonmovant 'produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.' " *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 21, 423 S.E.2d 444, 454 (1992) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)); *see also Va. Electric Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191 (1986) ("The burden rests on the movant to make a conclusive showing; until then, the non-movant has no burden to produce evidence."). "A defendant who moves for sum-

6. In their brief defendants assert that "the other Plaintiff-Appellants [other than Hallie] did not receive any medical treatment or experience any effects from the incident with Ms. Dawson." Defendants do not, however, cite to any support in the record for their proposition. We remind counsel for defendants that "[e]vidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, *with appropriate reference to the record on appeal* or the transcript of proceedings, or the exhibits." N.C. R. App. P. 28(b)(5) (emphasis added). We note that with regard to summary judgment against Hallie's claim defendants made appropriate references to the record.

We have, nevertheless, searched the record and are unable to find any support for defendants' contention. In this regard we emphasize that "review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated." N.C. R. App. P. 9(a). Defendants also assert that "as the preceding portions of Hallie Holloway's deposition testimony show, the Plaintiff-Appellants never saw a psychiatrist or psychologist." This statement was made in reference to the deposition testimony reproduced in the text of this opinion. We cannot see, however, how Hallie's deposition testimony relates in any manner to the existence of severe emotional distress of the other plaintiffs.

mary judgment must prevail on the basis of his own affidavits and admissions made by the plaintiff, and unless the defendant's showing is sufficient, there is no burden on the plaintiff to file affidavits showing that he has a cause of action, or even to file counteraffidavits at all." 73 Am. Jur. 2d *Summary Judgment* § 15 (1974). Unlike the situation in *Waddle* and unlike the motion as to Hallie, defendants have not affirmatively demonstrated the absence of a genuine issue. Summary judgment was, therefore, improper as to plaintiffs Damien, Swanzett and Sue.

In sum, defendants have shown that summary judgment against Hallie on the claim for IIED was proper. They have not, however, shown that summary judgment was proper on the IIED claims of Swanzett, Damien and Sue. Thus at retrial these claims are to be tried along with Damien's battery claim and Swanzett's assault claim.

The issues for retrial are Damien's battery claim, Swanzett's assault claim, their claims for IIED and punitive damages, and Sue's claim for IIED and punitive damages. The decision of the Court of Appeals is affirmed in part, reversed in part and the case is remanded to that Court for further remand to the Superior Court, Durham County for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

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

DAVID SIMEON, PETER ZEGLER, AND OTHERS SIMILARLY SITUATED v. JAMES E. HARDIN, JR., DISTRICT ATTORNEY FOR THE FOURTEENTH PROSECUTORIAL DISTRICT

No. 267PA93

(Filed 30 December 1994)

1. Courts § 67 (NCI4th); Declaratory Judgment Actions § 13 (NCI4th)— constitutional challenge to statutes—criminal prosecutions—subject matter jurisdiction

Plaintiffs' pending criminal prosecutions did not deprive the superior court of jurisdiction to consider plaintiffs' constitutional challenge to the statutes which authorize the district attorney to set the criminal trial calendar because the issues raised by plaintiffs could not be authoritatively settled in their individual

criminal cases and the declaratory and injunctive relief sought could not be adequately provided by the criminal court. N.C.G.S. § 7A-245.

Am Jur 2d, Courts §§ 151 et seq.; Declaratory Judgments §§ 68 et seq.

Validity, construction, and application of criminal statutes or ordinances as proper subject for declaratory judgment. 10 ALR3d 727.

2. Constitutional Law § 49 (NCI4th); Declaratory Judgment Actions § 6 (NCI4th)— district attorney's calendaring authority—standing to challenge statutes

Plaintiffs did not lack standing to challenge the statutes which authorize the district attorney to set the criminal trial calendar because their criminal cases were no longer pending at the time of the hearing on the district attorney's motion to dismiss where plaintiffs were both awaiting trial on criminal charges at the time they filed their complaint; plaintiffs alleged injuries suffered as a result of the district attorney's abuse of his calendaring authority; an actual controversy therefore existed between plaintiffs and the district attorney at the time their complaint was filed; and plaintiffs' standing when their complaint was filed was not affected by subsequent events.

Am Jur 2d, Constitutional Law § 190; Declaratory Judgments §§ 25, 26.

3. Actions and Proceedings § 10 (NCI4th); Courts § 2 (NCI4th)— challenge to district attorney's calendaring authority—PJC on criminal charge—claim not moot

Plaintiff Simeon's claim challenging the statutes which authorize the district attorney to set the criminal trial calendar was not rendered moot when plaintiff pled guilty to two misdemeanor assault charges and was sentenced to time served on one count and received a PJC on the other, since the district attorney remains free to pray for judgment against plaintiff on the PJC count at any time; plaintiff thus faces possible future exposure to the district attorney's calendaring practices; and this circumstance is sufficient to give plaintiff a litigable interest in resolving the issues presented in his claim.

Am Jur 2d, Actions § 56; Courts § 75.

4. Actions and Proceedings § 10 (NCI4th); Parties § 82 (NCI4th)— class action—mootness of one plaintiff's claim—continued representation of class

Assuming that plaintiff Zegler's claim challenging the statutes which authorize the district attorney to set the criminal trial calendar was rendered moot when the criminal charges against this plaintiff were dismissed, this case belongs to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of unnamed members of the class since it is unlikely that an individual could have the constitutional challenge to the district attorney's calendaring authority decided before being either released or convicted; other persons similarly situated will be detained under the allegedly unconstitutional procedure; and the claim is thus one that is "capable of repetition, yet evading review." Accordingly, should this action be certified as a class action by the trial court, plaintiff Zegler may continue to represent the interests of the class of similarly situated criminal defendants alleged in plaintiffs' complaint.

Am Jur 2d, Actions § 56; Parties §§ 43 et seq.

5. Constitutional Law § 31 (NCI4th)— constitutionality of procedural rules—jurisdiction of state courts

The General Assembly is not authorized to enact procedural rules that violate substantive constitutional rights, and it remains the duty of the state courts to provide a forum for individuals claiming that procedural rules abridge such rights. N.C. Const. art. IV, § 13(2).

Am Jur 2d, Constitutional Law §§ 326-330.

6. Courts § 60 (NCI4th); District Attorneys § 4 (NCI4th)— calendaring authority of district attorney—constitutionality of statutes—jurisdiction of superior court

The superior court is empowered to review the constitutionality of the statutes which prescribe the duties of the district attorney and to fashion an appropriate remedy should such statutes violate the Constitution.

Am Jur 2d, Courts §§ 87 et seq.; Prosecuting Attorneys §§ 19-32.

7. District Attorneys § 4 (NCI4th)— calendaring authority of district attorney—no facial vesting of judicial power by statutes

The statute authorizing the district attorney to set the criminal trial calendar, N.C.G.S. § 7A-49.3, the portion of N.C.G.S. § 7A-61 which provides that the district attorney "shall prepare the trial dockets," and the portion of N.C.G.S. § 15A-931 which provides that "the prosecutor may dismiss any charges stated in a criminal pleading by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time" do not, on their face, vest the district attorney with judicial powers in violation of the separation of powers clause or intrude upon the trial court's inherent authority since the ultimate authority over managing the trial calendar is retained in the court, and these statutes simply carry out the General Assembly's constitutional mandate to prescribe "such other duties" as are necessary for the district attorney to fulfill the responsibility of prosecuting criminal actions on behalf of the State.

Am Jur 2d, Prosecuting Attorneys §§ 19-32.

8. District Attorneys § 4 (NCI4th)— calendaring authority of district attorney—no facial constitutional violation

The statutes authorizing the district attorney to calendar criminal cases for trial, prepare the criminal trial dockets, and dismiss criminal charges against defendants do not authorize the district attorney to choose a particular judge to preside over a particular criminal case and are not facially invalid under the Due Process Clause of the U.S. Constitution or the law of the land, open courts, or criminal jury trial clauses of the N.C. Constitution.

Am Jur 2d, Prosecuting Attorneys §§ 19-32.

9. District Attorneys § 4 (NCI4th)— calendaring authority of district attorney—unconstitutional application by district attorney—genuine issue of material fact

Plaintiffs' amended complaint and exhibits raised a genuine issue of material fact as to whether statutes authorizing the district attorney to calendar criminal cases for trial, prepare criminal trial dockets, and dismiss criminal charges against defendants are being applied in the Fourteenth Prosecutorial District in a

manner violative of the Due Process Clause of the U.S. Constitution and the law of the land, open courts, and jury trial clauses of the N.C. Constitution where plaintiffs alleged that the district attorney delayed calendaring the first plaintiff's case for trial for the tactical purpose of keeping him in jail, delaying a trial at which he was likely to be acquitted, and pressuring him into entering a guilty plea; the second plaintiff incurred unnecessary witness-related expenses because his case was calendared repeatedly but was never called for trial; the district attorney purposely delays calendaring cases for trial for the purpose of exacting pretrial punishment and pressuring other criminal defendants into pleading guilty; pursuant to N.C.G.S. § 7A-49.3(a1), which allows the district attorney to announce the order of cases for trial on the first day of a criminal session, the defense bar is given less than one day's notice of the order in which cases will be called, and the district attorney calls cases out of the order noted on the printed calendar; the district attorney places a large number of cases on the printed trial calendar with knowledge that all of these cases will not be called, thereby providing defendants virtually no notice of which cases are actually going to be called for trial; and this tactic is often employed by the district attorney in an attempt to surprise defense counsel, thus impairing the quality of criminal defendants' legal representation. U.S. Const. amend. XIV; N.C. Const. art. I, §§ 18, 19, and 24.

Am Jur 2d, Prosecuting Attorneys §§ 19-32.

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of an order granting defendant's motion to dismiss entered by Farmer, J., on 15 March 1993 in Superior Court, Durham County. Heard in the Supreme Court 10 October 1994.

N.C. Prisoner Legal Services, Inc., by Paul M. Green, Ollie Taylor, and Marvin Sparrow, for plaintiff-appellants.

Michael F. Easley, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, and Debra C. Graves, Assistant Attorney General, for defendant-appellee.

Harry C. Martin, Louis D. Bilionis, and David S. Rudolf, on behalf of the North Carolina Academy of Trial Lawyers, the North Carolina Association of Public Defenders, and the National Association of Criminal Defense Lawyers, amici curiae.

Charles E. Burgin, President, for amicus curiae North Carolina Bar Association.

Donald M. Jacobs, President, for amicus curiae North Carolina Conference of District Attorneys.

Moore & Van Allen, PLLC, by Laura B. Luger, on behalf of the American Civil Liberties Union of North Carolina, amicus curiae.

FRYE, Justice.

On this appeal, plaintiffs contend that the superior court erred in dismissing their civil action challenging the Durham County District Attorney's[1] statutory authority to set the superior court's criminal trial calendar. Plaintiffs present three issues on this appeal: (1) whether the superior court erred in dismissing the case for lack of subject matter jurisdiction; (2) whether the superior court erred in concluding that plaintiffs lacked standing to litigate the issues raised in their complaint; and (3) whether the superior court erred in dismissing the case for failure to state a claim upon which relief could be granted. We answer each of these questions in the affirmative and, therefore, reverse the superior court's dismissal of the complaint and remand this case to that court for further proceedings.

On 2 October 1992, plaintiff David Simeon, on behalf of himself and others similarly situated, filed a complaint in Superior Court, Durham County, alleging that under the authority of N.C.G.S. §§ 7A-49.3, 7A-61, and 15A-931, the Office of the District Attorney has been given excessive power over administration of the criminal courts in violation of the state and federal constitutions. The complaint named Simeon as the representative of "all persons who are now, or will in the future be prosecuted on criminal charges in Durham County, for purposes of injunctive and declaratory relief." On 15 October 1992, the complaint was amended as of right, adding Peter Zegler as a named plaintiff in the action.

1. Mr. Ronald Stephens served as District Attorney for the Fourteenth Prosecutorial District (Durham County) during the specific time periods mentioned in plaintiffs' complaint and was the original defendant in this action. Mr. Stephens continued to serve in this position until just prior to this court's grant of plaintiffs' petition for discretionary review, at which time Mr. James E. Hardin, Jr., was appointed District Attorney. Because plaintiffs' action was commenced against Mr. Stephens in his official capacity as the District Attorney for the Fourteenth Prosecutorial District, Mr. Hardin was automatically substituted as the defendant in this action, pursuant to Rule 25(f) of the North Carolina Rules of Civil Procedure. N.C.G.S. § 1A-1, Rule 25(f) (1990).

Plaintiffs' amended complaint contains the following allegations: On or about 13 February 1992, plaintiff David Simeon was arrested and charged with several felonies. The district court found probable cause to proceed on or about 28 February 1992; however, as of the filing of the complaint on 2 October 1992, Simeon had not been to court and remained in jail due to practices of the district attorney. Simeon's case was not placed on the trial calendar until it was calendared for arraignment on or about 17 August 1992. Simeon's case was placed on several arraignment calendars after August 17; however, the case was continued by the district attorney on the grounds that his office had not yet provided discovery and the case was not ready for arraignment—this despite the fact that all discovery required by statute had been available to the district attorney for production since probable cause was established in February. The district attorney delayed Simeon's case for the tactical purposes of keeping him in jail, delaying a trial at which he was likely to be acquitted, and pressuring him into entering a guilty plea. The complaint further alleges that the strategy of the district attorney will continue to be one of delay by means of his control over the criminal trial calendar. Plaintiff Simeon has suffered and continues to suffer harm of a constitutional dimension as a proximate result of the district attorney's control of the criminal trial calendar in that he is being deprived of all his freedoms without benefit of a jury trial or other due process of law.

With reference to named plaintiff Peter Zegler, the amended complaint alleges that, on 20 March 1991, Zegler was convicted of misdemeanor simple assault in district court and appealed to the superior court the next day. Zegler's case was calendared several times in the following nineteen months, but had yet to be called for trial by the district attorney. Due to actions of the district attorney, Zegler's attorney was forced to prepare for trial repeatedly. In addition, on at least one occasion, an important defense witness was flown from out of state and accommodated at a hotel at Zegler's expense, yet Zegler's case was not called for trial. Plaintiff Zegler has suffered and continues to suffer harm of a constitutional dimension as a proximate result of the district attorney's control over the criminal trial calendar.

Plaintiffs' amended complaint further alleges that the statutes in question give the district attorney unbridled discretion to control the progress of criminal cases, including the power to select a particular judge, the power to keep a jailed defendant from being tried for an extended period of time, the power to force criminal defendants released on bail to miss work and come to court repeatedly, and the

power to severely inconvenience disfavored defense attorneys. Plaintiffs allege that these powers are used to the advantage of the State on a regular basis, harming criminal defendants like plaintiffs in ways not readily addressable in their criminal actions.

In addition, plaintiffs' amended complaint seeks 1) a declaration that the statutes violate the United States and North Carolina Constitutions both as written and as applied, and 2) a remedial order placing control of the criminal calendar under the supervision of the court. In the alternative, plaintiffs request an order directing the district attorney to exercise his calendaring authority in compliance with N.C.G.S. § 7A-49.3 and under such further direction of the court as necessary to ensure that justice is administered in a fair, impartial and orderly manner. The complaint does not challenge the validity of any final criminal conviction.

On 16 October 1992, the day after the filing of the amended complaint, plaintiff Simeon and the district attorney entered into a plea agreement whereby Simeon pled guilty to two counts of misdemeanor assault on a female and was sentenced to time served (230 days) on one count and a prayer for judgment continued (PJC) on the other. The district attorney dismissed plaintiff Zegler's misdemeanor simple assault charge on 3 December 1992.

On 30 November 1992, the district attorney filed a motion to dismiss plaintiffs' amended complaint for lack of subject matter jurisdiction and failure to state a claim under Rules 12(b)(1) and 12(b)(6), respectively. On 11 March 1993, a hearing on the district attorney's motion to dismiss was held before Judge Robert L. Farmer in Superior Court, Durham County. In support of his motion, the district attorney offered several exhibits, including certified copies of a transcript of plea in Simeon's case, a notice of dismissal in Zegler's case, and a copy of a letter from the district attorney to Zegler's defense counsel, dated 5 December 1992, memorializing previous agreements regarding the calendaring of Zegler's case for trial. In support of their complaint and in opposition to the district attorney's motion to dismiss, plaintiffs submitted a notebook of thirty-five exhibits, including affidavits from retired judges, former prosecutors, defense attorneys and other defendants in criminal cases in Durham County. These affidavits generally supported the allegations of the complaint and highlighted these individuals' negative experiences with district attorney calendaring in the Fourteenth Prosecutorial District and in other parts of the state. On 15 March 1993, Judge Farmer entered an order

in which he made findings of fact and conclusions of law and granted the district attorney's motion to dismiss.

Plaintiffs appealed to the Court of Appeals. Plaintiffs also petitioned this Court for discretionary review prior to determination by the Court of Appeals. This Court denied the petition on 29 July 1993. The case was briefed by the parties and scheduled for oral argument in the Court of Appeals on 12 March 1994. However, on 8 March 1994, this Court, upon reconsideration, granted plaintiffs' petition for discretionary review prior to determination by the Court of Appeals. We now consider plaintiffs' arguments on appeal.

[1] Plaintiffs first contend that the superior court erred in dismissing their complaint and reaching the following conclusion of law: "Criminal defendants must litigate criminal issues in their own criminal action and not by a separate civil action. The Civil Superior Court has no jurisdiction to hear issues raisable within a criminal proceeding." The superior court relied on *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 323 S.E.2d 294 (1984), in reaching this conclusion. Plaintiffs contend that the rationale of *Tucker* does not apply in this case because *Tucker* involved a challenge to a substantive criminal statute, while this case involves a challenge to procedural statutes. Plaintiffs further contend that the superior court did have jurisdiction to consider their complaint because the issues raised in the complaint and the declaratory and injunctive relief sought could not be adequately addressed within their individual criminal proceedings. We agree.

In *Tucker*, the Attorney General filed a civil complaint seeking a declaration that various portions of the Safe Roads Act of 1983, specifically those dealing with drunken driving, were constitutional. The Attorney General's complaint named as defendants several criminal defendants with drunken driving cases pending in superior court, as well as several superior court judges who had ruled in previous drunken driving cases that various provisions of the Act were unconstitutional. The superior court dismissed the Attorney General's complaint pursuant to Rule 12(b) for want of subject matter jurisdiction.

On discretionary review prior to determination by the Court of Appeals, this Court affirmed the superior court's finding that no actual or real existing controversy existed between the Attorney General and any of the named defendants and held that the superior court correctly dismissed the complaint as to all defendants for lack of jurisdiction. In holding that the trial court lacked jurisdiction to consider claims regarding the individual criminal defendants, this Court relied

on the "general rule against entertaining a declaratory judgment complaint if there is simultaneously pending either a criminal action or civil action involving the same parties and issues . . . ." *Tucker*, 312 N.C. at 353, 323 S.E.2d at 312. We stated that "the interest of the State and of the individual defendants under the Safe Roads Act are matters which can be authoritatively settled in the various pending criminal prosecutions and civil revocation proceedings in an orderly and thorough manner." *Id.*

Tucker is not controlling here. In *Tucker*, the portions of the Safe Roads Act in question were the substantive provisions under which the individual criminal defendants were charged. These substantive statutes were at the heart of the State's prosecution of the individual criminal defendants, and the constitutionality of these statutes could be raised by the individual criminal defendants in defense of their criminal prosecutions. Accordingly, the issue of the Act's constitutionality could be authoritatively settled during the criminal defendants' individual criminal prosecutions.

Unlike *Tucker*, the civil action in this case does not involve the same issues as plaintiffs' individual criminal prosecutions. This case involves a challenge not to the substantive statutes under which plaintiffs were charged, but to the procedural statutes which authorize the district attorney to set the criminal trial calendar. While this challenge may be related to plaintiffs' individual criminal prosecutions, it is collateral to the underlying criminal charges against plaintiffs and the issues which normally arise during a criminal prosecution. *See Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971) (in allowing a civil challenge to a sentencing statute, this Court recognized that while a declaratory judgement is a civil remedy which may not be resorted to in order to try ordinary matters of guilt or innocence, the courts do not lack power to grant a declaratory judgment merely because a questioned statute relates to penal matters). For example, plaintiffs allege that the district attorney exercises his calendaring authority to delay their and other criminal defendants' trials in an attempt to coerce a guilty plea. However, the tendency of prosecutorial calendaring practices to coerce guilty pleas cannot be reviewed in a criminal case because the plea of guilty, unless it is actually involuntary, constitutes a waiver of all antecedent constitutional violations. *Tollett v. Henderson*, 411 U.S. 258, 36 L. Ed. 2d 235 (1973).

In addition, the relief sought by plaintiffs here differs from that sought by the Attorney General in *Tucker*. In *Tucker*, the Attorney General sought only a declaratory judgment. In this case, plaintiffs seek not only a declaratory judgment, but also injunctive relief. Some of the relief sought by plaintiffs, such as an injunction prohibiting the district attorney from preparing trial dockets and calling criminal cases for trial, a standing order governing the docketing and calling of cases or, in the alternative, an order requiring the district attorney to exercise his calendaring authority in a constitutional manner, could be more adequately addressed in a civil action. Furthermore, the district attorney, the sole defendant in the present action and the party against whom injunctive relief is sought, is not a party to plaintiffs' pending criminal prosecutions. The people of the State, rather than the district attorneys, are parties in criminal prosecutions. *See* N.C. Const. art. IV, § 13(1).

Consequently, because the issues raised by plaintiffs could not be authoritatively settled in their individual criminal cases and the relief sought could not be adequately provided by the criminal court, the rationale of *Tucker* does not apply to this case.

We believe that plaintiffs' claims could best be considered and decided by the civil superior court. The superior courts have "general jurisdiction of all justiciable matters of a civil nature" whose jurisdiction is not specifically placed elsewhere. N.C.G.S. § 7A-240 (1989); *Harris v. Pembaur*, 84 N.C. App. 666, 668, 353 S.E.2d 673, 675 (1987). Furthermore, claims for injunctive and declaratory relief regarding "any statute" or "any claim of constitutional right" are the particular province of the superior courts. N.C.G.S. § 7A-245 (1989). Accordingly, we hold that plaintiffs' pending criminal prosecutions did not deprive the superior court of jurisdiction to consider plaintiffs' constitutional challenge to the statutes which authorize the district attorney to set the criminal trial calendar.

[2] Plaintiffs next contend that the trial court erred in concluding that, because their criminal cases were no longer pending at the time of the hearing on the district attorney's motion to dismiss, they lacked standing to challenge the district attorney's calendaring authority. The trial court reached the following conclusion of law: "Individuals without a pending criminal case possess no standing to litigate asserted constitutional wrongs purportedly arising in, or which might in the future arise in, the course of a criminal prosecution involving themselves or others. There must be the presence of an existing jus-

ticiable controversy." Plaintiffs contend that they have standing to challenge the district attorney's calendaring authority because, at the time their complaint was filed, they were criminal defendants subject to the district attorney's calendaring authority, and standing is unaffected by events subsequent to the filing of the complaint. We agree.

"Standing to challenge the constitutionality of a legislative enactment exists where the litigant has suffered, or is likely to suffer, a direct injury as a result of the law's enforcement." *Maines v. City of Greensboro*, 300 N.C. 126, 130-31, 265 S.E.2d 155, 158 (1980). When standing is questioned, the proper inquiry is whether an actual controversy existed "at the time the pleading requesting declaratory relief is filed." *Sharpe v. Park Newspapers*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986). Furthermore, it is the general rule that once jurisdiction attaches, "it will not be ousted by subsequent events." *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978) (judge's retirement did not divest the Judicial Standards Commission of jurisdiction or render the question of his removal moot), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979).

At the time plaintiffs filed their amended complaint in this case, both were awaiting trial on criminal charges in Durham County and were subject to the district attorney's calendaring authority. In their complaint, plaintiffs allege that they have suffered and continue to suffer harm of a constitutional dimension due to the district attorney's calendaring practices. Plaintiff Simeon alleges that the district attorney purposely delayed calendaring his case in order to keep him in jail and to pressure his guilty plea. Plaintiff Zegler alleges that because his case was calendared repeatedly but was never called for trial, he incurred unnecessary witness-related expenses. Accordingly, plaintiffs have alleged injuries suffered as a result of the district attorney's abuse of his calendaring authority and, therefore, an actual controversy existed between plaintiffs and the district attorney at the time their complaint was filed. Consequently, because both plaintiffs possessed standing when the complaint was filed and their standing was not affected by subsequent events, the trial court erred in concluding that plaintiffs lacked standing to pursue their claims.

The district attorney, however, contends that even if plaintiffs' standing to pursue their claims was not affected by subsequent events in their criminal cases, these subsequent events have rendered plaintiffs' claims moot. Accordingly, the district attorney argues that the

trial court was correct in dismissing plaintiffs' complaint. We disagree.

Whenever during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law. *Peoples*, 296 N.C. at 147, 250 S.E.2d at 912. If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action. *Peoples*, 296 N.C. at 148, 250 S.E.2d at 912.

[3] As to named plaintiff Simeon, at the time of the hearing he had pled guilty to two misdemeanor assault charges. Simeon was sentenced to time served on one count and received a PJC on the other. This PJC did not resolve Simeon's criminal case and did not constitute an appealable entry of judgment. *See State v. Maye*, 104 N.C. App. 437, 410 S.E.2d 8 (1991), *appeal dismissed*, 330 N.C. 853, 417 S.E.2d 248 (1992). Furthermore, the district attorney remains free to pray for judgment against Simeon on the PJC count at anytime. Accordingly, plaintiff Simeon faces possible future exposure to the district attorney's calendaring practices, a circumstance sufficient to give him a litigable interest in resolving the issues presented here. Therefore, plaintiff Simeon's claims are not moot, and the trial court should not have dismissed the complaint on this ground.

[4] As to named plaintiff Zegler, at the time of the hearing on the district attorneys' motion to dismiss, all criminal charges against him had been dismissed. As such, Zegler's claims appear to be moot, and the trial court responded in the usual manner by dismissing his claims. However, due to the unique posture of this case, the mootness of Zegler's claims warrants further attention.

In the instant case, plaintiffs propose in their complaint to represent the class of "persons who are now, or will in the future be prosecuted on criminal charges in Durham County." Plaintiffs' motion for class certification was not ruled upon prior to the trial court's dismissal of this action. At this stage, we accept these allegations as true. *See Crow v. Citibank Acceptance Co.*, 319 N.C. 274, 354 S.E.2d 459 (1987). Accordingly, while it is uncertain whether plaintiffs will be able to prove to the trial court that class certification is proper in this case, for purposes of our review we will assume that plaintiffs will be allowed to maintain this action as a class action.

Assuming that the district attorney is correct in asserting that plaintiff Zegler's claims are moot, we believe that this case belongs "to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class." *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11, 43 L. Ed. 2d 54, 63 n. 11 (1974) (class action challenging pretrial detention absent a judicial determination of probable cause allowed to continue despite the fact that the named class representatives were convicted and their pretrial detention ended prior to arguments in the Supreme Court). As the *Gerstein* Court recognized regarding pretrial detention, the named plaintiffs' exposure to the district attorney's calendaring authority is "by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided . . . before he is either released or convicted." *Id.* This is especially true in a case such as this where the district attorney, the defendant in this action, holds the power to dismiss plaintiffs' criminal prosecutions or speed them to trial prior to the resolution of plaintiffs' civil challenge.

Furthermore, accepting plaintiffs' allegations as true, "it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedure." *Id.* The claim, in short, is one that is distinctly "capable of repetition, yet evading review." *Id.* Accordingly, should this action be certified as a class action by the trial court, plaintiff Zegler may continue to represent the interests of the class of similarly situated criminal defendants alleged in plaintiffs' complaint.

Plaintiffs next contend that the trial court erred in dismissing their complaint for failure to state a claim upon which relief may be granted and concluding:

> The District Attorney is a constitutional officer and his duties are set forth in the Constitution and the statutes. Any change of the District Attorney's scope of authority, duties or procedure followed in handling criminal cases must be made by the General Assembly or by amendment to the N.C. Constitution and is not within the inherent authority of the Court to do so.

Plaintiffs contend that their allegations state a claim that the statutes authorizing the district attorney calendaring violate the North Carolina and United States Constitutions, both as written and as applied in the Fourteenth Prosecutorial District.

While the district attorney moved to dismiss under Rule 12(b)(6) and the trial court purported to grant this motion, we believe that the trial court's ruling is more appropriately viewed as a grant of summary judgment for the district attorney because matters outside the pleadings were presented to and not excluded by the trial court. N.C. R. Civ. P. 12(b); *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 325 S.E.2d 223 (1985).

Summary judgment is appropriately granted only where there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. *Branch Banking & Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E.2d 117 (1980). After examining the challenged statutes in light of the powers explicitly granted the district attorney in the Constitution and by the General Assembly as authorized in the Constitution, we conclude that the challenged statutes are constitutional on their face. However, we believe that plaintiffs' amended complaint raises a genuine issue of material fact as to whether the statutes are being applied in an unconstitutional manner in the Fourteenth Prosecutorial District.

[5] We first note that the trial court was incorrect in deciding that it was not within its inherent authority to consider plaintiffs' challenge to the district attorney's calendaring authority. While the superior court was correct in stating that the district attorney is a constitutional officer, all of the district attorney's duties are not prescribed by the constitution. Article IV, Section 18 of the North Carolina Constitution provides, in pertinent part, as follows:

> (1) *District Attorneys.* The General Assembly shall, from time to time, divide the State into a convenient number of prosecutorial districts, for each of which a District Attorney shall be chosen for a term of four years by the qualified voters thereof, at the same time and places as members of the General Assembly are elected. Only persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a District Attorney. The District Attorney shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe.

N.C. Const. art. IV, § 18.

Therefore, the constitution specifically prescribes only three duties for the district attorney: 1) to advise the officers of justice in his district; 2) to prosecute on behalf of the state all criminal actions in the superior courts of his district; 3) to perform such duties related to appeals therefrom as the Attorney General may require. N.C. Const. art. IV, § 18. The remainder of the district attorney's duties, including the docketing of criminal cases, are derived from statutes promulgated by the General Assembly pursuant to authority granted in Article IV, Section 18 of the North Carolina Constitution. N.C. Const. art. IV, § 18.

The trial court's conclusion that it was without authority to review the district attorney's calendaring authority was apparently based, at least to some extent, on Article IV, Section 13(2) of the North Carolina Constitution. The trial court quoted the following passage from that section in its findings of fact: "The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions . . . ." However, the next sentence of that section provides: "No rule of practice or procedure shall abridge substantive rights or limit the right of trial by jury." N.C. Const. art. IV, § 13(2). When these sentences are read together, it is clear that the General Assembly is not authorized to enact procedural rules that violate substantive constitutional rights, and it remains the duty of the state courts to provide a forum for individuals claiming that procedural rules abridge such rights.

[6] The power of the North Carolina courts to declare legislative enactments unconstitutional, and therefore void, is well-established. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787); N.C.G.S. § 7A-245 (1989). As this Court has stated: "Obedience to the Constitution on the part of the Legislature is no more necessary to orderly government than the exercise of the power of the Court in requiring it when the Legislature inadvertently exceeds its limitations." *State v. Harris*, 216 N.C. 746, 764, 6 S.E.2d 854, 866 (1940). Furthermore, the courts have power to fashion an appropriate remedy "depending upon the right violated and the facts of the particular case." *Corum v. University of North Carolina*, 330 N.C. 761, 784, 413 S.E.2d 276, 291, *cert. denied*, —— U.S. ——, 121 L. Ed. 2d 431 (1992). Consequently, we conclude that the superior court is empowered to review the constitutionality of the statutes which prescribe the duties of the district attorney and to fashion an appropriate remedy should such statutes violate the Constitution.

Plaintiffs challenge the constitutionality of N.C.G.S. § 7A-49.3 in its entirety, as well as portions of sections 7A-61 and 15A-931. Section 7A-49.3 provides as follows:

> (a) At least one week before the beginning of any session of the superior court for the trial of criminal cases, the district attorney shall file with the clerk of superior court a calendar of the cases he intends to call for trial at that session. The calendar shall fix a day for the trial of each case listed thereon. The district attorney may place on the calendar for the first day of the session all cases which will require consideration by the grand jury without obligation to call such cases for trial on that day. No case on the calendar may be called for trial before the day fixed by the calendar except by consent or by order of the court. Any case docketed after the calendar has been filed with the clerk may be placed on the calendar at the discretion of the district attorney.
>
> (a1) If he has not done so before the beginning of each session of superior court at which criminal cases are to be heard, the District Attorney, after calling the calendar and disposing of nonjury matters, including guilty pleas, if any such nonjury matters are to be disposed of prior to the calling of cases for trial, shall announce to the court the order in which he intends to call for trial the cases remaining on the calendar. Deviations from the announced order require approval by the presiding judge, if the defendant whose case is called for trial objects; but the defendant may not object if all the cases scheduled to be heard before his case have been disposed of or delayed with the approval of the presiding judge or by consent.
>
> (b) All witnesses shall be subpoenaed to appear on the date listed for the trial of the case in which they are witnesses. Witnesses shall not be entitled to prove their attendance for any day or days prior to the day on which the case in which they are witnesses is set for trial, unless otherwise ordered by the presiding judge.
>
> (c) Nothing in this section shall be construed to affect the authority of the court in the call of cases for trial.

N.C.G.S. § 7A-49.3 (1989). Plaintiffs further challenge the portion of section 7A-61 which provides that the district attorney "shall prepare the trial dockets." N.C.G.S. § 7A-61 (1989). In addition, plaintiffs challenge the portion of section 15A-931 which provides that "the prose-

cutor may dismiss any charges stated in a criminal pleading by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time." N.C.G.S. § 15A-931 (1988).

Plaintiffs contend that the statutes are facially invalid under the Due Process Clause of the United States Constitution and the separation of powers, inherent judicial powers, law of the land, open courts, and criminal jury trial clauses of the North Carolina Constitution. We disagree.

[7] We first address plaintiffs' contentions that the statutes in question vest an executive officer with judicial powers in violation of separation of powers and that this grant of judicial authority intrudes upon the inherent authority of the court. As noted earlier, the Constitution mandates that the district attorney "be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district." N.C. Const. art. IV, § 18. The Constitution also mandates that the district attorney perform such other duties as the General Assembly may prescribe. The General Assembly has chosen to include among the district attorney's duties the responsibility of setting the superior court criminal trial calendar. We do not believe that this grant of authority, on its face, violates separation of powers or infringes upon the superior court's inherent judicial power.

First of all, the district attorney cannot be easily categorized as belonging to any one branch of government. We note that the office of the district attorney is created in Article IV of the Constitution, the Judicial article, rather than in Article III, the Executive article. Furthermore, in the past, this Court has characterized district attorneys as "independent constitutional officers." *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 870 (1991). We have also recognized that solicitors, as district attorneys were formerly known, are officers of the court and, in varied factual situations and in relation to diverse legal problems, may be considered a judicial or quasi-judicial officer. *See State v. Furmage*, 250 N.C. 616, 627, 109 S.E.2d 563, 571 (1959).

Furthermore, we do not believe that the statutes which authorize district attorney calendaring vest the district attorney with judicial powers in violation of separation of powers or intrude upon the trial court's inherent authority. In the civil context, we have recognized that the "trial court is vested with wide discretion in setting for trial and calling for trial cases pending before it." *Watters v. Parrish*, 252 N.C. 787, 791, 115 S.E.2d 1, 4 (1960). We likewise believe that the

criminal superior court has wide discretion in managing criminal cases which are pending before it. However, the vesting of calendaring authority in the district attorney does not intrude upon the court's authority.

Subsection (c) of section 7A-49.3 specifically provides: "Nothing in this section shall be construed to affect the authority of the court in the call of cases for trial." N.C.G.S. § 7A-49.3(c). In addition, this Court has recognized that, while section 7A-61 provides that the district attorney shall prepare the trial dockets, "that statute does not mean that a judge is without authority to schedule a matter for a hearing in court." *State v. Mitchell*, 298 N.C. 549, 550-51, 259 S.E.2d 254, 255 (1979) (holding that a trial judge has the authority and sole responsibility to schedule hearings on post-conviction matters under N.C.G.S. § 15-217.1). Because the ultimate authority over managing the trial calendar is retained in the court, it cannot be said that these statutes infringe upon the court's inherent authority or vest the district attorney with judicial powers in violation of the separation of powers clause. On their face, these statutes simply carry out the General Assembly's constitutional mandate to prescribe "such other duties" as are necessary for the district attorney to fulfill the responsibility of prosecuting criminal actions on behalf of the State.

[8] Furthermore, we do not believe that the statutes in question are facially invalid under the Due Process Clause of the United States Constitution or the law of the land, open courts, or criminal jury trial clauses of the North Carolina Constitution.

Plaintiffs rely on *State v. Simpson*, 551 So. 2d 1303 (La. 1989), for the proposition that the statutes authorizing district attorney calendaring are violative of due process on their face. In *Simpson*, the Louisiana Supreme Court held that a judicial district's system which allowed the district attorney to choose the judge to whom particular criminal cases were assigned violated due process. However, we note that in *Simpson*, the parties stipulated that the state, through the district attorney, did in fact choose the judge to preside over particular criminal cases. *Simpson*, 551 So. 2d at 1304. There has been no such stipulation in this case. Furthermore, we find nothing in the statutes challenged by plaintiffs which authorizes the district attorney to choose a particular judge to preside over a particular criminal case. Accordingly, we are not prepared to assume that the district attorney utilizes his calendaring authority in this manner.

As written, the challenged statutes simply authorize the district attorney to prepare the criminal trial dockets, calendar criminal cases for trial, and dismiss criminal charges against a criminal defendant. The allocation of these duties to the district attorney does not, in and of itself, deprive plaintiffs and other criminal defendants of their constitutional rights. These statutes do not, on their face, deprive plaintiffs and other criminal defendants of their right to a fair and speedy trial, an impartial tribunal, access to the courts, or a trial by jury. Accordingly, these statutes are not facially invalid under the United States or North Carolina Constitutions. Therefore, summary judgment was appropriate and the trial court did not err in dismissing this portion of plaintiffs' complaint.

[9] Plaintiffs next contend that the trial court erred in dismissing their claim that the statutes in question violate the Due Process Clause of the United States Constitution and the law of the land, open courts, and jury trial clauses of the North Carolina Constitution as applied by the Durham County District Attorney.

"Law of the land," as used in Article I, Section 19 of the North Carolina Constitution, has been said to be synonymous with "due process of law" as used in the Fourteenth Amendment of the United States Constitution. *Bulova Watch Co. v. Brand Distributors*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1976) (in construing provisions of the North Carolina Constitution, the meaning given by the United States Supreme Court to even an identical term in the United States Constitution is not binding on this Court, but it is highly persuasive). Accordingly, we review plaintiffs' claims under these two provisions together.

As to procedure, due process means "notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal having jurisdiction of the cause." *In re Moore*, 289 N.C. 95, 101, 221 S.E.2d 307, 311 (1976). It incorporates the principle of adversarial fairness, requiring there to be a "balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474-75, 37 L. Ed. 2d 82, 87 (1973). Due process dictates that there be no punishment of a defendant prior to an adjudication of guilt. *See Bell v. Wolfish*, 441 U.S. 520, 60 L. Ed. 2d 447 (1979); *City of Billings v. Layzell*, 789 P.2d 221 (Mont. 1990) (trial court's unreasonable delay in scheduling trial of pretrial detainee amounted to pretrial punishment in violation of the Fourteenth Amendment). The open courts clause, Article I, Section

18 of the North Carolina Constitution, guarantees a criminal defendant a speedy trial, an impartial tribunal, and access to the court to apply for redress of injury. While this clause "does not outlaw good-faith delays which are reasonably necessary for the state to prepare and present its case," it does prohibit "purposeful or oppressive delays and those which the prosecution could have avoided with reasonable effort." *State v. Johnson*, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969). Furthermore, Article I, Section 24 of the North Carolina Constitution grants every criminal defendant the absolute right to plead not guilty and to be tried by a jury. Criminal defendants cannot be punished for exercising this right. *See State v. Langford*, 319 N.C. 340, 354 S.E.2d 523 (1987).

In the amended complaint, plaintiff Simeon alleges that the district attorney delayed calendaring his case for trial for the tactical purposes of keeping him in jail, delaying a trial at which he was likely to be acquitted, and pressuring him into entering a guilty plea. The complaint also alleges that the district attorney purposely delays calendaring cases for trial for the purpose of exacting pretrial punishment and pressuring other criminal defendants into pleading guilty. Plaintiff Zegler alleges that, because his case was calendared repeatedly but was never called for trial, he incurred unnecessary witness-related expenses.

The complaint further alleges that, pursuant to N.C.G.S. § 7A-49.3(a1), which allows the district attorney to announce the order of cases for trial on the first day of a criminal session, the defense bar is given less than one day's notice of the order in which cases will be called, and the district attorney calls cases out of the order noted in the printed calendar. Furthermore, plaintiffs allege that the district attorney places a large number of cases on the printed trial calendar knowing that all of these cases will not be called, thereby providing defendants virtually no notice of which cases are actually going to be called for trial. This tactic is often employed by the district attorney in an attempt to surprise criminal defense counsel, thus impairing the quality of criminal defendants' legal representation.

We believe that these allegations are sufficient to state a claim that the statutes which grant the district attorney calendaring authority are being applied in an unconstitutional manner in the Fourteenth Prosecutorial District. Plaintiffs' notebook of exhibits tended to support the plaintiffs' allegations. Furthermore, nothing in the district

attorney's motion to dismiss or his exhibits was sufficient to disprove these allegations as a matter of law so as to justify the dismissal of the complaint. Accordingly, summary judgment in favor of defendant district attorney was improper, and the trial court erred in dismissing that portion of the complaint.

For the foregoing reasons, we hold that plaintiffs' pending individual criminal prosecutions did not deprive the superior court of jurisdiction over the claims raised in plaintiffs' complaint. In addition, we hold that plaintiffs did have standing to pursue this civil action and that plaintiff Simeon's claims are not moot. We further hold that the statutes in question are facially valid under both the United States and North Carolina Constitutions. However, we also hold that plaintiffs' amended complaint raises a genuine issue of material fact as to whether the statutes authorizing district attorney calendaring are being applied in an unconstitutional manner by the District Attorney of the Fourteenth Prosecutorial District (Durham County). Accordingly, we reverse the order of the trial court which granted defendant district attorney's motion to dismiss and remand this case to that court for further proceedings not inconsistent with this opinion.

We note again that plaintiffs alleged the prerequisites for a class action in their complaint and filed a motion for class certification which was not ruled upon by the trial court. On remand, the trial court should consider plaintiffs' motion for class certification and determine whether certification is proper in this case.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

STATE OF NORTH CAROLINA v. ALAN HOWARD PENDLETON

No. 478A93

(Filed 30 December 1994)

Constitutional Law § 119 (NCI4th)— Campbell University police force—delegation of police power to religious institution—unconstitutional

The superior court did not err in holding that former N.C.G.S. Chapter 74A was unconstitutional as applied to delegate police powers to Campbell University where an officer on the campus police force arrested a student for driving while impaired on a

public highway near the campus. Under *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, the United States Supreme Court established a clear rule which the North Carolina Supreme Court is required to follow in cases arising under the Establishment Clause: A state may not delegate an important discretionary governmental power to a religious institution or share such power with a religious institution. All parties to this appeal concede that the State of North Carolina delegated its police power to Campbell University. Under *Foley v. Connelie*, 435 U.S. 291, police power is an important discretionary governmental power and, in light of findings of the superior court which were not excepted to and which are therefore binding, and which were based in part on uncontroverted evidence including Campbell University's own bulletin and its definition of its mission, the superior court did not err by concluding that Campbell University is a religious institution.

Am Jur 2d, Constitutional Law §§ 466 et seq.

Justice WHICHARD dissenting.

Justices MEYER and WEBB join in this dissenting opinion.

Appeal of right pursuant to N.C.G.S. § 7A-30 of a decision of the Court of Appeals, 112 N.C. App. 171, 435 S.E.2d 100 (1993), reversing an order entered by Allen (W. Steven, Sr.), J., on 29 April 1992 in Superior Court, Harnett County. Heard in the Supreme Court on 13 September 1994.

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

Patterson, Harkavy and Lawrence, by Martha A. Geer; Stewart and Hayes, by Gerald W. Hayes, Jr.; and Lytch, Tart and Fusco, P.A., by Phillip A. Fusco, for the defendant-appellant.

Robert A. Buzzard for Campbell University, amicus curiae.

Patterson, Harkavy and Lawrence by Burton Craige; and Daniel H. Pollitt; for American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

MITCHELL, Justice.

On 12 April 1991, Officer Reed Jones of the campus police force of Campbell University observed the defendant, Alan Howard

Pendleton, operating an automobile on a public highway near that university's campus in Buies Creek, North Carolina. Jones followed the defendant as the defendant traveled toward the campus. The defendant crossed the center line of the roadway several times and weaved back and forth within his lane of travel. Jones stopped the defendant and arrested him for driving while impaired in violation of N.C.G.S. § 20-138.1. On 26 June 1991, the defendant was convicted in District Court, Harnett County, of driving while impaired. He appealed to the Superior Court for trial *de novo*.

On 3 September 1991, the defendant filed a motion in the Superior Court, Harnett County, seeking dismissal of the charge against him on the ground that Chapter 74A of the General Statutes of North Carolina violated the First Amendment to the Constitution of the United States, and Article I, Sections 13 and 19, of the Constitution of North Carolina. Specifically, the defendant alleged that Chapter 74A was unconstitutional because it permitted employees of a religious institution to be commissioned and function as police officers and thereby authorized a religious institution to exercise the police power of the State. The defendant further alleged that by permitting the State—through its Attorney General—to delegate its police powers to a private, church-owned religious institution, Chapter 74A violated the constitutional separation of church and state because such a delegation "enables state authority to intervene in the church agency."

A hearing was held on the defendant's motion, during which uncontroverted evidence was introduced tending to show, *inter alia*, that Campbell University is closely affiliated with the Baptist State Convention of North Carolina. Campbell University operates a police force consisting of a captain and eight full-time officers. All of the officers of that police force were commissioned as police officers by the Attorney General of North Carolina acting under the provisions of Chapter 74A authorizing him to commission as policemen the employees of certain public and private institutions or companies. At the times relevant to this appeal, Ricky Symmonds was employed as a deputy sheriff by the Harnett County Sheriff's Department. While so employed, Symmonds also acted as the chief of Campbell University's campus police force. Officer Jones, the officer who arrested and charged the defendant Pendleton, was employed as a police officer by Campbell University. The defendant was an undergraduate student at Campbell University and resided in a campus dormitory.

On 29 April 1992, Judge Allen entered an order in the Superior Court, Harnett County, concluding that Chapter 74A was unconstitutional because it created an excessive entanglement of state and church, constituted an impermissible delegation of authority to a religious institution and was an establishment of religion. The order further concluded that the defendant's arrest and the evidence obtained as a result had been invalid, since they had resulted from an unconstitutional delegation and exercise of the State's police power. Based on these conclusions, the order of the Superior Court allowed the defendant's motion to dismiss. The State appealed to the Court of Appeals.

At all times pertinent to this appeal, former Chapter 74A provided[1], *inter alia*:

> Any educational institution . . . whether State or private, . . . may apply to the Attorney General to commission such persons as the institution . . . may designate to act as policemen for it. The Attorney General upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to the persons so appointed a commission to act as such policemen.

N.C.G.S. § 74A-1 (1989) (repealed by Session Laws 1991 (Regular Session, 1992), ch. 1043, § 8 (effective 25 July 1992)). Further, as the Court of Appeals stated in its opinion in the present case, former Chapter 74A also provided

> that policemen commissioned under the Chapter shall possess all the powers of municipal and county police to make arrests for felonies and misdemeanors and to charge for infractions on property owned or controlled by their employers. N.C. Gen. Stat. § 74A-2(b). The authority of policemen who are employed by any college or university extends to the public roads passing through or immediately adjoining the property of the employer. N.C. Gen. Stat. § 74A-2(e)(1). In addition, the authority of such college or

1. After the order of the Superior Court but before this case reached the Court of Appeals, Chapter 74A was repealed in its entirety. N.C. Sess. Laws 1991 (Regular Session, 1992), ch. 1043, § 8 (effective 25 July 1992). Provisions pertaining to the subject matter formerly controlled by Chapter 74A are now found in Chapter 74E of the North Carolina General Statutes. At all times pertinent to this appeal, however, the authority of the university and of the officer who arrested and charged the defendant rested upon former Chapter 74A, exclusively. Therefore, this opinion is directed solely to the constitutionality of those former statutory provisions as they apply to the facts of this particular case.

> university policemen may be extended by agreement between the employer institution's board of trustees and the governing board of the municipality or county in which the institution is located. N.C. Gen. Stat. § 74A-2(e)(2) and (3).

State v. Pendleton, 112 N.C. App. 171, 175, 435 S.E.2d 100, 103 (1993). Applying the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745 (1971), the Court of Appeals concluded:

> Chapter 74A has a secular legislative purpose, its primary effect is neither to advance nor to inhibit religion, it does not foster an excessive entanglement with religion and it is not an unconstitutional delegation of the State's law enforcement authority.

Pendleton, 112 N.C. App. at 180, 435 S.E.2d at 106. The Court of Appeals held that Chapter 74A was constitutional, both on its face and as applied.

Based on the uncontroverted evidence comprising the record on appeal before us, we conclude that the Superior Court did not err in holding that former Chapter 74A was unconstitutional as applied in the present case. Accordingly, we reverse the decision of the Court of Appeals and reinstate the order of the Superior Court, Harnett County, allowing the defendant's motion to dismiss.

The defendant has conceded on appeal before this Court that former Chapter 74 was facially constitutional. The defendant has argued here that former Chapter 74A, which provided *inter alia* for the delegation of the State's police power to educational institutions, was unconstitutional as applied to Campbell University because it violated the First Amendment to the Constitution of the United States and Article I, Sections 13 and 19 of the Constitution of North Carolina.

Ordinarily, when a statute is challenged on constitutional grounds, the best course is to evaluate any challenge made under the state constitution before turning to a review of the statute under the Constitution of the United States. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294-95, 71 L. Ed. 2d 152, 163 (1982). *See Reed v. Madison*, 213 N.C. 145, 147, 195 S.E. 620, 622 (1938). However, where a law has been applied in such a manner as to be a manifest violation of the federal constitution as interpreted by the Supreme Court of the United States, state constitutional review may be unnecessary and dilatory. Based on the particular evidence presented in this case, we conclude that, as applied, former Chapter 74A violated

the First and Fourteenth Amendments to the Constitution of the United States. We base our decision in this case solely on federal constitutional grounds. We neither consider nor decide any state constitutional issues.

In cases applying the Establishment Clause of the First Amendment, the Supreme Court of the United States has developed a three-pronged analytical scheme for determining the constitutionality of legislative enactments. *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745. Under this analytical scheme, known as the Lemon test, to survive constitutional review:

> First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion."

Id. at 612-13, 29 L. Ed. 2d at 755 (citations omitted). If a statute, as applied, violates any one prong of the Lemon test, it is unconstitutional. *Edwards v. Aguillard*, 482 U.S. 578, 583, 96 L. Ed. 2d 510, 518-19 (1987).

We turn our analysis to the third prong of the Lemon test and consider whether, based on the evidence presented in this case, the delegation of the State's police power to Campbell University creates or fosters an excessive government entanglement with religion. This entanglement prong of the Lemon test has been the subject of much debate. It has been criticized as being "blurred, indistinct, and variable" as well as "insolubly paradoxical." *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 768-69, 49 L. Ed. 2d 179, 200 (1976) (White, J., concurring, joined by Rehnquist, J. (now C.J.)). It has been said, for example, that the entanglement prong is paradoxical because it requires that aid to parochial schools be closely watched, yet such close supervision itself creates excessive entanglement. *Wallace v. Jaffree*, 472 U.S. 38, 109, 86 L. Ed. 2d 29, 77 (1985) (Rehnquist, J., dissenting). "The required inquiry into 'entanglement' has been modified and questioned," and the entire Lemon test has been said to have "proven problematic." *Wallace*, 472 U.S. at 68, 86 L. Ed. 2d at 51 (O'Connor, J., concurring).

The Supreme Court's conspicuous nonreliance on *Lemon* in *Lee v. Weisman*, —— U.S. ——, 120 L. Ed. 2d 467 (1992), led some, includ-

ing Mr. Justice Scalia, to believe that the test had been abandoned.[2] However, the Court resuscitated the oft-criticized Lemon test in *Lamb's Chapel v. Center Moriches*, —— U.S. ——, 124 L. Ed. 2d 352 (1993). Employing the Lemon test, Justice White wrote for a clear majority of the Court in *Lamb's Chapel* that "there is a proper way to enter an established decision and Lemon, however frightening it might be to some, has not been overruled." *Lamb's Chapel*, —— U.S. at —— n.7, 124 L. Ed. 2d at 363 n.7. Consequently, the Lemon test remains the yardstick that this Court is required to use for measuring the constitutionality of statutes under the Establishment Clause.

In *Lemon*, the Supreme Court made it abundantly clear that the object of the Establishment Clause is to prevent the intrusion of either church or state into the domains of the other. *Lemon*, 403 U.S. at 614, 29 L. Ed. 2d at 756. The Court stated there:

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction *and churches excluded from the affairs of government.*

Id. at 625, 29 L. Ed. 2d at 763 (emphasis added). We must decide whether the Superior Court erred in concluding that there had been such an intrusion of a religious institution into government affairs, given the particular evidence forming the record in this case.

In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 74 L. Ed. 2d 297 (1982), the Supreme Court considered the excessive entanglement implications of a statute vesting important discretionary governmental powers in a religious institution. Citing the third prong—the entanglement prong—of the Lemon test, the Supreme Court held in that case that the delegation of a State's alcohol licensing power to religious institutions was unconstitutional. In *Larkin*, a Massachusetts statute vested in governing bodies of churches and schools the power effectively to veto applications for liquor licenses for establishments within a 500-foot radius of such churches or schools. Holding the statute unconstitutional, the Supreme Court stated, "The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Larkin*, 459 U.S. at 127, 74 L. Ed. 2d at 307.

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2. "The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision." *Lee*, —— U.S. at ——, 120 L. Ed. 2d at 517 (Scalia, J., dissenting) (citation omitted).

In *Larkin*, the Supreme Court established a clear rule which this Court is required to follow in cases arising under the Establishment Clause: A state may not delegate an important discretionary governmental power to a religious institution or share such power with a religious institution. All parties to this appeal concede that, pursuant to former Chapter 74A, the State of North Carolina delegated its police power to Campbell University. Therefore, this Court must resolve two questions. First, we must determine whether the police power is an important, discretionary governmental power within the Supreme Court's meaning in *Larkin*. Second, we must decide whether the particular uncontroverted evidence presented in this case supports the Superior Court's conclusion that Campbell University is a religious institution of a type contemplated by the Supreme Court in *Larkin*. If the answer to both these inquiries is yes, then we are required to hold that the statute, as applied on the particular facts of this case, is unconstitutional on the ground that it violates the Establishment Clause.

The first question—whether the police power is an important discretionary governmental power—has already been answered clearly and expressly by the Supreme Court of the United States. In *Foley v. Connelie*, 435 U.S. 291, 55 L. Ed. 2d 287 (1978), the Supreme Court held that "the exercise of police authority calls for a very high degree of judgment and discretion." *Id.* at 298, 55 L. Ed. 2d at 294. The Supreme Court clearly and emphatically said that police "are clothed with authority to exercise an almost infinite variety of discretionary powers" and are vested with "plenary discretionary powers." *Id.* at 297-98, 55 L. Ed. 2d at 293-94. Under this unmistakable mandate of the Supreme Court of the United States in *Foley*, we are required to conclude that the police power is an important discretionary governmental power.

Given that the police power is an important, discretionary government power, we must next address the issue of whether, based on the particular uncontroverted evidence in the present case, the Superior Court erred in concluding that for purposes of analysis under the Establishment Clause, Campbell University is a "religious institution" within the meaning of that phrase as used by the Supreme Court in *Larkin*. The Superior Court's findings of fact are conclusive and binding on this Court if supported by substantial evidence. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992). In the present case, the Superior Court, based upon uncontroverted evidence including the "CAMPBELL UNIVERSITY BULLETIN 1990-92," made findings, as follows:

Campbell University is a Baptist University located in Buies Creek, Harnett County, North Carolina. It was founded in [sic] January 5, 1887.

In 1925, the school's property was deeded to the North Carolina Baptist Convention.

Each student that attends Campbell University's undergraduate school is required to take Religion 101 and any additional religion course.

Religion 101 is a basic Bible course with special emphasis on the birth and development of the Israelite nation, the life and time of Jesus and the emergence and expansion of the early church.

All of the elective religious courses are centered around the Judeo-Christian religion. Campbell University's students are required to adhere to a Code of Ethics which arises out of the institution's statement of purpose [which states]:

> *The basic principles which guide the development of Christian character and govern Christian behavior are to be found in the Scriptures. Moral law is the gift of God and is fully revealed in the teachings of Jesus Christ.*
>
> *The student, by virtue of his enrollment, agrees to abide by the rules and moral precepts which govern the University community. Because of the University's commitment to the lordship of Christ over every area of life, wholehearted obedience to moral law as set forth in the Old and New Testaments and exemplified in the life of Christ applies to every member of the University community, regardless of position.*
>
> *While the Bible does not provide a specific teaching regarding all social practices, its emphasis on general principles is unmistakable, particularly in circumstances where lack of self-restraint would be harmful or offensive to others. Out of these general principles come certain concrete expectations which should be viewed not negatively but as practical guidelines for conduct and for a productive way of life.*
>
> *To uphold at all times and in all places, both on- and off-campus, the University's statement of purpose.*

The Baptist State Convention of North Carolina recommends members of the Board of Trustees to the Baptist State Convention for election.

The legally designated authority of Campbell University rests in its Board of Trustees. Both in and out of the classroom Campbell University endeavors to present Christian principles to students and to foster their application to daily life.

Campbell University's mission [as expressly declared in the "CAMPBELL UNIVERSITY BULLETIN 1990-92"] is to:

> *Provide students with the option of a Christian world view;*
>
> *Bring the word of God, mind of Christ, and power of the Spirit to bear in developing moral courage, social sensitivity, and ethical responsibility that will inspire a productive and faithful maturation as individuals and as citizens;*
>
> *Transfer from one generation to the next the vast body of knowledge and values accumulated over the ages;*
>
> *Encourage creativity, imagination, and rigor in the use of intellectual skills;*
>
> *Affirm the University's commitment to the belief that truth is never one-dimensional but in wholeness is revelatory, subjective, and transcendent as well as empirical, objective, and rational, and that all truth finds its unity in the mind of Christ;*
>
> *Frame University teaching in the context of a liberal arts education seeking to free persons to live more abundantly and securely in an ever-changing social order;*
>
> *Foster stewardship in nurturing the gifts of the mind and in developing aesthetic sensibilities;*
>
> *Equip students with superior vocational skills, productive insights, and professional integrity;*
>
> *Provide a community of learning that is committed to the pursuit, discovery, and dissemination of knowledge to serve the region as well as national and international communities.*

By agreement between the University Board of Trustees and the governing board of the municipality [of Buies Creek], the University's police may exercise their police power throughout the municipality.

> By agreement between the University's Board of Trustees and the governing board of the county, the University's police power may extend county-wide.
>
> Campbell University police officers exercise their police power on campus and on the highway adjacent to property owned by Campbell University. There are two main highways that run through Campbell [University]—Highway 421 and [Highway 27].
>
> Captain Ricky Simmonds' immediate supervisor is the Dean of Student Life at Campbell University and the Dean has complete supervisory power over him. The Dean of Student Life is responsible for the administration of the University's disciplinary system, including its Code of Ethics.

The State did not object to the foregoing findings nor did it take exception to them on appeal to this Court. "Where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal." *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962). Therefore, this Court is bound by the above uncontested findings of the Superior Court. *Id.*; *accord State v. Perry*, 316 N.C. 87, 107, 340 S.E.2d 450, 462 (1986).

The Superior Court also found that "Campbell's religious purpose is inextricably intertwined with its secular activities and it unabashedly attempts to proselytize and indoctrinate its students." This is the only finding we quote that was excepted to by the State. From its findings—including the above uncontested findings and the single contested finding—the Superior Court concluded as a matter of law that for purposes of this case Campbell University is a "religious institution."

The Superior Court's conclusions of law are binding upon us if they are "required as a matter of law by the findings or correct as a matter of law in light of the findings." *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994) (citing *Mahaley*, 332 N.C. at 592-93, 423 S.E.2d at 64). In light of the findings of the Superior Court, which were not excepted to by the State and which, therefore, are binding upon this Court, we are compelled to conclude in this case that the Superior Court did not err when it concluded, for purposes of applying the Establishment Clause, that Campbell University is a "religious institution" within the meaning of the Supreme Court of the United States in its decision in *Larkin*.

Given the uncontroverted evidence, it is difficult to see how the Superior Court could have made any different findings or reached any different conclusions than it in fact reached. In its own university bulletin for 1990-92, Campbell University proclaimed with understandable religious enthusiasm that it "is a Baptist university" and that:

> The purpose of Campbell University arises out of three basic theological and Biblical presuppositions: learning is appointed and conserved by God as essential to the fulfillment of human destiny; in Christ, all things consist and find ultimate unity; and the Kingdom of God in this world is rooted and grounded in Christian community.

Therefore, Campbell University expressly defined its mission as including: "[providing] students with the option of a Christian world view; [bringing] the word of God, mind of Christ, and power of the Spirit to bear in developing moral courage, social sensitivity, and ethical responsibility that will inspire a productive and faithful maturation as individuals and as citizens. . . ." No one has disputed the fact that Campbell University also carries out laudable purposes relating to the secular education and training of its students. Nevertheless, where a trial court has found that an institution's secular purposes and religious mission are "inextricably intertwined"—as the Superior Court found from uncontroverted and substantial evidence in this case—we have no choice but to treat it as a religious institution for First Amendment purposes. *See Zobrest v. Catalina Foothills School District*, 509 U.S. ---, --- and n.1, 125 L. Ed. 2d 1, 7 and n.1 (1993) (treating a school in which secular education and advancement of religious values or beliefs were inextricably intertwined as a religious institution); *Lemon*, 403 U.S. 602, 29 L. Ed. 2d 745 (treating church-related schools that have the purpose of propagating and promoting a particular religious faith as religious institutions). Consequently, the State's delegation of its police power to Campbell University under former Chapter 74A was—based upon the uncontested findings in this case—a delegation of an important discretionary power to a religious institution. As a result, we are required to hold that former Chapter 74, as applied in this case, resulted in a violation of the Establishment Clause of the First Amendment as construed by the Supreme Court of the United States in *Larkin*. *Larkin*, 459 U.S. at 127, 74 L. Ed. 2d at 307.

We emphasize that our conclusion that the Superior Court did not err in holding that former Chapter 74A was unconstitutional as

applied here to delegate police powers to Campbell University is based upon the unique facts as found by the Superior Court from the particular uncontroverted evidence presented, which findings of facts were not excepted to by the State in this case. We do not consider or decide the status of Campbell University for any other purpose or any other case. We merely hold that, based on the unique record before us, the order of the Superior Court holding the now repealed Chapter 74A to be unconstitutional as applied in this case was without error and must be reinstated. The decision of the Court of Appeals to the contrary must be reversed.

The decision we find ourselves bound to enter based upon binding decisions of the Supreme Court of the United States should not impede the proper enforcement of the criminal laws on the campus of Campbell University. There are methods other than those formerly set out in Chapter 74A for providing for the safety and protection of college campuses—including those college campuses which are deemed by the Supreme Court of the United States, as a matter of constitutional law, to be religious institutions.

For the foregoing reasons, the decision of the Court of Appeals is reversed.

REVERSED.

Justice WHICHARD dissenting.

I agree with the Court of Appeals' conclusion that former Chapter 74A of the General Statutes did not violate the Establishment Clause of the First Amendment to the Constitution of the United States. I believe *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 74 L. Ed. 2d 297 (1982), upon which the majority relies to find Chapter 74A unconstitutional, is distinguishable and does not invalidate the statute.

The Massachusetts statute at issue in *Larkin* conferred upon the governing body of a church or school an absolute veto over applications for liquor licenses when the applicant sought to sell liquor within five hundred feet of the church or school. The United States Supreme Court determined that the statute

> substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications. The challenged statute thus

> enmeshes churches in the processes of government and creates the danger of "[p]olitical fragmentation and divisiveness on religious lines."

Larkin, 459 U.S. at 127, 74 L. Ed. 2d at 307 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 623, 29 L. Ed. 2d 745, 762 (1971)). It therefore created an excessive entanglement between church and state in violation of the First Amendment.

The majority opinion views *Larkin* as standing for the proposition that no important discretionary power may be delegated to a religious institution. I believe the holding is less expansive, namely, that a delegation of state power to a church violates the First Amendment when the church's exercise of that power fuses religious and governmental functions. Because the nature of both the institution involved and the power delegated differ in this case from those in *Larkin*, I do not believe the *Larkin* precedent requires that we hold Chapter 74A unconstitutional.

The entity that received and exercised state power in *Larkin* was a "formally constituted parish council," an "institution of religious government." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, —- U.S. —-, —-, 129 L. Ed. 2d 546, 557 (1994). Campbell University is neither a church nor an "institution of religious government." It is an institution of higher education affiliated with the North Carolina Baptist Convention. The University's Board of Trustees, though comprised of members of Baptist churches from across the state, governs university affairs, not religious matters. Thus, the Board is not a religious governing body like a parish council.

The Supreme Court has long recognized that colleges and universities closely affiliated with, or even governed by, a religious denomination are not necessarily pervasively sectarian institutions as a result. *See, e.g., Hunt v. McNair*, 413 U.S. 734, 37 L. Ed. 2d 923 (1973); *Tilton v. Richardson*, 403 U.S. 672, 29 L. Ed. 2d 790 (1971). In *Hunt* the Supreme Court concluded that the Baptist College at Charleston was not "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Hunt*, 413 U.S. at 743, 37 L. Ed. 2d at 931. The members of the Board of Trustees of the College were elected by the South Carolina Baptist Convention, which also had the sole power to amend the College's charter and whose approval was required for certain financial transactions. However, neither students nor faculty members had to

meet religious qualifications for admission or appointment, and the College's operations were not "oriented significantly towards sectarian rather than secular education." *Id.* at 744, 37 L. Ed. 2d at 931.

The Supreme Court reached a similar conclusion in *Tilton*. There the Court described the "general pattern" of education at religiously affiliated colleges and universities: "[B]y their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students." *Tilton*, 403 U.S. at 686, 29 L. Ed. 2d at 803. The Court proceeded to note that the four universities receiving aid were "governed by Catholic religious organizations" and populated by predominantly Catholic faculties and student bodies. *Id.* However, all four schools admitted and employed non-Catholics, and none mandated student attendance at religious services. Theology courses, though required, were not limited to consideration of Roman Catholicism and were taught according to the professors' professional standards and "the academic requirements of the subject matter." *Id.* at 686-87, 29 L. Ed. 2d at 803-04. Thus the Court concluded that all four universities were "institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." *Id.* at 687, 29 L. Ed. 2d at 804.

Campbell University fits the mold of the church-related universities involved in both *Hunt* and *McNair*. The institution's mission statement, quoted in the trial court's findings of fact and in the majority opinion here, contains both sectarian rhetoric and secular academic aims. Of the nine goals stated, five—a majority—are secular and reveal a commitment to academic rigor and intellectual development. The Supreme Court has declined to rely solely or significantly on an institution's religious rhetoric when determining whether it is pervasively sectarian. *See Hunt*, 413 U.S. at 743, 37 L. Ed. 2d at 931. Similarly, such rhetoric does not render Campbell a religious institution as that term is used in *Larkin*. Though closely affiliated with a religious denomination, Campbell does not subordinate secular education to religious doctrine; it functions neither as a church nor as a religious governing body.

Just as the nature of the institution involved here differs from that involved in *Larkin*, the nature and result of the power delegated also distinguish this case from that one. The statute challenged in

Larkin conferred upon a church the power to veto applications for liquor licenses; the church thus effectively usurped the role of the state. Such abdication by the state created " 'a fusion of governmental and religious functions,' " thus excessively entangling church and state. *Larkin*, 459 U.S. at 126-27, 74 L. Ed. 2d at 307 (quoting *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 222, 10 L. Ed. 2d 844, 858 (1963)).

The church-state relationship created by the state's delegation of its veto power to churches in *Larkin* "presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America." *Grumet*, — U.S. at —-, 129 L. Ed. 2d at 557. Religious authority completely supplanted civic authority, allowing churches to use civic power for purely religious ends: "[The statute] substitute[d] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications. The . . . statute thus enmeshe[d] churches in the processes of government . . . ." *Larkin*, 459 U.S. at 127, 74 L. Ed. 2d at 307.

By contrast, neither an abdication of state power to a church nor the resulting fusion of governmental and religious functions occurred here; thus, we are not forced to adopt the result the Supreme Court reached in *Larkin*. At issue here is the delegation of the state's police power. The Attorney General commissioned employees of Campbell University to act as police officers for the school under the authority of former Chapter 74A. Campbell paid the officers' salaries as required by section 74A-4 and remained civilly liable for the acts of the police in the exercise of their authority under the statute. N.C.G.S. § 74A-1 (1989). The officers had the same authority as municipal and county police "to make arrests for both felonies and misdemeanors and to charge for infractions." N.C.G.S. § 74A-2(b).

Additionally, the officers were required to take "the usual oath." N.C.G.S. § 74A-2(a). N.C.G.S. § 11-11 contains the oath for law enforcement officers:

> I, [name], do solemnly swear (or affirm) that I will be alert and vigilant to enforce the criminal laws of this State; that I will not be influenced in any matter on account of personal bias or prejudice; that I will faithfully and impartially execute the duties of my office as a law enforcement officer according to the best of my skill, abilities, and judgment; so help me, God.

N.C.G.S. § 11-11 (1990). The officers also had to take the oath found in Article VI, section 7 of the Constitution of North Carolina, *id.*, which states:

> I, [name], do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as [a law enforcement officer], so help me God.

Thus, members of Campbell's police force pledged to operate within the limits imposed on their law-enforcement power by the federal and state constitutions and laws, and to exercise their power in a neutral manner. The police power exercised by Campbell officers served not as a standardless vehicle for the advancement or protection of religious interests but as a neutral means of protecting the safety of all citizens and residents at and near the University. The existence of constitutional and statutory standards distinguishes this case from *Larkin*, where churches were not required to follow any standards or to explain the exercise of their veto power. Further, the record here does not show that members of Campbell's police force proselytized students, visitors, or faculty or otherwise acted in a religious manner or for a religious purpose in their exercise of the powers delegated to them. The police power conferred was quintessentially secular, neutral and nonideological.

Finally, this delegation of power did not substitute the opinion of a religious body for that of the state and therefore did not fuse religious and governmental functions. "Where 'fusion' is an issue [as in *Larkin*], the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." *Grumet*, —- U.S. at —-, 129 L. Ed. 2d at 558. Chapter 74A authorized the delegation of the police power to any company or educational institution on neutral bases, not on the basis of any belief or practice that was religious in nature. The First Amendment does not prohibit church-related institutions from receiving "public benefits that are neutrally available to all." *Roemer v. Board of Public Works of Md.*, 426 U.S. 736, 746, 49 L. Ed. 2d 179, 187 (1976). That Campbell is affiliated with the North Carolina Baptist Convention is wholly incidental to the state's commissioning of the University's police officers to enforce secular statutes of general applicability; in *Larkin*, by contrast, the churches received their civic authority because they were churches.

In *Tilton* the Supreme Court warned that

> [t]here are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.

Tilton, 403 U.S. at 678, 29 L. Ed. 2d at 798-99. The objectives of the Establishment Clause of the First Amendment were not impaired by the operation of former Chapter 74A because the statute did not create an excessive entanglement between church and state. The standard established by *Larkin* soundly prohibits states from allowing churches to exercise civic authority without appropriate standards and with the goal of protecting religious interests. The delegation here, however, was not to a church or a religious governing body, did not involve the exercise of civic power without standards, and did not have the purpose or effect of protecting or promoting religious interests. It thus did not run afoul of the Establishment Clause of the First Amendment.

I therefore respectfully dissent and vote to affirm the result reached by the Court of Appeals.

Justices MEYER and WEBB join in this dissenting opinion.

JOHN L. BUFORD AND BETTY TATE BUFORD v. GENERAL MOTORS CORPORATION

No. 526PA93

(Filed 30 December 1994)

1. Automobiles and Other Vehicles § 254 (NCI4th)— sale of new car—New Motor Vehicle Warranties Act—reasonable conduct by dealer

The trial court correctly granted a directed verdict in defendant's favor on the issue of whether defendant unreasonably failed or refused to comply with the New Motor Vehicles Warranties Act (the Lemon Law) where defendant first learned of plaintiffs' complaints through their attorney's letter of 20 February 1990, one year after plaintiffs bought their vehicle; defendant responded to

that letter by mail on 1 March 1990, only nine days later; it performed two independent inspections, one as a result of the communication with the attorney and another after plaintiffs filed their suit; defendant performed the minor repairs and adjustments necessary during the first inspection, all free of charge; defendant's division manager found no defects that substantially impaired the value of the Suburban during his inspection and test drive, but testified that he would have corrected any defects he found; despite these findings, defendant offered to settle the lawsuit and avoid publicity by paying the damages allowed under the Lemon Law in exchange for possession of, and title to, the vehicle; and plaintiffs refused. The only suggestion of unreasonableness is plaintiffs' allegation that defendant should have offered them a replacement or refund but never did; this is not legally sufficient, even when taken as true, to send the issue to the jury.

Am Jur 2d, Automobiles and Highway Traffic §§ 721 et seq.

Validity, construction, and effect of state motor vehicle warranty legislation (Lemon Law). 51 ALR4th 872.

2. Automobiles and Other Vehicles § 259 (NCI4th)— new vehicle—Lemon Law action—attorney fees

The trial court did not abuse its discretion by denying plaintiffs' motion for attorney fees in an action under the New Motor Vehicles Warranties Act arising from the purchase of a Suburban where defendant responded to both plaintiff-husband and his attorney within two weeks of the attorney's letter to defendant; it arranged to have the Suburban inspected, conducted the inspection over a four-day period, and repaired all defects found during that inspection free of charge; it supplied a rental car for plaintiffs' use during those four days, also free of charge; a second inspection occurred after plaintiffs filed their lawsuit, during which the vehicle was test driven and visually examined; in December 1991 defendant offered to accept return of the Suburban and pay plaintiffs their refund under the Lemon Law; defendant thus acted altogether reasonably from the time it learned of plaintiffs' complaints about their vehicle; and no evidence tends to show an unreasonable refusal or failure to resolve the matter. N.C.G.S. § 20-351.8(3) places an award of attorney's fees within the discretion of the trial court and both reason and the evidence here supported the denial of the motion.

Am Jur 2d, Automobiles and Highway Traffic §§ 721 et seq.

Validity, construction, and effect of state motor vehicle warranty legislation (lemon law). 51 ALR4th 872.

3. Automobiles and Other Warranties § 259 (NCI4th)— purchase of new Suburban—Lemon Law—recovery conditioned on return of vehicle

The trial court did not err in a Lemon Law action arising from the purchase of a Suburban by conditioning recovery of damages on return of the vehicle. A consumer may not retain a vehicle for which he has received a refund under the Lemon Law whether the refund arises out of a request by the consumer pursuant to N.C.G.S. § 20-351.3(a) or out of a judgment for monetary damages. The last sentence of N.C.G.S. § 20-351.8(2) requires a jury to refer to the factors listed in N.C.G.S. § 20-351.3(a) in determining the amount of its award for monetary damages which, as provided in N.C.G.S. § 20-351.3(a), must provide for the return of the defective vehicle to the manufacturer.

Am Jur 2d, Automobiles and Highway Traffic §§ 721 et seq.

Validity, construction, and effect of state motor vehicle warranty legislation (lemon law). 51 ALR4th 872.

4. Judgments § 38 (NCI4th)— purchase of new vehicle—Lemon Law—supplemental judgment after session—no error

The trial court did not err in a Lemon Law action arising from the purchase of a Suburban by entering a supplemental judgment outside the session during which the case was heard without the consent of the parties. The trial court had authority under N.C.G.S. § 7A-47.1 to enter the judgment outside the session because defendant's motion for a supplemental judgment did not require a jury; under N.C.G.S. § 1A-1, Rule 6(c), expiration of the 30 March 1992 session of Superior Court had no impact on the trial court's jurisdiction to enter a supplemental judgment on 11 May 1992; and the trial court had authority, under *Housing, Inc. v. Weaver*, 305 N.C. 428, to enter its supplemental judgment because defendant moved to amend the judgment on 13 April 1992, within the ten-day window provided by N.C.G.S. § 1A-1, Rule 59(e). Rule 59 requires that a motion for a new trial or to

amend a judgment be made within ten days of the judgment, but does not prescribe the time for judicial action on the motion.

Am Jur 2d, Judgments § 81.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 112 N.C. App. 437, 435 S.E.2d 782 (1993), vacating in part a judgment entered 6 April 1992 and vacating an order and supplemental judgment entered 11 May 1992, by Martin (Lester P., Jr.), J., in Superior Court, Forsyth County, and remanding for a partial new trial. Heard in the Supreme Court 13 September 1994.

Moore and Brown, by B. Ervin Brown, II, David B. Puryear, Jr., and R. J. Lingle, for plaintiff-appellants.

Petree Stockton, L.L.P., by Richard J. Keshian and Julia C. Archer, for defendant-appellee.

WHICHARD, Justice.

This case arises out of plaintiffs' purchase of a 1989 Chevrolet Suburban and requires us to interpret North Carolina's New Motor Vehicles Warranties Act (hereinafter the "Lemon Law"), N.C.G.S. §§ 20-351 through -351.10 (1993), for the first time. Plaintiffs bought their vehicle from Parks Chevrolet, Inc., an authorized dealer of General Motors automobiles, on 24 February 1989. They paid $23,066.00, $16,000.00 of which they financed. They were current on their finance payments of $357.59 per month. The General Motors warranty applicable to the Suburban covers the entire vehicle for up to three years or 50,000 miles, whichever comes first. Warranted repairs are free during the first year or up to 12,000 miles. After that point the consumer pays a $100 deductible fee per repair until the warranty expires. Plaintiffs put 12,000 miles on their vehicle within three months of their purchase. Plaintiff-husband uses it to haul heavy machinery to job sites from which he removes hazardous wastes such as lead and asbestos.

Plaintiff-husband testified that he first noticed problems with his new vehicle as he drove it home from Parks Chevrolet the day he bought it. He found the vehicle difficult to start and heard the doors and windows rattling. The first time it rained, he noticed that the tail-

gate leaked. Additionally, the defroster blew air in the wrong direction, and the windshield wipers sprayed water onto the hood instead of the windshield.

Plaintiffs returned their vehicle to Parks Chevrolet for its first repairs on 2 March 1989, one week after their purchase. Over the course of the next three years, plaintiffs returned the vehicle to Parks Chevrolet—or, after they moved to Pennsylvania, to Day Chevrolet in Pittsburgh—for repairs on at least thirty-one different occasions. Because of the numerous repair attempts, plaintiffs' Suburban was out of commission for more than forty days during the first year of ownership.

The primary problems plaintiffs reported included continuous shaking and vibration of the doors, windows, and body panels, excessive brake wear, wind passing through the doors and windows, and dashboard vents blowing air the wrong way. The vents and windshield washers had been repaired by the time of trial, while the fit of the doors and windows had not been corrected to plaintiffs' satisfaction despite several attempts. At the time of trial, plaintiffs had replaced the brakes five times in the 88,000 miles they had driven the vehicle. Plaintiffs also experienced problems with items not covered under the General Motors warranty, such as the spoiler on the hood and the wiring on the running board, both of which Parks Chevrolet installed.

After approaching Parks Chevrolet's service manager about the problems, plaintiff-husband met with the owner, Richard C. Parks, in March or April 1989. Plaintiff-husband testified that Parks offered him four options: live with the problems; trade in the vehicle and take the loss; go to arbitration; or go to court. He also testified that Parks told him that "quality is lacking in those Suburbans." Plaintiff-husband declined to utilize General Motors' arbitration system after learning from Parks and the Better Business Bureau in Pittsburgh that consumers receive little satisfaction from that procedure. He further testified that Parks did not offer to replace the Suburban or to refund plaintiffs' money.

Plaintiffs contacted an attorney, J. Bruce Mulligan, who wrote to Parks Chevrolet on 10 November 1989, restating plaintiffs' complaints and stating that the vehicle fell within the Lemon Law. The letter noted three specific defects that both Parks Chevrolet and Day Chevrolet had been unable to repair:

(1) the heating and air conditioning controls and vent system; (2) the fitting of the doors, particularly the driver's door and numerous vibrations in the body, which is ill-fitting; (3) a continuous grinding noise in the rear end which has resulted in two complete brake replacements in less than 30,000 miles for the vehicle.

Neither this letter nor Mulligan's phone calls to Chevrolet's Customer Assistance Division and General Motors Corporation generated a response. On 20 February 1990 Mulligan wrote to both the Customer Assistance Division and General Motors stating plaintiffs' intent to file suit under the Lemon Law if the matter was not resolved.

On 1 March 1990 John Lyles, the Division Manager at the Charlotte branch of Chevrolet Motor Division, replied to Mulligan, informing him that personnel in the Pittsburgh branch would handle the matter because plaintiffs lived in Pennsylvania at that time. Additionally, Lyles called plaintiff-husband around 9 March 1990. He offered, on behalf of Chevrolet Motor Division, to have plaintiffs' Suburban inspected at Day Chevrolet by a General Motors representative. He also offered the use of a rental car free of charge during the inspection. He testified that plaintiff-husband refused to allow any inspection and hung up on him. Mulligan eventually wrote to George Evanich, the Division Manager at the Pittsburgh branch of Chevrolet Motor Division, and reported that plaintiff-wife had made an appointment in April to have the Suburban inspected.

On 23 April 1990 Art Matlack, a Chevrolet Technical Analysis Expert, inspected plaintiffs' Suburban. At that time plaintiffs had driven the vehicle about 50,000 miles. Matlack performed minor repairs and adjustments, such as replacing bearings, aligning the hood, and adjusting mirrors. Some conditions plaintiffs complained of—for example, wind entering the vehicle around the door frame on the driver's side—did not occur during his testing and inspection. He completed all repairs at no charge to plaintiffs. Evanich sent the results of the inspection to Mulligan on 3 May 1990, and explained in his letter that "the vehicle returned to [plaintiff-husband] on April 27, 1990, was in the opinion of Chevrolet Motor Division free of all defects which would affect the operation, safety, or merchantability of this vehicle." General Motors did not offer to replace the vehicle or refund plaintiffs' money.

Plaintiffs filed suit in Superior Court, Forsyth County, on 13 March 1991, alleging that General Motors had unreasonably refused to comply with the Lemon Law by failing to either refund their pur-

chase price or replace the defective vehicle as required under the Act, and was therefore liable to plaintiffs for monetary damages. One month after the filing, Lyles himself performed a second inspection of the plaintiffs' Suburban. He tried to examine all seventeen problems listed by plaintiffs through discovery. However, plaintiff-husband cut Lyles' inspection short, indicating that he could wait no longer for Lyles to finish.

As of the date of Lyles' inspection, only two of the primary problems alleged by plaintiffs remained—the fit and finish of the body and premature brake wear. Plaintiffs concede that defendant had repaired the heating and ventilation system to their satisfaction. Lyles examined the three aspects of the vehicle's fit and finish that plaintiffs complained of: a misaligned hood; rattling windows; and an ill-fitting door on the driver's side. He found that a spoiler on the hood, not installed by General Motors, affected the hood's alignment, making it difficult to close and causing some vibration. That condition, however, did not fall within the coverage of the General Motors warranty because the company neither manufactured nor installed the spoiler.

During his test drive, Lyles listened for a rattling noise from the windows on the driver's side. He heard no such noise, but did testify that he was unclear about the nature of the alleged noise because plaintiff-husband refused to communicate about his complaints. Finally, Lyles examined the vehicle's body in search of defects in the alignment of the door on the driver's side. After taking photographs from several different angles, he performed two standard tests during his test drive to determine the point at which air might enter the vehicle. First, he lit a cigarette and traced the door frame. When doors are misaligned or otherwise ill-fitting, cigarette smoke will be drawn out of a vehicle while the smoker is driving. Next he put his hand around the frame in an effort to feel air entering the passenger cabin. Lyles discovered no air coming in around the door frame as a result of either test. He concluded from his inspection that any problems with the Suburban's fit and finish were minor imperfections to be expected on vehicles. He testified that eight out of ten 1989 Suburbans would have similar imperfections. He found no defects that could substantially impair the value of plaintiffs' vehicle.

As to brake wear, Lyles testified that the General Motors warranty does not cover that condition because it depends on the owners' care and use of the vehicle. He further testified that hauling heavy loads causes brakes to wear out more quickly than normal because a

vehicle's stopping distance and the pressure needed on the brakes increase with the weight of the vehicle. Given the use plaintiff-husband made of his Suburban, Lyles did not seem surprised that the brakes wore out fairly quickly.

The case was tried to a jury during the 30 March 1992 session of Superior Court, Forsyth County. At the close of all the evidence, defendant moved for, and the trial court granted, a directed verdict in favor of defendant on the issue of whether it had unreasonably refused to comply with the Lemon Law. The court submitted two issues to the jury: whether plaintiffs' Suburban contained uncorrected defects that substantially impaired its value; and if so, what amount of damages plaintiffs should receive from defendant. The jury answered the first question in the affirmative and returned a verdict for plaintiffs in the amount of $20,766.00. The trial court entered judgment on 6 April 1992 for that amount, but conditioned plaintiffs' receipt of their damages on the return of the Suburban to General Motors. The trial court denied plaintiffs' motion for attorney's fees filed pursuant to N.C.G.S. § 20-351.8(3). On 4 May 1992 plaintiffs filed notice of appeal from the portion of the judgment that required return of the vehicle and from the denial of their motion for attorney's fees.

Defendant filed a Motion to Amend Judgment on 13 April 1992, requesting the trial court to add the following sentence to its judgment: "In the event plaintiffs fail to return the vehicle and proper title within thirty (30) days of the judgment, the judgment shall be offset by the fair market value of a 1989 Chevrolet Suburban as of April 6, 1992." The trial court granted defendant's motion and entered a supplemental judgment on 11 May 1992, ordering that the damages awarded to plaintiffs be offset by the difference between the book value of a 1989 Suburban as of 6 April 1992 and as of the date on which plaintiffs tendered the vehicle and proper title to General Motors. Plaintiffs filed notice of appeal from the supplemental judgment on 14 May 1992.

The Court of Appeals reversed the trial court's directed verdict on the issue of defendant's unreasonable noncompliance and ordered a partial new trial, holding that whether General Motors unreasonably failed to comply with the Lemon Law is a question for the jury, not the trial court. It also vacated the trial court's judgment to the extent it conditioned recovery of damages on the return of the vehicle to General Motors. Finally, the court vacated the supplemental judgment on the grounds that the trial court lacked jurisdiction to enter it.

On 27 January 1994 this Court allowed defendant's petition for discretionary review. For reasons that follow, we now reverse the Court of Appeals.

[1] Defendant first contends the Court of Appeals erred when it reversed the trial court's directed verdict in defendant's favor on the issue of whether defendant acted unreasonably so as to warrant treble damages under the statute. At trial the court refused to submit to the jury the issue of whether General Motors unreasonably refused to comply with the Lemon Law during its course of dealing with plaintiffs. The Court of Appeals reversed the trial court, holding that whether a manufacturer unreasonably refused to comply with the law is a question for the jury when substantial evidence exists to support the contention. Additionally, the Court of Appeals remanded the case for a new trial solely on this issue. Defendant now argues that the trial court correctly directed a verdict in its favor. We agree, and accordingly reverse the Court of Appeals on this issue.

The portion of the Lemon Law that provides for treble damages states:

> In any action brought under this Article, the court may grant as relief:
>
> . . .
>
> (2) Monetary damages to the injured consumer in the amount fixed by the verdict. Such damages shall be trebled upon a finding that the manufacturer unreasonably refused to comply with G.S. 20-351.2 or G.S. 20-351.3.

N.C.G.S. § 20-351.8(2) (1993). During the charge conference, the trial court stated, "I haven't heard any evidence from anybody that shows that the defendant . . . in any way . . . unreasonably refused to comply. Looks like they [did] everything in the world they could do; continued to make repairs, [did] repairs outside the warranty." For those reasons, the court refused to submit to the jury the issue of whether General Motors acted unreasonably, and granted defendant's motion for a directed verdict.

A directed verdict is improper if the evidence, viewed in a light most favorable to the non-moving party, is legally sufficient to send the issue to the jury. *Taylor v. Walker*, 320 N.C. 729, 733-34, 360 S.E.2d

796, 799 (1987); *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 337-38 (1985). It is proper when, as a matter of law, plaintiffs cannot recover upon any view of the facts established by the evidence. *Taylor*, 320 N.C. at 734, 360 S.E.2d at 799. Though the party who moves for a directed verdict bears a heavy burden, *id.*, we conclude that defendant met this burden here.

Defendant first learned of plaintiffs' complaints through Mulligan's letter of 20 February 1990, one year after plaintiffs bought their vehicle. It responded to that letter by mail on 1 March 1990, only nine days later. It performed two independent inspections, one as a result of the communication with Mulligan and another after plaintiffs filed their suit. Defendant performed the minor repairs and adjustments necessary during the first inspection, all free of charge. Lyles found no defects that substantially impaired the value of the Suburban during his inspection and test drive, but testified that he would have corrected any defects he found. Despite these findings, defendant offered to settle the lawsuit and avoid publicity by paying the damages allowed under the Lemon Law in exchange for possession of, and title to, the vehicle. Plaintiffs refused.

All the evidence thus leads to the conclusion that defendant acted reasonably and in good faith throughout its course of dealing with plaintiffs. The only suggestion of unreasonableness is plaintiffs' allegation that defendant should have, but never did, offer them a replacement or refund. This is not legally sufficient, even when taken as true, to send the issue to the jury. Defendant cooperated with plaintiffs and addressed their concerns in a prompt and honest manner as soon as it was notified of their dissatisfaction. Defendant reasonably concluded, as a result of two inspections and several tests, that the condition of plaintiffs' vehicle did not warrant paying them a full refund or supplying them with a replacement vehicle. The trial court thus correctly directed a verdict in defendant's favor on the issue of whether defendant unreasonably failed or refused to comply with the Lemon Law, and the Court of Appeals erred when it reversed the directed verdict and ordered a new trial on this issue.

[2] Defendant next argues that the Court of Appeals erred by holding that the trial court abused its discretion when it denied plaintiffs' motion for attorney's fees. We agree, and accordingly reverse the Court of Appeals on this issue.

Attorney's fees are available as a remedy under N.C.G.S. § 20-351.8(3), which provides:

> In any action brought under this Article, the court may grant as relief:
>
> . . .
>
> (3) A reasonable attorney's fee for the attorney of the prevailing party, payable by the losing party, upon a finding by the court that:
>
> a. The manufacturer unreasonably failed or refused to fully resolve the matter which constitutes the basis of such action; . . . .

The trial court denied plaintiffs' motion for an award of attorney's fees pursuant to this provision as well as plaintiffs' Motion to Amend Judgment, filed in part on the grounds that the court failed to award a reasonable attorney's fee. The Court of Appeals ordered the trial court to "consider plaintiffs' entitlement to attorney's fees in light of the jury's verdict [on remand] on the issue of whether General Motors unreasonably refused to comply with the Warranty Act." We hold that this order was erroneous.

The statute places an award of attorney's fees within the discretion of the trial court. We will not second-guess a trial court's exercise of its discretion absent evidence of abuse. An abuse of discretion occurs only when a court makes a patently arbitrary decision, manifestly unsupported by reason. *State v. Locklear*, 331 N.C. 239, 248-49, 415 S.E.2d 726, 732 (1992); *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986). In reviewing the trial court's denial of plaintiffs' motion for attorney's fees, we must determine whether it could "have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985). We conclude that the trial court exercised its discretion in a rational and reasonable manner. Both reason and the evidence supported denial of the motion.

As noted above, defendant responded to both plaintiff-husband and his attorney within two weeks of the attorney's letter to defendant. It arranged to have the Suburban inspected, conducted the inspection over a four-day period, and repaired all defects found during that inspection free of charge. It supplied a rental car for plaintiffs' use during those four days, also free of charge. A second inspection occurred after plaintiffs filed their lawsuit, during which the vehicle was test driven and visually examined. Finally, in December 1991 defendant offered to accept return of the Suburban and pay plaintiffs their refund under the Lemon Law. Defendant thus acted

altogether reasonably from the time it learned of plaintiffs' complaints about their vehicle. No evidence tends to show an unreasonable refusal or failure to resolve the matter. The trial court thus did not abuse its discretion when it denied plaintiffs' motion for attorney's fees under N.C.G.S. § 20-351.8(3).

[3] Defendant also contends the Court of Appeals erred by vacating the portion of the trial court's judgment which conditioned plaintiffs' recovery of damages on their return of the vehicle to defendant. It argues that the Court of Appeals' ruling confers a double recovery and a windfall on the plaintiffs. We agree, and accordingly reverse the Court of Appeals on this issue.

A consumer who buys a new motor vehicle may exercise either of two options when that vehicle contains defects that the manufacturer cannot repair or correct: request a comparable new vehicle or request a refund of the contract price, finance charges, collateral charges, and incidental and consequential damages. N.C.G.S. § 20-351.3(a). If the consumer chooses a refund, he must return the vehicle to the manufacturer. *Id.* The manufacturer is entitled to a reasonable allowance for the consumer's use of the vehicle if the consumer chooses a refund. *Id.* § 20-351.3(c).

Plaintiffs argue that the recovery of damages pursuant to a jury verdict, unlike a manufacturer's refund, does not require the return of the vehicle. We disagree, and hold that when a consumer receives a refund under the Lemon Law, whether by request pursuant to section 20-351.3(a) or through judicial action, the consumer may not retain the defective vehicle. This result is consistent with the language of the Act, *see id.* § 20-351.3(a), and best achieves its purposes.

Plaintiffs rely on N.C.G.S. § 20-351.8 in support of their position. They contend they are entitled to keep their Suburban as well as the $20,766 in damages because this provision does not expressly condition the recovery of monetary damages on return of the defective vehicle. Section 20-351.8 provides, in pertinent part:

> In any action brought under this Article, the court may grant as relief:
>
> (1) A permanent or temporary injunction or other equitable relief as the court deems just;
>
> (2) Monetary damages to the injured consumer in the amount fixed by the verdict. Such damages shall be trebled upon a

> finding that the manufacturer unreasonably refused to comply with G.S. 20-351.2 or G.S. 20-351.3. The jury may consider as damages all items listed for refund under G.S. 20-351.3 . . . .

The relevant portion of section 20-351.3 states:

> (a) When the consumer is a purchaser . . ., if the manufacturer is unable, after a reasonable number of attempts, to conform the motor vehicle to any express warranty by repairing or correcting . . . any defect or condition or series of defects or conditions which substantially impair the value of the motor vehicle to the consumer, . . . the manufacturer shall, at the option of the consumer, replace the vehicle with a comparable new motor vehicle or accept return of the vehicle from the consumer and refund to the consumer the following:
>
> > (1) The full contract price including, but not limited to, charges for undercoating, dealer preparation and transportation, and installed options, plus the non-refundable portions of extended warranties and service contracts;
> >
> > (2) All collateral charges, including but not limited to, sales tax, license and registration fees, and similar government charges;
> >
> > (3) All finance charges incurred by the consumer after he first reports the nonconformity to the manufacturer, its agent, or its authorized dealer; and
> >
> > (4) Any incidental damages and monetary consequential damages.

The remedies provision, section 20-351.8, by referring directly to section 20-351.3, fully incorporates the amount and type of relief available at the consumer's option into a jury's calculation of monetary damages. Plaintiffs attempt to avoid such incorporation by arguing that the directions to the jury in the last sentence of N.C.G.S. § 20-351.8(2) are only permissive, and therefore do not *mandate* return of the vehicle. We disagree. That subsection is ambiguous to the extent it does not expressly address the subject of retention of the vehicle. Therefore, we must use rules of statutory construction to resolve the ambiguity. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990) ("[W]here a statute is ambiguous, judicial construction must be used to ascertain the legislative will."); *N.C. Baptist Hospitals, Inc. v. Mitchell*, 323 N.C. 528, 532, 374 S.E.2d 844, 846 (1988) (same principle).

We begin this process by determining the intent underlying the legislation. *Black v. Littlejohn*, 312 N.C. 626, 630, 325 S.E.2d 469, 473 (1985); *In re Kapoor*, 303 N.C. 102, 106, 277 S.E.2d 403, 407 (1981); *In re Hardy*, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978) (The "primary rule of construction [is] that the intent of the Legislature controls."). We determine that intent not only from the express language used, "but also from the [provision's] nature and purpose, and the consequences which would follow its construction one way or another." *Art Society v. Bridges, State Auditor*, 235 N.C. 125, 130, 69 S.E.2d 1, 5 (1952).

The Lemon Law has several purposes. It protects consumers who purchase defective new vehicles. It also encourages private settlement between such consumers and manufacturers, as revealed by section 20-351.3(a). The reference in section 20-351.8(2) to section 20-351.3(a) discloses a legislative intent to treat jury verdicts as refunds. Finally, the Act seeks a fair result that neither unduly benefits nor unduly burdens either party to a dispute.

Having determined the legislative intent, we must avoid a "construction . . . which operates to defeat or impair the object of the statute" if we can do so consistently with the statutory language itself. *N.C. Baptist Hospitals*, 323 N.C. at 532, 374 S.E.2d at 846; *see also In re Hardy*, 294 N.C. at 96, 240 S.E. 2d at 371. We will eschew a strictly literal construction of a statute that will contravene or impair the goals of the legislation if we can reasonably avoid such a construction without distorting the language. *N.C. Baptist Hospitals*, 323 N.C. at 533, 374 S.E.2d at 847; *In re Banks*, 295 N.C. 236, 240, 244 S.E.2d 386, 389 (1978); *In re Hardy*, 294 N.C. at 95, 240 S.E.2d at 371. Finally, "[w]hether a particular provision in a statute is to be regarded as mandatory or directory depends more upon the purpose of the statute than upon the particular language used." *Bridges*, 235 N.C. at 130, 69 S.E.2d at 5 (1952); *see also Puckett v. Sellars*, 235 N.C. 264, 268, 69 S.E.2d 497, 500 (1952) (" 'Whether [the word "may" is] merely permissive or imperative depends on the intention as disclosed by the nature of the act in connection with which the word is employed and the context.' " (quoting 2 Lewis' Sutherland, Stat. Const. 1153 § 640)).

Mindful of both the purposes of the statute and these rules of construction, we hold that a consumer may not retain a vehicle for which he has received a refund under the Lemon Law. This rule applies whether the refund arises out of a request by the consumer pursuant to section 20-351.3(a) or out of a judgment for monetary damages. We

further hold that the last sentence of N.C.G.S. § 20-351.8(2) requires a jury to refer to the factors listed in § 20-351.3(a) in determining the amount of its award for monetary damages which, as provided in § 20-351.3(a), must provide for the return of the defective vehicle to the manufacturer.

Our conclusions comport with the nature and purpose of the Lemon Law and avoid the undesirable consequences of alternative interpretations. To allow a jury to award both monetary damages and ownership of the vehicle to victorious plaintiffs because of purportedly permissive language in section 20-351.8(2) would impair the goals of the legislation. For example, it would overcompensate successful consumers to the detriment of the manufacturer, and almost certainly to the detriment of other consumers to whom the manufacturer would likely pass the additional expense. Plaintiffs' interpretation of the statute would allow a consumer to receive treble damages and attorney's fees as well as continued ownership of the defective vehicle. Such a recovery would represent an unintended windfall to the consumer, which contravenes the notion that the statute seeks to protect the interests of both consumers *and* manufacturers. Additionally, such double recovery would create a disincentive to negotiate a private settlement. Consumers who realize they may keep their vehicle and receive a refund if they sue the manufacturer, but not if they resolve the issue without judicial action, would decline to pursue private negotiations with the manufacturer. This would defeat a major purpose of the Lemon Law, the resolution of disputes over defective vehicles without court action. We should avoid such an undesirable result when possible. "If an act is susceptible to more than one construction, the consequences of each are a potent factor in its interpretation, and undesirable consequences will be avoided if possible." *Little v. Stevens*, 267 N.C. 328, 336, 148 S.E.2d 201, 206 (1966), *quoted in Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 15, 287 S.E.2d 786, 794-95 (1982); *see also Commissioner of Insurance v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978) ("In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results."); *Puckett*, 235 N.C. at 268, 69 S.E.2d at 500 (Courts will not impute a legislative intent "fraught with injustice" when a different construction of the language used "serves to effectuate the objective of the legislation.").

Our conclusions, informed by the policies underlying the Lemon Law, are consistent with both the language and the purpose of the statute.

We would reach the same result even without exercising our power of statutory construction. Section 20-351.8(1) provides that a court may grant "equitable relief as the court deems just" in addition to the monetary damages and attorney's fees available to successful plaintiffs. The return of a defective vehicle in exchange for an award of money damages qualifies as equitable relief. Thus the portion of the trial court's judgment requiring plaintiffs to return the Suburban fell squarely within the broad discretion granted trial courts by the statute. We cannot say, given the facts of the case, that the trial court abused its discretion.

The trial court's judgment, which conditioned plaintiffs' receipt of damages on their return of the Suburban, was thus correct under our interpretation of the statute. It protected plaintiffs' interests without awarding them an undeserved windfall or double recovery. Therefore, the Court of Appeals erred when it vacated the judgment.

[4] Defendant further contends the Court of Appeals erred by vacating the trial court's supplemental judgment entered on 11 May 1992. In that judgment the trial court ordered that plaintiffs' award of damages "shall be off-set by the difference between the book value of a 1989 Chevrolet Suburban as of April 6, 1992 and the book value of a 1989 Chevrolet Suburban as of the date on which the vehicle and proper title are tendered to defendant pursuant to the judgment [of 6 April 1992]." The Court of Appeals vacated this judgment because it was entered outside the session during which the case was heard, without the consent of the parties. The defendant contends this was error. We agree, and accordingly reverse the Court of Appeals on this issue.

A superior court generally must enter its judgment "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). However, this Court has consistently recognized the authority of the legislature to provide for judicial action out of term. *Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, 156, 446 S.E.2d 289, 293 (1994); *State v. Humphrey*, 186 N.C. 533, 535, 120 S.E. 85, 87 (1923) ("[E]xcept by agreement of the parties *or by reason of some express provision of law*," judgments may not be entered out of term or out of county.) (emphasis added). There is

both statutory and common law authority for the trial court's entry of its supplemental judgment.

First, as noted and discussed in *Capital Outdoor*, N.C.G.S. §§ 7A-47.1 (1989) and 1A-1, Rule 6(c) (1990) both authorize the entry of judgment out of session. *Capital Outdoor*, 337 N.C. at 156-58, 446 S.E.2d at 293-95. Section 7A-47.1 provides, in relevant part,

> in all matters and proceedings not requiring a jury . . . 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 . . . may hear and pass upon such matters and proceedings in vacation, out of session or during a session of court.

Defendant's motion for a supplemental judgment did not require a jury. Therefore, the trial court had authority under section 7A-47.1 to enter the judgment outside the 30 March 1992 session in which the case was heard.

The North Carolina Rules of Civil Procedure provide:

> 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.

N.C.G.S. § 1A-1, Rule 6(c) (1990). Under this rule, expiration of the 30 March 1992 session of Superior Court, Forsyth County, had no impact on the trial court's jurisdiction to enter a supplemental judgment on 11 May 1992.

This Court's decision in *Housing, Inc. v. Weaver*, 305 N.C. 428, 290 S.E.2d 642 (1982), offers further support for the action. We unanimously held in that case that "a trial court may alter or amend a judgment pursuant to Rule 59 . . . after the adjournment of the term during which the judgment was entered." *Id.* at 440, 240 S.E.2d at 649. Rule 59 requires that a motion for a new trial or to amend a judgment be made within ten days of the judgment, but does not prescribe the time for judicial action on the motion. The legislature could not have "intended that [this] specific period[] might be curtailed by the adjournment of the term of court at which judgment was rendered. To attribute any such intent to the legislature would vitiate the purpose of [Rule 59]." *Id.* The trial court entered its original judgment in this

case on 6 April 1992. Defendant moved to amend the judgment on 13 April 1992, within the ten-day window provided by Rule 59(e). Thus the trial court had authority, under *Housing, Inc.*, to enter its supplemental judgment based on that motion on 11 May 1992.

Finally, defendant contends the Court of Appeals erred by granting a partial new trial on the issue of whether General Motors unreasonably refused to comply with the Lemon Law. Having determined that plaintiffs are not entitled to a new trial, we need not address this issue.

Accordingly, we reverse the Court of Appeals' decision. The case is remanded to the Court of Appeals with instructions to remand it to the Superior Court, Forsyth County, for reinstatement of that court's judgment and its order and supplemental judgment.

REVERSED AND REMANDED.

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

JAMES A. BOWERS, JR., JAMES A. BRANSON, BENJAMIN BROCKMAN, VAUGHN W. CRABB, BILLY R. GANT, HENRY L. JONES, LYMAN F. LANCE, JR., JERRY T. RICH, LINDSAY P. ROYAL, DAVID F. THOMPSON, PAUL D. WOOD, JR., AND MORRIS J. YANDLE v. CITY OF HIGH POINT

No. 316PA93

(Filed 30 December 1994)

1. Municipal Corporations § 219 (NCI4th)— law enforcement officers—retirement benefits—authority of city to interpret base rate

The assertions of an assistant city manager regarding plaintiff's separation allowance for early retirement were beyond the power of the city to make and cannot be enforced where plaintiffs worked as law enforcement officers for the City of High Point; they approached the assistant city manager for public safety regarding the computation of their separation allowance; the assistant city manager computed the allowance based on compensation including longevity, overtime, and accrued vacation; plaintiffs relied on the computation, retired, and began receiving benefits; the personnel director subsequently informed the city

manager that the separation allowance should not have been based on longevity, overtime, and accrued vacation; plaintiffs were informed that their benefits would be reduced and brought this suit; and the trial judge granted plaintiffs' motion for summary judgment. Municipalities can exercise only that power which the legislature has conferred upon them; under N.C.G.S. § 143-166.41(a), the legislature mandated that local government pay its law enforcement officers who retire before reaching age sixty-two and who meet certain other criteria an amount as set forth in the statute based upon the base rate of compensation. The legislature did not explicitly give local government the discretion to determine the base rate of compensation, which shows that it did not intend local government to have that discretion. Longevity, overtime, and accrued vacation should not have been included in the base rate because "base rate of compensation" refers to that portion of compensation which is relatively stable and forms the foundation or groundwork of the employee's entire compensation scheme.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 502 et seq.

2. Municipal Corporations § 234 (NCI4th)— law enforcement officers—early retirement—calculation of separation allowance—assertions by city ultra vires—city not estopped

The City of High Point was not estopped from asserting *ultra vires* where plaintiffs worked for the City as police officers, they queried an assistant manager regarding the calculation of their separation allowance for early retirement, the assistant city manager calculated the allowance including longevity, overtime, and accrued vacation in the base rate calculation, plaintiffs retired and began drawing benefits, the City subsequently determined that the base rate should not have included longevity, overtime, and accrued vacation, and the benefits were reduced. The City had no authority under the relevant statute to enter into the agreement between the assistant city manager and plaintiffs, the agreement was *ultra vires*, and a city cannot be estopped from defending a contract action on the basis of *ultra vires*.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 523.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 110 N.C. App. 862, 431 S.E.2d 219 (1993), affirming summary judgment entered by Ross (Thomas W.), J., in the Superior Court, Guilford County, on 20 May 1992. Heard in the Supreme Court 16 March 1994.

Byerly & Byerly, by W. B. Byerly, Jr., for plaintiff-appellees.

Fred P. Baggett and Roddy M. Ligon, Jr., for defendant-appellant.

EXUM, Chief Justice.

Plaintiffs, former law enforcement officers for the City of High Point, filed this lawsuit alleging that defendant, the City of High Point, breached its contractual obligation to pay certain compensation promised in return for early retirement. Plaintiffs also sued for an unconstitutional impairment of contract, an unconstitutional taking, and a violation of 42 U.S.C. § 1983. Each party moved for summary judgment based on the pleadings, stipulations, and numerous affidavits. The trial court granted plaintiffs' motion for summary judgment and denied that of the defendant. The Court of Appeals affirmed, and we granted discretionary review.

I.

The facts are not in dispute:

Plaintiffs worked as law enforcement officers for the City of High Point. On 15 July 1986 the legislature enacted N.C.G.S. § 143-166.42, which states that local law enforcement officers retiring before age sixty-two are to receive the same "separation allowance" afforded State law enforcement officers under N.C.G.S. § 143-166.41; that law was to become effective 1 January 1987. 1985 N.C. Sess. Laws ch. 1019, § 2. Plaintiffs approached Randall W. Spencer, the Assistant City Manager for Public Safety, regarding how their separation allowance was computed under the new statute. Spencer's responsibilities included general personnel administration for the city's work force, including the police department.

In November or December of 1986 Spencer, relying on his reading of the statute and on the advice of the city attorney, other local government personnel administrators in the State, and the North Carolina League of Municipalities, computed the allowance based on the officer's compensation including longevity pay, overtime pay, and

accrued vacation. Longevity pay is an annual payment made to defendant's employees based on the employee's salary and number of years of service. Accrued vacation represents that vacation time earned by the employee but not used; upon termination of employment the employee is paid for the value of his unused vacation time. Neither the City Manager, H. Lewis Price, nor the City Council participated in Spencer's computation of benefits. Plaintiffs, relying on Spencer's computation of retirement compensation, retired from their jobs as law enforcement officers after January 1, 1987. They were paid in accordance with Spencer's computations.

During February 1990 John R. McCrary, the Personnel Director of the City of High Point, informed the City Manager, H. Lewis Price, that the amount the city had been paying plaintiffs was incorrect, being based on an erroneous interpretation of N.C.G.S. § 143-166.41. According to McCrary, the separation allowance should have been based on the law enforcement officer's compensation not including longevity pay, overtime pay, and accrued vacation. Price advised McCrary to inform plaintiffs that the amount they had been receiving was incorrect and that in the future they would not receive as much as they had been receiving based on Spencer's erroneous computation. In March 1990 McCrary wrote to plaintiffs explaining that their separation allowance had been computed erroneously and that their benefits would be reduced.[1] Plaintiffs then brought this suit asking the court to declare that plaintiffs were entitled to receive a separation allowance based on their compensation including longevity pay, overtime pay, and accrued vacation; they also asked the court to order defendant, "by mandamus or otherwise," to make payments in accordance with that amount.

The record clearly shows that defendant, through its agent Randall W. Spencer, represented to plaintiffs that they would receive a separation allowance under N.C.G.S. §§ 143-166.41 & 143-166.42 based on their pre-retirement compensation including longevity pay, overtime pay, and accrued vacation. Plaintiffs, acting in reliance on that representation, accepted early retirement after 1 January 1987. Plaintiffs assert that defendant's conduct, including that of Spencer, created a contractual obligation to pay plaintiffs according to Spencer's representations. On appeal to this Court defendant does not contend that plaintiffs' claims fail as a matter of contract law, and

1. The record shows that plaintiffs' average monthly allowance as originally calculated was approximately $800; the average monthly allowance after the reduction was $650.

the facts as contained in the pleadings, affidavits and stipulations would seem to refute any such contention. Defendant instead argues that Spencer's representations were *ultra vires*, or beyond the power of the city, and hence unenforceable. Plaintiffs argue in response that Spencer did not act *ultra vires*, and that in any event defendant is estopped from asserting the doctrine of *ultra vires* as a defense.

The only issues before us are, therefore, (1) whether Spencer's actions were *ultra vires* and, if so, (2) whether the city is estopped from asserting that defense.

II.

[1] It is a well-established principle that municipalities, as creatures of the State, can exercise only that power which the legislature has conferred upon them. The authority of municipalities has been described as:

> (1) the powers granted in express terms; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the accomplishment of the declared objects of the corporation—not simply convenient, but only those which are indispensable, to the accomplishment of the declared objects of the corporation.

Moody v. Transylvania County, 271 N.C. 384, 386, 156 S.E.2d 716, 717 (1967); *accord* 56 Am. Jur. 2d *Municipal Corporations* § 194 (1971). In this regard, the legislature has stated:

> It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter [Chapter 160A] and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect . . . .

N.C.G.S. § 160A-4 (1987). This statute, while reflecting our legislature's desire that cities should have the authority to exercise the powers conferred upon them, nevertheless clearly reiterates the principle that municipalities have only that power which the legislature has given them.

A contract made by a municipality beyond its power is unenforceable. *See Moody*, 271 N.C. at 388, 156 S.E.2d at 719.

The issue thus becomes whether the legislature authorized the city to enter contracts for separation allowances based on pre-retirement compensation including overtime pay, longevity pay, and accrued vacation.

The parties' arguments relating to whether Spencer's actions as an agent of the city were authorized by the legislature focus solely on Article 12D of Chapter 143 of the General Statutes. Section 143-166.41(a) in Article 12D states:

> [E]very sworn law-enforcement officer . . . employed by a State department, agency, or institution who qualifies under this section shall receive, beginning on the last day of the month in which he retires on a basic service retirement . . ., an annual separation allowance equal to eighty-five hundredths percent (.85%) of the annual equivalent of the base rate of compensation most recently applicable to him for each year of creditable service. . . .

N.C.G.S. § 143-166.41(A) (1993). In order to qualify, the officer must have attained fifty-five years of age, or have completed at least thirty years of creditable service, and not have attained sixty-two years of age. N.C.G.S. §§ 143-166.41(a)(1) & (2). Payments under this statute continue until the officer reaches age sixty-two. N.C.G.S. § 143-166.41(c). This section was made applicable to local law enforcement officers by section 143-166.42, which became effective 1 January 1987.

Thus, our legislature has mandated that local government pay its law enforcement officers who retire before reaching age sixty-two, and who meet certain other criteria, an amount each month as set forth in the statute. That monthly amount, according to the statute, is equal to: .0085 x "the annual equivalent of the base rate of compensation" x "each year of creditable service."

Plaintiffs argue that defendant did not act *ultra vires* in entering its agreement with plaintiffs since the statute gives local government the discretion to interpret "base rate of compensation." They further argue that defendant interpreted that phrase in a rational manner as including overtime pay, longevity pay, and accrued vacation. We cannot agree that the statute gives local government the discretion to interpret the statute.

In support of their contention, plaintiffs refer to section 143-166.42, which states that "the governing body of each unit of local government shall be responsible for making determinations of eligibility . . . and for making payments to their eligible officers . . . ." N.C.G.S. § 143-166.42

(1993). While this statute permits local governments to determine eligibility and requires them to make payments, it does not authorize local governments to determine the *amount* of the separation allowance differently from the mandate of section 143-166.41(a). The statute, which explicitly makes local government responsible for certain aspects of administering the separation allowance but does not explicitly make local government responsible for determining the amount of the allowance, is strong evidence that the legislature did not intend local governments to have that responsibility.

The legislature in numerous instances has explicitly given cities and towns the discretion to determine monetary amounts for various purposes. *See, e.g.*, N.C.G.S. § 160A-349.8 (1994) (board of cemetery trustees "shall fix a price" for lots and may change price "in the discretion of the board"); N.C.G.S. § 160A-610(21) (1994) (regional public transportation authority has authority "to set in its sole discretion rates, fees and charges"). That the legislature did not explicitly give local government the discretion to determine the "base rate of compensation" shows, we conclude, that it did not intend local governments to have that discretion.

Accepting plaintiffs' argument that local government has the discretion to interpret "base rate of compensation" could have several negative consequences. We agree with the Court of Appeals that the purpose of section 143-166.41 was to encourage early retirement. 110 N.C. App. at 865, 431 S.E.2d at 220. Permitting local governments to determine the amount of the separation allowance could frustrate the legislature's intent if local governments were to interpret that phrase in a manner that would effectively reduce the separation allowance. Also, it could require the courts constantly to review local governments' interpretations of "base rate of compensation" for rationality. For numerous reasons, we think the legislature wanted uniformity in the separation allowance it required local governments to pay pursuant to sections 143-166.41(a) and 143-166.42.

[2] Having determined that "base rate of compensation" has a definite meaning not subject to alteration by local governments, we must next determine whether that phrase includes plaintiffs' overtime pay, longevity pay, and accrued vacation pay.

The primary goal of statutory construction is to give effect to the legislature's intent. *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 294 (1975). To that end, a statute clear on its face must be enforced as

written. *Peele v. Finch*, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973). We will presume that the legislature acted with care and deliberation, *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970), and, when appropriate, reference will be made to the purpose of the legislation, *Re Hardy*, 294 N.C. 90, 95-96, 240 S.E.2d 367, 371-72 (1978).

Although we are unable to set forth any rule which easily and conclusively determines what forms of compensation are to be included in "base rate of compensation," we are satisfied that the plain meaning of "base rate of compensation" does not include overtime pay, longevity pay, or pay for unused accrued vacation. "Base pay" is defined as "wages, *exclusive of overtime, bonuses, etc.*" Black's Law Dictionary 157 (6th ed. 1990) (emphasis added). "Pay" is defined as "[c]ompensation; wages; salary; commissions; fees," *id.* at 1128, and hence "base pay" is comparable to "base compensation." Thus, the accepted definition of "base pay" is a strong indication that the term does not include plaintiffs' overtime pay and is some indication that longevity pay and accrued vacation pay, which are arguably in the nature of "bonuses, etc.," should not be included either.[2]

To the extent that "base pay" is not synonymous with "base rate of compensation" and the definition of "base pay" is inconclusive with respect to longevity pay or accrued vacation pay, the statute indicates that the forms of payment at issue here are not to be included. "Base" is defined as "[b]ottom, foundation, groundwork, that on which a thing rests." Black's Law Dictionary 151. "Rate" is defined as "[p]roportional or relative value, measure, or degree." Id. at 1261. In the context of an employee's compensation, rate is proportional to, or relative to, some variable such as time or output and it tends to connote some degree of regularity or steadiness. We conclude, therefore, that "base rate of compensation" refers to that portion of compensation which is relatively stable and forms the "foundation" or "groundwork" of the employee's entire compensation scheme. This would generally be the minimum amount of compensation to which the employee is entitled in any given pay period relatively independent of factors other than the employment relationship itself.

2. In Article 6 of Chapter 135 of the General Statutes, dealing with disability income for state employees, "base rate of compensation" is defined as "the regular monthly rate of compensation not including pay for shift premiums, overtime, or other types of extraordinary pay; in all cases of doubt, the Board of Trustees [of the Teachers' and State Employees' Retirement System] shall determine what is 'base rate of compensation.' " N.C.G.S. § 135-101 (1992). While one particular use of a phrase can be persuasive as to another use of that phrase by the legislature, we do not find in this instance that the definition of "base rate of compensation" in Chapter 135 is useful to interpreting that phrase in Chapter 143. We also note that neither party made reference to this statute.

Overtime pay is highly variable depending on the needs of the department in any given period of time. Before overtime hours have been assigned, and absent any reason to know that overtime hours will be assigned, an employee generally does not have an expectation that he will receive overtime pay. Overtime pay thus does not constitute a part of an employee's base rate of compensation. Similarly, the balance of accrued vacation, which changes as the employee takes vacation leave or accrues more vacation time, may fluctuate greatly over time. Also, as accrued vacation is payable only once upon separation from employment it is more like a bonus and less like a rate of compensation. That the stub accompanying the plaintiffs' paychecks clearly delineated payments for "REGULAR HRS" and "OVERTIME DOLLARS" and the balance of "VAC[ATION] LEAVE" indicates the parties themselves viewed pay for "regular hours" as distinct from pay for overtime and the balance of accrued vacation. We believe the legislature intended to exclude an item of payment from "base rate of compensation" when that item of payment is treated by the parties as distinct and separate from a base payment such as "regular hours."

Although longevity pay is a more stable, or predictable, form of payment than overtime pay or accrued vacation, we conclude that longevity pay is not included within the plain meaning of "base rate of compensation." Longevity pay was not included in the plaintiffs' regular paycheck. It was disbursed to them once annually. The annual amount of longevity pay was figured on the basis of the employee's length of service, and regular salary, or base compensation. The meaning of "base," as we have shown above, in the context of "base compensation" is foundation, or groundwork, or that on which something rests. Since longevity pay is figured on the basis of an employee's base compensation, longevity pay cannot logically be the same as or included within the term "base compensation."

While we can find no cases from other jurisdictions directly on point, numerous cases are generally consistent with our reasoning and our conclusion. In *Bruder v. Pension Plan for Employees of Holscher-Wernig, Inc.*, 599 F. Supp. 347 (E.D. Mo. 1984), the court faced whether a pension plan administrator's interpreting "basic rate of compensation," which affected the pension received, to exclude commissions was arbitrary and capricious. In concluding that the interpretation was reasonable, the court considered that the claimant received commissions "sporadically and in varying amounts" and that commissions "are [not] guaranteed in the same manner as monthly salaries." *Id.* at 350.

In *Ball v. District of Columbia*, 795 F. Supp. 461 (D.C. Cir. 1992), *remanded*, 22 F.3d 1184 (per curiam 1994),[3] the court was faced with whether firemen's "standby pay," which is a percentage of the "basic salary" designed to compensate the firemen for unusual schedules, was included in "basic rate of pay," which under federal law could not be reduced. In concluding that standby pay was included, the court reasoned that standby pay is included in every paycheck, that it does not vary with the type or number of hours worked, and that there was evidence that firemen were commonly paid standby pay as an extra premium. *Id.* at 464.

In *O'Haver v. City of Lubbock*, 815 S.W.2d 915 (Tex. App. 1991), the court was faced with whether an officer's "base salary," which by law had to be equal to the "base salary" of other police officers of the same class, included the value of the use of police vehicles during off-duty hours. In finding that it did not, the court looked to the synonymous term "base pay" which was defined as "the basic rate of pay for a particular job exclusive of overtime pay, bonuses, etc." *Id.* at 916 (citing Webster's Ninth New Collegiate Dictionary (1990)). The court reasoned that an officer's entire compensation "includes such items as base salary, plus overtime pay, longevity, or seniority pay, education incentive pay, assignment pay and certification pay." It concluded, "[t]he ordinary meaning of base salary excludes overtime pay, assignment pay, certification pay and other additional payments of compensation such as bonuses and allowances (e.g., car allowances)." *Id.* at 917.

In *Stover v. Retirement Board*, 78 Mich. App. 409, 260 N.W.2d 112 (1977), the court addressed whether payments for unused vacation were part of the "average final compensation" which affected the amount of retirement to be received by the plaintiff police officer. The court held that unused vacation was not to be included, reasoning:

> Annual compensation received does not include unused sick or vacation payments because those payments are not made regularly during a worker's tenure with the City. Those payments are properly viewed as a retirement bonus received at retirement and

3. On appeal the case was remanded without opinion. Although not a part of the official disposition, it appears that the parties jointly moved to remand the case. 1994 WL 179975. As the lower court opinion was not vacated or reversed, and the issues to be decided on remand were not set forth, we consider the lower court's holdings to remain intact. In any event the lower court opinion does not underpin our decision, but is merely illustrative of how other courts have treated this issue.

not as annual compensation received during a certain number of years immediately preceding the member's retirement.

Id. at 412-13, 260 N.W.2d at 114.

In *Kardas v. Board of Selectmen of Dedham*, 8 Mass. App. 184, 392 N.E.2d 544 (1979), the court faced the issue whether incentive pay was to be included in "highest annual rate of compensation," which affected the police chief's compensation. The court affirmed the trial court's conclusion that "highest annual rate of compensation" referred to the "base salary" and did not include incentive pay. *Id.* at 192, 392 S.E.2d at 548. The court seemed to affirm the reasoning of the trial court which was that incentive pay was "not a general benefit due all officers." *Id.* at 187, 392 S.E.2d at 546.

Although these cases involve benefits or statutory language different from that before us, we find these cases generally supportive of our interpretation of "base rate of compensation" in N.C.G.S. § 143-166.41, which we find excludes plaintiffs' overtime pay, longevity pay, and accrued vacation. The cases cited by plaintiffs do not involve the term "base pay" or "base compensation" or any analogous terms. *Abbott v. City of Los Angeles*, 178 Cal. App. 2d 204, 3 Cal. Rptr 127 (1960) ("salary"); *City of Long Beach v. Allen*, 143 Cal. App. 2d 35, 300 P.2d 356 (1956) ("salary"); *Kilfoil v. Johnson*, 135 Ind. App. 14, 191 N.E.2d 321 (1963) ("wages"); *Bower v. Contributory Retirement Appeal Bd.*, 393 Mass. 427, 471 N.E.2d 1296 (1984) ("regular compensation").

Thus, we conclude the term "base rate compensation" in section 143-166.41(a) of the statute has a fixed meaning and does not authorize local governments to award a separation allowance based on plaintiffs' overtime pay, longevity pay, or accrued vacation.

As plaintiffs have not pointed to a statute authorizing defendant to enter a contract for a separation allowance as represented by Spencer, and as plaintiffs have not argued that such authority is necessarily or fairly implied in an express power or that such power is essential and indispensable to defendant's declared objects, we conclude that Spencer's assertions regarding the separation allowance were beyond the power of the city to make; hence they cannot be enforced against the city.

III.

[3] Plaintiffs argue that even if Spencer's representations were *ultra vires*, or beyond the city's power, the city is nevertheless estopped to deny liability according to Spencer's representations. Plaintiffs provide no argument here other than to quote from *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 344 S.E.2d 821, *disc. rev. denied*, 318 N.C. 417, 349 S.E.2d 598 (1986), and *May v. City of Kearney*, 145 Neb. 475, 17 N.W.2d 448 (1945), which we quoted in *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

We stated in *Moody v. Transylvania County*:

> If a contract is *ultra vires* it is wholly void and (1) no recovery can be had against the municipality; (2) there can be no ratification except by the Legislature; (3) the municipality cannot be estopped to deny the validity of the contract. The fact that the other party to the contract has fully performed his part of the contract, or has expended money on the faith thereof, will not preclude the city from pleading *ultra vires*.

271 N.C. at 388, 156 S.E.2d at 719. Consistent with that language, we have repeatedly held that a city cannot be estopped from defending a contract action on the basis of *ultra vires*. *Raleigh v. Fisher*, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950); *Jenkins v. Henderson*, 214 N.C. 244, 248, 199 S.E. 37, 40 (1938); *accord Watauga County Bd. of Education v. Town of Boone*, 106 N.C. App. 270, 276-77, 416 S.E.2d 411, 415 (1992). We find 56 Am. Jur. 2d *Municipal Corporations* § 529 to be instructive on this point:

> In accordance with the general principle that where there is an entire absence of power on the part of a municipal corporation or political subdivision, it cannot be estopped in that regard, the rule is that such corporation or subdivision cannot be estopped to assert the invalidity of an *ultra vires* contract—that is, a contract which it had no power to make. The doctrine of estoppel cannot be applied against a municipal corporation, county, or other political subdivision to validate a contract which it has no power to make, even though the corporation has accepted the benefits thereof and the other party has fully performed his part of the agreement, or has expended large sums in preparation for performance. A reason frequently assigned for this rule is that to apply the doctrine of estoppel against a municipality in such case would be to enable it to do indirectly what it cannot do directly. . . .

> In applying the doctrine of estoppel to municipal corporations, it is to be remembered that a municipal charter is in the nature of a power of attorney, and that the law holds those dealing with such corporations to a knowledge of the extent of the power thereby conferred, and of any restrictions imposed upon the manner of the exercise of the rights and duties thereby delegated, and visits upon such contracting parties the consequences of any violation of any essential statutory limitation, by refusing to enforce the offending contract, either directly or by way of estoppel. (Footnotes omitted.)

We have recognized that the doctrine of *ultra vires* "[u]ndoubtedly . . . entails much hardship" to those dealing with the municipality, *Fisher*, 232 N.C. at 635, 61 S.E.2d at 902, but pursuant to the principles set forth above in numerous cases, we must conclude that defendants are not estopped from asserting the defense of *ultra vires*.

This Court has never held that a municipality can be estopped from asserting *ultra vires*. In *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439, the issue was the effect of certain representations made by city officials regarding the location of a civic center to be funded by municipal bonds. We quoted from *May v. City of Kearney*, 145 Neb. 475, 17 N.W.2d 448 (1945), which applied the doctrine of estoppel against the municipality in a similar case. We concluded, however, that the facts in *Sykes* did not support the doctrine of estoppel. 278 N.C. at 122, 179 S.E.2d at 121-22. To the extent *Sykes* recognized that estoppel can be asserted against a municipality, it was in the context of a prejudicial misrepresentation by the municipality within its power to make and not in the context of a municipality exceeding the authority conferred upon it by the legislature.

Similarly, in *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 554, 344 S.E.2d 821, 827, the Court of Appeals applied the doctrine of estoppel to prevent Elizabeth City from denying liability under an agreement with its firefighters regarding the accumulation of vacation leave. The city was estopped from asserting invalidity on the ground that the agreement violated a city ordinance. Indeed, the Court of Appeals concluded the agreement was authorized by the legislature and was not *ultra vires*. *Id.* at 552, 344 S.E.2d at 826. Thus, *Pritchard* did not involve estoppel to assert the doctrine of *ultra vires*.

"There is a clear distinction between the irregular or improper exercise of an existing power to contract and the entire absence of such power." 56 Am. Jur. 2d *Municipal Corporations* § 523. The city's action at issue here involves a lack of authority, not improperly exercised authority; therefore, the city is not estopped from asserting *ultra vires*. *Moody*, 271 N.C. at 388, 156 S.E.2d at 719.

Since the city had no authority to enter the agreement made between Spencer and plaintiffs, plaintiffs had no enforceable right to payments according to Spencer's representations. Thus plaintiffs' contract action fails. As plaintiffs never had a contractual right to receive payments in excess of those provided for in N.C.G.S. § 143-166.41, we likewise reject their claims based on an unconstitutional impairment of contract, an unconstitutional taking, and 42 U.S.C.§ 1983.

IV.

In conclusion, we hold that sections 143-166.41 & 143-166.42 of the General Statutes do not authorize municipalities to make separation allowances based on overtime pay, longevity pay, and accrued vacation, and plaintiffs may not invoke the doctrine of estoppel to prevent the city from asserting the defense of *ultra vires*.

The decision of the Court of Appeals is

REVERSED.

STATE OF NORTH CAROLINA v. SWINDALL BROWN

No. 180A93

(Filed 30 December 1994)

1. Criminal Law § 181 (NCI4th)— competency to stand trial—refusal to assist defense—attitude as basis

The trial court did not err by concluding that defendant was competent to stand trial where the evidence in the record supported findings by the trial court that, although defendant refused to assist in his own defense, defendant did not suffer from a mental incapacity, and his attitude, rather than a mental illness or defect, prevented him from cooperating in the preparation of his defense.

Am Jur 2d, Criminal Law §§ 95 et seq.

2. Constitutional Law § 266 (NCI4th)— trial strategy—conflict between defendant and counsel—defendant's wishes followed—right to counsel

The trial court did not violate defendant's right to counsel when it ruled that defendant's wishes must prevail whenever he and his attorney reached an impasse regarding trial strategy where defendant never waived his right to counsel, and the trial court ensured that defendant was fully informed about the consequences of his decision and his attorney's opinions before ordering counsel to proceed according to defendant's wishes.

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

3. Evidence and Witnesses §§ 927, 1009 (NCI4th)— statements by victim's wife—unavailable witness—guarantees of trustworthiness—admissibility under residual hearsay exception—right of confrontation

Two statements made by a murder victim's wife to a police detective possessed equivalent circumstantial guarantees of trustworthiness for their admission into evidence at defendant's murder trial under the residual hearsay exception set forth in Rule 804(b)(5) where the wife later died from AIDS; the wife gave her first statement only one week after the murder; she freely admitted the nature of her relationship with defendant and described how the victim armed himself with a knife before leaving her home when he learned that defendant was outside the home, which could support an inference that the victim provoked defendant; the wife was near death at the time of her second, tape-recorded statement; she could no longer work, was often bed-ridden, and believed in good faith she would not be strong enough to testify even if she were alive at the time of the trial; and the statements mirrored each other in all respects. Furthermore, this evidence showed that the victim's wife was worthy of belief so that admission of the statements did not violate the Confrontation Clause of the Sixth Amendment. N.C.G.S. § 8C-1, Rule 804(b)(5).

Am Jur 2d, Evidence §§ 701 et seq.

Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5). 75 ALR4th 199.

4. Homicide § 552 (NCI4th)— first-degree murder—instruction on second-degree murder not required—no abdication of duty by court

There was no evidence negating the State's evidence of premeditation and deliberation in a first-degree murder prosecution which required the trial court to instruct the jury on the lesser included offense of second-degree murder where the evidence tended to show that defendant waited outside the apartment of the victim's estranged wife for around thirty minutes while the victim and his wife dined together; when the victim left the apartment, defendant ran toward him, shouted "[t]here's that MF," and began shooting; defendant fired four shots at the victim, two of which were fatal, and ran away; after surrendering to the authorities, defendant asked several different officers if he had "gotten" the victim; while the victim had placed a knife in the front of his pants, the knife was still in his pants, concealed by his shirt, when he was killed; and the absence of gunshot residue on the victim's clothing indicates that he was not shot at close range.

Am Jur 2d, Trial §§ 1427 et seq.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

5. Homicide § 550 (NCI4th)— first-degree murder—failure to instruct on second-degree murder—wishes of defendant—no abdication of responsibility

The trial court did not abdicate its duty to instruct on all charges supported by the evidence in a first-degree murder trial by its failure to instruct on the lesser included offense of second-degree murder when defendant had requested, against the advice of counsel, that the court instruct only on first-degree murder where the record shows that the court based its decision on the absence of evidence to support a charge on second-degree murder and not on the wishes of the defendant.

Am Jur 2d, Trial §§ 1427 et seq.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

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 11 January 1993 Criminal Session of Superior Court, Durham

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 Dennis P. Myers, Assistant Attorney General, for the State.

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

WHICHARD, Justice.

Defendant was tried non-capitally for the first-degree murder of Michael LeRoy Cobb. The jury found him guilty, and the trial court imposed a sentence of life imprisonment. We find no error.

At trial the State presented evidence tending to show that Michael Cobb was fatally shot on 18 September 1991 at the corner of Glendale Avenue and West Geer Street in Durham, North Carolina. The victim had a butcher knife tucked into his pants. An autopsy revealed four gunshot wounds to the victim's body—one each to the left chest, left temple, left cheek and left chin. All four bullets were recovered from the body. The wounds to the chest and temple caused the victim's death.

Agent Eugene Bishop, an expert in firearm identification at the State Bureau of Investigation, testified that the four bullets removed from the victim's body were .32 caliber and had been fired from the same weapon. He also testified that the victim's shirt contained no gunpowder or other residue. Most weapons leave residue on material when fired two feet or less from that material. Bishop could not determine the distance from which the victim was shot because the gun had not been recovered. He did testify, however, that the minimum distance from shooter to victim might have been five to seven feet; the victim was not shot from point-blank range.

Cory Pettiford, age fourteen, testified that on the evening of 18 September 1991 he and his stepsister were returning from a local park. When they reached the apartment complex at the corner of West Geer Street and Glendale Avenue, Cory saw a black man in his thirties run across the street carrying a cereal box and a silver gun. The man yelled, "[t]here goes that MF," then threw down his cereal box and started shooting. Cory testified he heard four or five shots before the man ran away.

Daphene Lyons and Carolyn Woods testified they lived in the same apartment building as Julia Cobb, the victim's wife. At approximately 7:30 p.m. on 18 September 1991, they were talking outside Lyons' apartment, which is next door to Cobb's. They saw defendant sitting on some steps across the street and looking at their apartment building. After about thirty minutes, defendant crossed the street and approached them. Woods and Lyons went inside, and Lyons telephoned Cobb at Woods' behest to warn her about defendant's presence. Woods then returned to her own apartment. Lyons heard four or five gunshots approximately five minutes after defendant crossed the street and approached the building. Woods testified she heard noises, which turned out to be gunshots, about five minutes after she and Lyons went inside. On cross-examination Woods testified she acted as a liaison between Cobb and defendant until mid-September 1991 when Cobb broke off the relationship to reconcile with the victim.

Robert Meeks, age thirteen, lived in the same building as Cobb, Lyons and Woods. On 18 September 1991, at approximately 7:30 p.m., Meeks was watching television in his bedroom when he heard several gunshots. Looking out his window, he saw the victim tremble and begin to fall. He also saw defendant throw an object down and run up Glendale Avenue. Meeks testified that defendant stayed about one and one-half car lengths away from the victim. Though Meeks admitted on cross-examination that he was not positive he saw defendant, he stated that the man he saw had defendant's size and complexion.

Detective Daryl Dowdy testified that defendant turned himself in at the magistrate's office on 18 September 1991. Defendant was transported to police headquarters for questioning; upon arrival and before Dowdy asked any questions, defendant asked, "did I get Cobb?" Other officers also testified they heard defendant make this statement. Dowdy then informed defendant of his *Miranda* rights and took a statement from him. After defendant returned to the magistrate's office, Dowdy issued a warrant for his arrest for the murder.

Defendant presented evidence in his own defense but did not testify. Linda Jackson testified that she worked with defendant and Cobb at Royal Home Fashions. Jackson believed Cobb and the victim had marital problems and that Cobb had been dating defendant. Sam Dewitt, another co-worker, recalled that defendant left work early on one occasion after the victim threatened him. He also testified that the victim had once flattened the tires on Cobb's automobile. Michael Braswell testified that he had shared an apartment with defendant

and knew Cobb as defendant's girlfriend. Larry Ward testified he had known defendant since childhood and that defendant had been dating Cobb since 1985. Ward also testified he had never known defendant to threaten anyone. Felicia Allen, Julia Cobb's daughter, testified that she had called the police on numerous occasions to break up fights between the victim and her mother prior to their separation. She denied telling an investigator that the incident on 18 September 1991 occurred because the victim left Cobb's apartment to confront defendant. On cross-examination Allen admitted that her mother broke up with defendant in October or November of 1990 when he burned her car. Following that incident, Allen's grandmother told defendant to stay away from their home. Allen did not believe her mother had had any further contact with defendant. Finally, Allen testified that her mother remained mentally competent until her death from Acquired Immune Deficiency Syndrome (AIDS) on 29 June 1992.

[1] Defendant contends the trial court erred by finding him competent to stand trial and to assist in his defense in a rational and reasonable manner. He argues that he failed the statutory test for competence because he was unable to communicate with his attorney to the extent necessary for the preparation of his defense. We disagree.

A pretrial hearing was held before Judge Orlando Hudson to determine whether defendant was competent to stand trial. Dr. Patricio Lara, who evaluated defendant between 1 May and 22 May 1992 at Dorothea Dix Hospital, testified about defendant's competence. He stated that defendant had low to average intelligence, thought and spoke coherently, and operated under no delusional or impaired perceptions. Dr. Lara further testified that defendant exhibited a "tense and guarded" attitude and a severe distrust of people which indicated a "personality issue" that would render defendant unable to work with a lawyer until that lawyer resolved or overcame defendant's emotional problems. Dr. Lara conceded on cross-examination that resolution of defendant's problems could require professional psychiatric intervention. He opined, however, that defendant understood the basic facts of the case, the nature and purpose of the charges against him, and his role in the proceedings, and that he could assist defense counsel in the presentation of a defense. He observed no evidence of psychosis or severe mental illness. Dr. Lara concluded that defendant was competent but might choose not to participate in his defense due to his "perception, social values and mistrust, . . . not because of a basic incapacity."

Based on Dr. Lara's testimony, Judge Hudson found that (i) Dr. Lara is a forensic psychiatrist; (ii) Dr. Lara's diagnosis of defendant was adjustment disorder with mixed disturbance of emotions and personality disorder; (iii) Dr. Lara did not find defendant's condition to impair his understanding of the nature and seriousness of the pending charges or the court proceedings; and (iv) Dr. Lara found that defendant was capable of understanding his position in the law and of assisting his attorney in the preparation of his defense. He then concluded that defendant was competent to stand trial:

> [D]efendant does understand the seriousness of the charges against him, the nature of the court proceedings, . . . he does understand his position in the law, . . . he is capable of assisting his attorney in the preparation of his defense. And . . . he, therefore, has the capacity to proceed to trial on these charges.

The statutory test for determining a defendant's mental capacity to stand trial is as follows:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

N.C.G.S. § 15A-1001(a) (1988). This "statute provides three separate tests in the disjunctive. If a defendant is deficient under any of these tests he or she does not have the capacity to proceed." *State v. Shytle*, 323 N.C. 684, 688, 374 S.E.2d 573, 575 (1989).

Defendant argues that Dr. Lara's testimony revealed defendant had the future potential, but not the current capacity, at the time of trial to assist in his defense in a rational manner. He maintains the record proves he suffered from a debilitating level of paranoia at the time of his trial and was incapable of rationally assisting his attorney in his defense. Therefore, he argues, he could not "assist in his own defense in a rational or reasonable manner" and did not have the mental capacity to stand trial.

The record does reveal that defendant failed to cooperate with his attorney on several occasions. At the pretrial competency hearing Dr. Lara conceded on cross-examination that defendant's problem with cooperation would partially impair his ability to participate in

his trial. Defense counsel made numerous motions to withdraw both before and during trial on the grounds that defendant would not divulge any information regarding the incident of 18 September 1991.

The record also reveals, however, that defendant's behavior stemmed from a refusal—not an inability—to assist in his own defense. Dr. Lara testified that defendant's failure to participate, while a "major obstacle in the work with the attorney," stemmed from defendant's "perception, social values and mistrust," not from "a basic incapacity." Additionally, defendant asked the trial court on the first day of trial to appoint a new attorney for him. The court placed defendant under oath and conducted questioning for the record; defendant's responses revealed that he suffered from a bad attitude, not a mental incapacity. He stated that he had attended high school through the eleventh grade and later had earned a General Equivalency Degree. He denied having any type of mental handicap. He understood that he was entitled to be represented by a lawyer, but not by a lawyer of his choice. Finally, the following colloquy occurred:

> [COURT]: Mr. Brown, I have heard nothing here that would be grounds for removal of your attorney, sir. He says that he has worked out a defense for you, he has prepared a defense for you, and he is ready to go to trial for you, but he needs your cooperation. Now, why do you say that you cannot cooperate with your attorney?
>
> [DEFENDANT]: I didn't say that.
>
> [COURT]: Well, can you cooperate with him?
>
> [DEFENDANT]: I refuse to cooperate with him.
>
> [COURT]: You refuse to cooperate with him?
>
> [DEFENDANT]: Yeah.
>
> [COURT]: In other words, you can cooperate with him, but you refuse to?
>
> [DEFENDANT]: I refuse to cooperate with him.

Based on the foregoing, the trial court could properly find that defendant did not suffer from a mental incapacity—that his attitude, rather than a mental illness or defect, prevented him from assisting in his own defense. It thus could properly conclude that he was competent to stand trial. This assignment of error is therefore overruled.

[2] Defendant next contends the trial court effectively allowed him to proceed without counsel but did not ensure that he properly waived his constitutional right to counsel. On several occasions, both before and during the trial, defense counsel notified the court that defendant refused to cooperate in the preparation of his defense. The trial court, relying on *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991), ruled that defendant's wishes must prevail whenever he and his attorney reached an impasse regarding trial strategy. Defendant argues that the court should have either allowed him to proceed *pro se* or ordered him to abide by the decisions of his attorney. We disagree.

A court may not require an indigent defendant to represent himself at trial because the Sixth Amendment to the United States Constitution guarantees the assistance of counsel in a serious criminal prosecution. *Faretta v. California*, 422 U.S. 806, 818, 45 L. Ed. 2d 562, 572 (1975); *Gideon v. Wainright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963); *see Ali*, 329 N.C. at 403, 407 S.E.2d at 189. The language and structure of the Sixth Amendment also protect a defendant's right to self-representation; a fully informed criminal defendant has the constitutional right to waive the assistance of counsel. *Faretta*, 422 U.S. at 818-21, 45 L. Ed. 2d at 572-74. Defendant here never waived his right to counsel, however. Every time the trial court asked if he wanted to dismiss his attorney and represent himself, defendant chose to keep his attorney. The trial court could not dismiss defendant's attorney against defendant's wishes. Therefore, it had to decide whose strategy should prevail, defendant's or defense counsel's, when the two conflicted. Relying on *Ali*, the court concluded that defendant's wishes regarding trial tactics must control.

We held in *Ali* that a trial court did not violate a defendant's right to counsel when it allowed him, not defense counsel, to decide whether to exercise a peremptory challenge. We noted that tactical decisions—such as which witnesses to call, which motions to make, and how to conduct cross-examination—normally lie within the attorney's province. "However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *Ali*, 329 N.C. at 404, 407 S.E.2d at 189.

Defendant here held strong opinions about trial strategy, jury instructions, and the examination of witnesses. Defense counsel believed that abiding by defendant's wishes contravened his client's

best interests and violated his own ethical obligations. As required by *Ali*, counsel notified the court at each impasse "of the circumstances, [his] advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached." *Id.* Further, the trial court ensured that defendant was fully informed about the consequences of his decisions and his attorney's opinions before ordering counsel to proceed according to defendant's wishes. We conclude that the court properly interpreted and applied our decision in *Ali*. This assignment of error is therefore overruled.

[3] Defendant next contends the trial court erred by admitting two out-of-court statements under Rule 804(b)(5). He argues that the statements were not admissible under any exception to the hearsay rule and that admitting them violated his Sixth Amendment right to confront the witnesses against him. We disagree.

At the pretrial hearing before Judge Hudson defendant moved to suppress two statements made by Julia Cobb, the victim's wife. Detective Daryl Dowdy of the Durham Police Department testified that he interviewed Cobb twice—first on 25 September 1991 and again in a taped interview on 30 May 1992. Both interviews occurred in Cobb's home. Cobb gave the following information during the first interview: Cobb had broken up with defendant approximately four months before the shooting; since then defendant had threatened to kill both Cobb and the victim on numerous occasions. On 13 September 1991 defendant told Cobb, "If I can't have you, your husband is not going to have you either." Cobb invited the victim to her home for dinner on the evening of 18 September 1991. As they ate, they saw defendant out the window. A few minutes later Cobb received a telephone call from a neighbor warning her that defendant was in the neighborhood. The victim prepared to leave around 8:00 p.m.; he placed a kitchen knife inside the front of his pants, covering the handle with his shirt. Cobb walked the victim to the door and watched him go down the stairs. She heard four gunshots as he turned the corner of the building. Cobb then ran back into her apartment, looked out her kitchen window, and saw the victim lying in the parking lot. At the end of the interview, Officer Dowdy wrote a statement containing the above information which Cobb signed and adopted.

Officer Dowdy further testified he tape-recorded a second interview with Cobb on 30 May 1992 after he learned from the District Attorney's office that she was dying from AIDS. Officer Dowdy noted that Cobb appeared very ill and uncomfortable, yet alert and aware of

the purpose of the interview. Cobb's second statement essentially mirrored her first, although she admitted she had dated defendant for approximately one year before ending the relationship in an effort to reconcile with her husband. On cross-examination Officer Dowdy testified that Cobb did not die until 29 June 1992, six months before defendant's trial began. He conceded he made no effort to contact the defense with the information that Cobb was near death.

Felicia Allen, Cobb's daughter, testified that in September 1991 Cobb had stopped taking her medicine, was depressed, and could no longer work due to her illness. Allen further testified that by 30 May 1992—the date of the second interview with Officer Dowdy—Cobb needed assistance with walking due to blood clots and swelling. The swelling, which extended from Cobb's leg to her stomach, arms, and neck, caused Cobb intense pain and often confined her to bed. Cobb executed a living will and discussed funeral plans with Allen prior to 30 May 1992. Finally, Allen stated that Cobb feared she would be unable to testify in court, even if she were still alive, because of her rapidly deteriorating health.

Judge Hudson denied defendant's motion to suppress both statements. He found that the statements contained sufficient circumstantial guarantees of trustworthiness, were offered as evidence of material facts, and were more probative of those facts than any other evidence reasonably obtainable, and that admission of the statements best served the interests of justice. He therefore admitted them under Rule 804(b)(5), the residual hearsay exception.

We first address the admissibility of the statements under our Rules of Evidence. Rule 804(b)(5) provides:

> 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 [for former testimony, statements under belief of impending death, statements against interest and statements of personal or family history] 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 than 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.

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 noted the six-part inquiry in which the trial court must engage in determining the admissibility of hearsay under Rule 804(b)(5). Only the third factor is involved here: "The trial judge . . . must include in the record his findings of fact and conclusions of law that the statement possesses 'equivalent circumstantial guarantee[s] of trustworthiness.' " *Triplett*, 316 N.C. at 9, 340 S.E.2d at 741. In weighing these guarantees, a trial court must consider:

> (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 to this inquiry are factors such as the nature and character of the statement and the relationship of the parties.

Id. at 10-11, 340 S.E.2d at 742.

The trial court here made all six findings required by *Triplett* and fully considered the question of the statements' trustworthiness. In its order it made the following findings of fact relevant to the question of trustworthiness:

> 10. . . . Julia Cobb, to the exclusion of all other persons, was able to observe the decedent victim and his reaction upon learning that the defendant was outside Ms. Cobb's residence watching the parties and waiting for the decedent to leave. In addition, Julia Cobb, to the exclusion of all other persons, was able to accurately describe the relationship that existed between herself, [the victim] and the defendant prior to the incident of September 18, 1991.
>
> . . . .
>
> 22. . . . Julia Cobb had no relationship to the State other than that of a witness in this case.
>
> 23. . . . Julia Cobb described the events of September 18, 1991 to family members, Dr. Miriam Cameron, and to several members of the Durham City Police Department to include Officer Dowdy. . . . [T]hose statements were consistent with the written statement she made on September 25, 1991 and the recorded taped statement she made on May 30, 1992.

> 24. . . . Julia Cobb as the declarant of the above described statements was motivated to tell the truth. . . . [H]er terminal condition and immediately impending death give unqualified circumstantial guarantees of trustworthiness.

Based on these findings, the court concluded that "the statements of Julia Cobb possess equivalent circumstantial guarantees of trustworthiness" and ordered that the statements "shall be admissible evidence pursuant to . . . Rule 804(b)(5); and . . . *Triplett*, 316 N.C. 1 (1986)."

We are bound by findings of fact supported by competent evidence. *State v. Thompson*, 332 N.C. 204, 215, 420 S.E.2d 395, 401 (1992); *State v. Ross*, 329 N.C. 108, 123, 405 S.E.2d 158, 167 (1991). This holds true even if evidence exists "from which a different conclusion could have been reached." *State v. Johnson*, 322 N.C. 288, 293, 367 S.E.2d 660, 663 (1988). Substantial competent evidence supports the trial court's findings here. Cobb gave her first statement only one week after the murder. She freely admitted the nature of her relationship with defendant and described how the victim armed himself with a knife. These facts could support an inference that the victim—Cobb's husband—provoked defendant; still, Cobb included the details in her statement. She was near death at the time of her second, tape-recorded statement. She could no longer work, was often bedridden, and believed in good faith she would not be strong enough to testify, even if she were alive, at the time of trial. The statements mirrored each other in all material respects. This evidence supports the court's findings, and those findings support its conclusions. We find no error in the admission of the hearsay testimony under Rule 804(b)(5).

We next determine whether admitting the statements violated the Confrontation Clause of the Sixth Amendment. To be constitutionally admissible, hearsay must contain indicia of reliability; hearsay that falls within a firmly rooted exception to the hearsay rule inherently possesses such indicia. *Idaho v. Wright*, 497 U.S. 805, 815, 111 L. Ed. 2d 638, 652 (1990). Hearsay not within a firmly rooted exception is admissible only if supported by a showing of particularized guarantees of trustworthiness. *Id.* These guarantees arise out of the "circumstances surrounding the making of the statement," taken as a whole, "that render the declarant particularly worthy of belief." *Id.* at 819, 111 L. Ed. 2d at 655. The residual hearsay exception does not qualify as firmly rooted for Confrontation Clause purposes, *id.* at 817-

18, 111 L. Ed. 2d at 653-54, so the court must search for circumstantial guarantees of trustworthiness. The factors noted above in addressing the admissibility of Cobb's statements under the Rules of Evidence equally support their admission under Confrontation Clause analysis, for they rendered Cobb worthy of belief. This assignment of error is therefore overruled.

[4] In his final assignment of error, defendant contends the trial court erred by refusing to instruct the jury on second-degree murder. We disagree.

A trial court must instruct the jury on lesser included offenses supported by the evidence. *State v. Williams*, 314 N.C. 337, 351, 333 S.E.2d 708, 718 (1985). To determine whether such an instruction is necessary, a court must focus on "what the State's evidence tends to prove." *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). A defendant charged with first-degree, premeditated and deliberate murder is entitled to an instruction on second-degree murder where the evidence raises a material question as to the existence of premeditation, deliberation or the specific intent to kill. *Strickland*, 307 N.C. at 287, 298 S.E.2d at 652.

> If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Id. at 293, 298 S.E.2d at 658; *see also State v. Leroux*, 326 N.C. 368, 378-79, 390 S.E.2d 314, 322, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990) ("[t]he propriety of an instruction on a lesser [included] offense is not [determined by] whether the jury could convict defendant of the lesser crime, but [by] 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.").

The trial court determined that the verdict sheet would only contain the options of guilty of first-degree murder or not guilty, stating, "[t]here is not evidence to support a lesser included charge and the defendant doesn't specifically make a request for it." Defendant con-

tends his evidence controverted the State's evidence of premeditation and deliberation, thereby requiring the court to instruct the jury on the lesser included offense of second-degree murder. He argues, for example, that neither Carolyn Woods nor Daphene Lyons saw him holding a gun; that a history of conflict between the victim, defendant, and Cobb raises the inference that the victim provoked defendant on the night of the murder; and that the knife found on the victim further supports such an inference. Finally, he argues that the victim was not dead when defendant ran away, indicating defendant did not have the intent to kill.

None of defendant's evidence conflicts with the State's proof of the elements of first-degree murder. The evidence tended to show that on the night of 18 September 1991, defendant waited outside Cobb's apartment for around thirty minutes while Cobb and the victim dined together. When the victim left the apartment, defendant ran toward him, shouted "[t]here's that MF," and began shooting. Defendant fired four shots at Cobb, two of which were fatal, and ran away. After surrendering to the authorities, defendant asked several different officers if he had "gotten" Michael Cobb. While the State's evidence revealed that the victim had placed a knife in the front of his pants, the evidence further showed that the knife was still in his pants, concealed by his shirt, when he was killed. The absence of gunshot residue on the victim's clothing indicates he was not shot from close range. Defendant presented no evidence to negate the proof of premeditation and deliberation; thus, he was not entitled to an instruction on second-degree murder.

[5] Defendant also contends the trial court erroneously believed it had to abide by defendant's wishes when deciding whether to charge on second-degree murder. While such a belief would indeed constitute error, the record does not support defendant's contention. During the charge conference, the court stated at least three times that it was not inclined to instruct on second-degree murder. Twice the court noted solely the fact that the evidence failed to support a second-degree murder charge. Only once did it mention that such an instruction was unsupported by the evidence *and* contravened defendant's decision—contrary to the advice of counsel—to request an instruction only on first-degree murder. The court did not abdicate its duty to instruct on all charges supported by the evidence. It concluded, correctly, that the State's uncontroverted evidence proved each element of first-degree murder, and it therefore properly refused to instruct on murder in the second degree. While the decision coin-

cided with defendant's wishes, those wishes did not dictate the decision. This assignment of error is therefore overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. JAMES WEATHERS

No. 404PA93

(Filed 30 December 1994)

1. Criminal Law § 301 (NCI4th)— murder and failure to appear charges—joinder for trial—harmless error

The trial court erred by joining for trial a 1989 murder charge and a 1991 failure to appear for the murder trial charge because those charges do not arise out of the same transaction or occurrence. However, the error was harmless in light of the fact that defendant's guilty plea to the failure to appear charge is being vacated and the fact that defendant's failure to appear would have been admissible in the murder trial to show flight. N.C.G.S. § 15A-926(a).

Am Jur 2d, Actions § 159.5; Criminal Law § 20.

2. Evidence and Witnesses § 308 (NCI4th)— acts of prostitution—defendant's possession of metal pipe—more probative than prejudicial

A witness's testimony which described acts of prostitution between the witness and defendant and her finding a metal pipe under defendant's pillow a month before the death of the victim, a known prostitute, was properly admitted in defendant's murder trial to show that the pipe was in defendant's bedroom in reasonable proximity to the time of the victim's death where other evidence tended to show that the victim was killed by a blunt object, such as a pipe, and since defendant's confession indicated that he had thrown a pipe away prior to the victim's death. Furthermore, the trial court did not err by finding that this testimony was more probative than prejudicial under the balancing test of Rule 403. N.C.G.S. § 8C-1, Rules 403 and 404(b).

Am Jur 2d, Evidence §§ 452 et seq.

3. Evidence and Witnesses § 897 (NCI4th)— admission of search warrant—no plain error

The trial court did not commit plain error by admitting into evidence in a first-degree murder trial the search warrant which authorized a search of defendant's home where defendant failed to object to the admission of the warrant; defense counsel responded negatively when the trial court inquired whether there were any objections to the warrant; the record suggests that the contents of the warrant were neither read to the jury nor passed to it for review; and the claimed error was not so fundamental that justice could not have been served.

Am Jur 2d, Evidence § 662.

Written recitals or statements as within rule excluding hearsay. 10 ALR2d 1035.

4. Homicide § 254 (NCI4th)— first-degree murder—sufficient evidence of premeditation and deliberation

The State's evidence was sufficient for the jury to find that defendant committed a homicide with premeditation and deliberation so as to support his conviction for first-degree murder where it tended to show that the victim, a known prostitute, was killed in defendant's bedroom; the victim bled to death as a result of seven lacerations to the posterior scalp caused by a blunt instrument such as a pipe; a metal pipe was seen under defendant's pillow a month before the killing; a lack of provocation by the victim was shown by evidence that defendant's bedroom did not appear to have been the scene of a fight, defendant was not injured, and defendant did not mention any provocation in his statements to law officers; defendant told officers that he went out in his car, picked up the victim, and brought her back to his house, where he had the murder weapon, at a time when he knew they would be alone; defendant went to great lengths to conceal the murder by disposing of the body and destroying or hiding evidence such as the metal pipe, the sheets and the mattress; and defendant exhibited an uncaring attitude toward the victim by dumping her nude body by the roadside.

Am Jur 2d, Homicide §§ 437 et seq.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.

5. Searches and Seizures § 68 (NCI4th)— search of defendant's home—consent by stepdaughter

A search of defendant's home based on the consent of defendant's stepdaughter was lawful, and the trial court properly denied defendant's motion to suppress evidence discovered during the search, where the evidence supported the trial court's determination that the stepdaughter was a resident of the premises and thus had the authority to consent to a search of the house and bedroom she shared with defendant.

Am Jur 2d, Searches and Seizures § 92.

Authority to consent for another to search or seizure. 31 ALR2d 1078.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child—state cases. 99 ALR3d 598.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse—state cases. 4 ALR4th 196.

6. Criminal Law § 145 (NCI4th)— acceptance of guilty plea—absence of factual basis

The trial court erred by accepting defendant's plea of guilty to failure to appear for trial because there was no factual basis for the plea where the clerk of court testified that defendant was present when his case was called for trial, and no evidence contradicted that testimony. N.C.G.S. § 15A-1022(c).

Am Jur 2d, Criminal Law § 489.

7. Homicide § 489 (NCI4th)— premeditation and deliberation—inference from nature of killing—propriety of instruction

There was ample evidence to support the trial court's instruction that the jury could rely on the nature of the killing to find premeditation and deliberation where the use of excessive force was shown by medical testimony that lacerations on the victim's body

were caused by blows from a blunt object consistent with a metal pipe, and the infliction of lethal wounds after the victim had fallen was shown by evidence of the excessive number of wounds and testimony that the victim's nose could have been fractured while the victim was face down and being struck in the back of the head.

Am Jur 2d, Homicide § 501.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.

8. Evidence and Witnesses § 1070 (NCI4th)— instruction on flight—sufficiency of evidence

Although evidence that defendant was charged with failure to appear for his murder trial would not support an instruction on flight, the trial court's instruction on flight was supported by evidence that, after officers questioned defendant at his home, he agreed to show them where he had thrown away a metal pipe; while looking for the pipe at his workplace, defendant received permission from the officers to use the bathroom; defendant went inside the bathroom and "out the other door"; and defendant ran down some railroad tracks and hid until the police eventually found him.

Am Jur 2d, Trial § 1184.

9. Criminal Law § 869 (NCI4th)— repetition of previous instruction—opportunity to be heard not required

When the trial court is merely repeating a previous instruction, the reinstruction is not an "additional instruction" within the meaning of N.C.G.S. § 15A-1234(c), and the trial court is not required to give the parties an opportunity to be heard prior to the reinstruction.

Am Jur 2d, Trial §§ 1108 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing life imprisonment entered by Kirby, J., at the 14 January 1993 Criminal Session of Superior Court, Gaston County. Defendant's petition for certiorari and motion to bypass the Court of

Appeals as to an additional judgment allowed by the Supreme Court 22 November 1993. Heard in the Supreme Court 12 September 1994.

Michael F. Easley, Attorney General, by Michael S. Fox, Associate Attorney general, for the State.

Daniel K. Shatz for defendant.

FRYE, JUSTICE.

Defendant was indicted for the murder of Gloria Pamela Carver. He was tried noncapitally by a jury, found guilty of murder in the first degree, and sentenced to a mandatory term of life imprisonment. Additionally, defendant was sentenced to one year in prison after pleading guilty to a charge of failure to appear at his murder trial on 11 March 1991. Defendant appealed his murder conviction to this Court. We allowed defendant's petition for certiorari and to bypass the Court of Appeals in order to review the judgment entered upon his plea of guilty to the charge of failure to appear for the trial of his murder case.

Defendant brings forward ten assignments of error. We find merit in one of defendant's assignments relating to the failure to appear charge. We find no prejudicial error in the assignments related to defendant's murder conviction.

The evidence presented at trial tended to show the following facts and circumstances. On 17 September 1989 the body of Pamela Gloria Carver, a known prostitute, was discovered. An investigation led police officers to defendant. Defendant was arrested on 20 September 1989.

An autopsy revealed that the victim had seven lacerations on her posterior scalp, a fractured nose, skull fractures, and bruises to the brain beneath the lacerations. Dr. Steven Tracy, a pathologist for Gaston Memorial Hospital, indicated that it was not possible to determine the order or the time span in which these wounds were inflicted. Dr. Tracy stated that in his opinion the cause of death was exsanguination, or bleeding to death.

Detective Mickey Cook testified that after he arrived at defendant's home, he and defendant went outside to talk. After defendant signed a consent form allowing officers to search his home, Detective Cook entered the home and conducted a search, while another officer searched the vehicles outside the premises. Additionally, Detec-

tive Cook testified that defendant's stepdaughter, Tammy Thomas, told him about a pipe that she kept around the house for protection. Defendant indicated that he had made the pipe but had thrown it away. Defendant and the officers went to look for the pipe in a trash bin at defendant's workplace.

Detective Douglas Ivey, the officer supervising the investigation, testified that while defendant was outside talking to Detective Cook he spoke with the people inside the house and determined that one of the individuals was defendant's stepdaughter, Tammy Thomas. Thomas informed Detective Ivey that she lived in the house with defendant and indicated that she did not mind showing him around. Detective Ivey observed blood splatters on the bedroom wall and on a laundry basket. Additionally, Detective Ivey observed that the mattress on the bed was new. When Detective Ivey began to look under the bed, Thomas stated that she did not feel comfortable with him looking there. Detective Ivey then stopped the search and returned to the living room. After conferring with the other detectives, Detective Ivey decided to seize the house and obtain a search warrant before continuing the search of defendant's home.

Thomas testified on voir dire that defendant is her stepfather and she frequently resided with him during 1988 and 1989. Thomas testified that she consented to Detective Ivey's search of the house. On cross-examination, Thomas clarified that while she agreed to let Detective Ivey look around, she expressed concern when he looked under the bed and pulled out a box and again when he pulled down the covers of the bed. Her concern was that Detective Ivey was doing more than just "looking around."

Melissa Hensley testified that she was a prostitute. She further testified that approximately one month before Ms. Carver's death defendant picked her up and took her to his house to engage in an act of prostitution. While defendant was in the bathroom, Hensley lay down on the bed and discovered a steel bar under the pillow. She placed the steel bar under the bed. When defendant noticed the bar was missing, he became angry. Hensley told defendant where she had put the pipe and asked him to "take her back uptown," which he did. On cross-examination, Hensley testified that defendant never struck her.

Officer Rick Powers testified that he was the officer who served the arrest warrant on defendant. Officer Powers read to the court the statement he took from defendant. Defendant stated that he had been

drinking since getting off work at 3:00 p.m. on 15 September 1989 and that he picked Ms. Carver up between 9:00 p.m. and 10:00 p.m. that evening. When they returned to his house, each of them had a beer and defendant took two green pills that a friend told him would "kick a beer." Defendant gave Ms. Carver fifty dollars and they engaged in sexual intercourse. Defendant stated:

> It was at this time that things became dazed. I do know that I hit Pam at this time, but I don't know why I did it. I don't know if I hit her with my fist or with an iron pipe that was on the bed when we lay down.

Defendant did not testify or offer any evidence at trial.

The jury was instructed that it could find defendant guilty of first-degree murder, guilty of second-degree murder, or not guilty. The jury returned a verdict of guilty of first-degree murder.

[1] In his first assignment of error, defendant contends that the trial court committed error by joining his 1989 murder charge and 1991 failure to appear charge, because the charges do not arise out of the same transaction or occurrence. We agree but find the error harmless.

Consolidation of criminal offenses for trial against one defendant is controlled by N.C.G.S. § 15A-926, which provides, in pertinent part:

> (a) Joinder of Offenses.—Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

N.C.G.S. § 15A-926(a) (1988). If the consolidated charges have a transactional connection, the decision to consolidate the charges is left to the "sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion." *State v. Silvia*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981).

While defendant was charged with murder and with failure to appear for his murder trial, this connection is insufficient to satisfy the transactional requirement of N.C.G.S. § 15A-926(a). We do not believe that these two crimes "are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C.G.S. § 15A-926(a) (1988). For this reason, the joinder of these two crimes constituted

error. However, the error was harmless in light of the fact that we are vacating defendant's guilty plea to the failure to appear charge. Furthermore, defendant would not have been prejudiced in the murder trial because evidence of his failure to appear would have been admissible as evidence of flight. Accordingly, we hold that joinder of the murder charge and the failure to appear charge was harmless error.

[2] Defendant's second assignment of error pertains to the admissibility of Melissa Hensley's testimony. Prior to Hensley's testimony, defendant objected to the portion of her testimony which described the acts of prostitution between Hensley and defendant and her finding a lead pipe under his pillow. After argument from both sides, the trial court denied defendant's objection and admitted Hensley's testimony. On appeal, defendant argues that the testimony was inadmissible under North Carolina Rules of Evidence, Rules 403 and 404(b). Defendant's argument is without merit.

Under Rule 404(b), evidence of other crimes, wrongs, or acts is admissible for purposes other than to prove the character of a person or to show that he acted in conformity therewith. Such other purposes include "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). The aforementioned list is not exclusive and "the fact that evidence cannot be brought within a category does not necessarily mean that the evidence is inadmissible." *State v. DeLeonardo*, 315 N.C. 762, 770, 340 S.E.2d 350, 356 (1986). In *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990), this Court definitively stated that Rule 404(b) is a 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." *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54.

In the instant case, the trial court admitted Hensley's testimony to show that defendant had a metal pipe in his bedroom approximately one month prior to the death of the victim. Since the evidence tended to show that the victim was killed by the use of a blunt object, such as a pipe, and since defendant's confession indicated that he had thrown a pipe away prior to the victim's death, this evidence was clearly admissible to show that the pipe was in defendant's bedroom in reasonable proximity to the time of the victim's death.

We also reject defendant's contention that Ms. Hensley's testimony was more prejudicial than probative under the balancing test of Rule 403. Rule 403 of the North Carolina Rules of Evidence 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 (1992). Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree. Relevant evidence is properly admissible "*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, 94, 343 S.E.2d 885, 889 (1986). " 'Unfair prejudice,' as used in Rule 403, means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *DeLeonardo*, 315 N.C. at 772, 340 S.E.2d at 357 (quoting Commentary, N.C.G.S. § 8C-1 Rule 403 (Cumm. Supp. 1985)). We find nothing in the instant case to suggest that the jury's decision to convict defendant of first-degree murder was based primarily on the fact that he had sex with a prostitute or because he had a pipe under his pillow.

"In general, the exclusion of evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's sound discretion." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). We conclude that the trial court did not abuse its discretion in permitting Hensley's testimony.

[3] For his third assignment of error, defendant contends that the trial court committed plain error by admitting into evidence and passing to the jury the search warrant which authorized the search of defendant's home. Defendant asserts that the search warrant contained an inadmissible hearsay recitation by Detective Cook. Further, defendant argues that the search warrant amounted to an expression of judicial opinion by the magistrate because the warrant linked defendant to the victim's death. We find no error.

We have held that it is error to allow a search warrant and supporting affidavit to be admitted into evidence over defendant's objections. *State v. Edwards*, 315 N.C. 304, 306, 337 S.E.2d 508, 509 (1985). Here defendant did not object to the admission of the search warrant

into evidence. In addition, the State contends, and the record suggests, that the contents of the search warrant were neither read to the jury nor passed to it for review. Furthermore, when the court inquired of defense counsel if there were objections to the search warrant, counsel responded in the negative. Nevertheless, defendant urges this Court to review this assignment of error under the plain error rule adopted by this Court when considering instructional error.

> [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."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). This Court has applied the plain error rule to the admission of evidence. *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 806 (1983). However, this is not the exceptional case where, after reviewing the entire record, it can be said that the claimed error is so fundamental that justice could not have been done. Thus, we reject this assignment of error.

[4] Defendant's next contention is that the trial court erred by denying defendant's motion to dismiss the charge of first-degree murder at the close of the State's case. At the close of the State's evidence, defendant moved to have the charge of first-degree murder dismissed on the grounds that the State had failed to present sufficient evidence as to each element of the charge and a jury could not find that defendant killed the victim with premeditation and deliberation based on the evidence presented. Defendant contends that the statement he gave to Detective Powers indicates that he was in a "dazed state" when the victim was killed, thus showing a lack of premeditation and deliberation.

Defendant contends that the only other source of evidence which might have shown premeditation and deliberation was the physical

evidence regarding the victim's wounds. Dr. Tracy testified that the victim bled to death as a result of seven lacerations to the posterior scalp caused by a blunt instrument. Dr. Tracy was unable to determine the time span or the sequence in which the blows were inflicted. Defendant contends that Dr. Tracy's testimony is insufficient to support a charge of premeditation and deliberation; thus, defendant's motion to dismiss should have been granted. We conclude that Dr. Tracy's testimony, when considered with the other evidence, is sufficient to show premeditation and deliberation.

In this case, defendant was convicted of first-degree murder. In defining first-degree murder and its elements, this Court has stated:

> "First degree murder is the unlawful killing of a human being with malice, premeditation and deliberation." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981). Premeditation and deliberation generally must be established by circumstantial evidence, because they ordinarily " 'are not susceptible to proof by direct evidence.' " *Id.* (quoting *State v. Love*, 296 N.C. 194, 203, 250 S.E.2d 220, 226-27 (1978)). "Premeditation" means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. *Id.* "Deliberation" means that the intent to kill was formed while the defendant was in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation. *Id.* 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.*

State v. Vause, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991) (quoting *State v. Faust*, 254 N.C. 101, 108, 118 S.E.2d 769, 773, *cert. denied*, 308 U.S. 851, 7 L. Ed. 2d 49 (1961)).

In ruling on a motion to dismiss, the court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Premeditation and deliberation may be inferred from "lack of provocation on the part of the deceased." *Vause*, 328 N.C. at 238, 400 S.E.2d at 62; *cf. State v. Corne*, 303 N.C. 293, 297, 278 S.E.2d 221, 223 (1981) (killing not with premeditation and deliberation where "shooting was a sudden event, apparently brought on by some provocation on the part of the deceased"). In this case, the direct evidence indicates a lack of provocation from the victim; defendant's bedroom did not appear to have

been the scene of a fight, since nothing was damaged or broken. A lack of struggle was also evidenced by the absence of injury to defendant. Additionally, defendant did not mention any provocation in any of his statements to law enforcement officers.

Further, premeditation and deliberation may be inferred from "the conduct and statements of the defendant before and after the killing." *Vause*, 328 N.C. at 238, 400 S.E.2d at 62. In this case defendant stated that he went out in his car, picked up the victim, and brought her back to his house—where he had the murder weapon—at a time when he knew they would be alone. Defendant's conduct after the killing provides further evidence of premeditation and deliberation. Defendant went to great lengths to conceal the murder, including disposing of the body and destroying or hiding evidence such as the pipe, the sheets, and the mattress. Defendant's uncaring attitude about the victim, evidenced by killing her and then dumping her nude body by the roadside, could be considered by the jury in finding premeditation and deliberation. When viewed in the light most favorable to the State, the evidence presented was sufficient for the jury to find that defendant committed the homicide with premeditation and deliberation.

[5] In his fifth assignment of error defendant argues that the trial court erred by denying defendant's motion to suppress the evidence resulting from the officers' search of his home. Defendant contends that his state and federal constitutional right to be free from unreasonable searches and seizures was violated when Detective Ivey searched defendant's home based on consent given by Tammy Thomas, defendant's stepdaughter. Defendant argues that none of the evidence presented at trial suggests that Thomas had any authority, real or apparent, to allow a search of defendant's bedroom. Defendant's contention is without merit.

Generally, consent for a search can only be given by a person whose reasonable expectation of privacy may be invaded by the proposed search. There are often situations, however, where two or more persons share a reasonable expectation of privacy in the same place and, generally, either person may consent to the search. *See United States v. Matlock*, 415 U.S. 164, 39 L. Ed. 2d 242 (1974). The trial court found, based on substantial evidence, that Tammy Thomas was a resident of the premises and, therefore, had the authority to

consent to a search of the house and bedroom which she shared with defendant. The trial court was correct in denying defendant's motion to suppress.

[6] Defendant's sixth and seventh assignments of error relate to defendant's failure to appear charge. In his seventh assignment of error, defendant contends that the trial judge erred by accepting his plea of guilty to failure to appear without any showing that there was a factual basis to support the plea. We agree.

A judge may not accept a defendant's guilty plea without first determining that there is a factual basis for the plea. N.C.G.S. § 15A-1022(c) (1988). In this case, the State called Jerri Queen, Clerk of Superior Court, Gaston County, as its only witness for the failure to appear charge. Queen explained that she maintains the court's criminal files and defendant's case was set for the 11 March 1991 trial calendar. The pertinent portion of Ms. Queen's testimony is as follows:

> Q. [Prosecutor] And did James Weathers appear at the—for trial during the term?
>
> A. [Ms. Queen] He did.
>
> Q. And state whether or not he appeared in the courtroom when those matters were called for trial.
>
> A. Yes, sir.
>
> Q. And was there a subsequent order of arrest that was issued?
>
> A. Yes, sir.

Queen's testimony shows that defendant was present when his case was called. No one testified that defendant was not present when his case was called for trial. There was no factual basis for defendant's guilty plea to the charge of failure to appear for trial; thus, it was error for the trial court to accept defendant's guilty plea. The guilty plea and the judgment based thereon are hereby vacated.

[7] For his eighth assignment of error, defendant argues that the trial court committed plain error by instructing the jury that it could rely on the nature of the killing to find premeditation and deliberation. Defendant contends that because there was no evidence presented about the amount of force required to inflict the victim's wounds, or

that any lethal blows were struck after the victim had fallen, the trial court's instruction allowed the jury to find premeditation and deliberation based on factors not supported by the evidence.

Defendant did not object to the trial court's instructions at trial. Thus, the instructions can be reviewed only for plain error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375. Only in a "rare case" will an improper instruction "justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* at 661, 300 S.E.2d at 378.

In this case the trial court gave the following jury instruction:

> 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, use of grossly excessive force, infliction of lethal wounds after the victim has [fallen], brutal or vicious circumstances of the killing, the manner in which—the means by which the killing was done.

This instruction is based on North Carolina Pattern Instructions—Criminal No. 206.10.

In *State v. Cummings*, the Court was presented with a claim similar to the one in this case. Noting that the instruction was delivered straight from pattern jury instructions, N.C.P.I.—Crim. 206.10, this Court stated that "[t]he elements listed are merely examples of circumstances which, if found, the jury could use to infer premeditation and deliberation. It is not required that each of the listed elements be proven beyond a reasonable doubt before the jury may infer premeditation and deliberation." *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 76 (1990). In *Cummings*, this Court found that there was sufficient evidence to support the instruction and rejected the defendant's argument.

Similarly, in this case there is ample evidence to support the court's instruction. There was testimony from Dr. Tracy which dispelled any argument that excessive force was not used. Dr. Tracy testified that the lacerations on the victim's body were caused by blows from a blunt object consistent with an iron pipe. The excessive number of wounds, and the testimony that the victim's nose could have been fractured while the victim was face down and being struck in the back of her head, constituted sufficient evidence for the jury to

find that lethal wounds were inflicted after the victim had fallen. The trial court correctly instructed the jury that it could rely on the nature of the killing to find premeditation and deliberation. As in *Cummings*, we reject this assignment of error.

[8] In his ninth assignment of error, defendant contends that the trial court committed plain error by instructing the jury on flight by defendant. Defendant argues that the State did not present any evidence that defendant fled.

Defendant contends that the fact that he was charged with failure to appear for the murder trial is not evidence supporting an instruction on flight. We agree. Defendant also argues that because he remained at his home, the site of the killing, until the officers came there to talk to him, there was no evidence of flight. We do not agree. The State's evidence tends to show that defendant disappeared while he was allegedly showing the investigating officers the pipe at his place of employment.

Furthermore, defendant's own statement corroborates the State's claim that he attempted to flee when it became obvious that the officers were finding evidence of his crime. After officers questioned defendant at his home, he agreed to show them where he had thrown away a pipe. While looking for the pipe outside his workplace, defendant asked the detectives if he could go around to the side of the building and use the bathroom. After receiving permission to go, defendant stated that he went inside to the bathroom and "just went out the other door." Defendant stated that he ran down the railroad tracks and hid until the police eventually found him. We find the evidence clearly sufficient to support a jury instruction on flight. Accordingly, we reject defendant's argument.

[9] In his final assignment of error, defendant argues that the trial court committed error by reinstructing the jury on premeditation without giving the parties an opportunity to be heard. After the jury began its deliberations, the jury returned with a question for the court. The jury asked, "Define premeditation, please, and does it have a time frame?" The trial court then responded by repeating a portion of its previous instruction and did not afford the parties an opportunity to be heard before reinstructing the jury.

N.C.G.S. § 15A-1234(c) addresses the issue of additional instructions to the jury. This section reads in pertinent part as follow:

(c) Before the judge gives *additional instructions*, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard.

N.C.G.S. § 15A-1234(c) (1988) (emphasis added). This Court has not addressed this specific issue; however, the Court of Appeals has held that the requirements set forth in subsection (c) do not apply when the court merely repeats a previous instruction. *State v. Buchanan*, 108 N.C. App. 338, 340, 423 S.E.2d 819, 821 (1990). We agree with the Court of Appeals. As long as the trial court is merely repeating a previous instruction, it is not necessary for the judge to give the parties an opportunity to be heard prior to reinstruction. We find no merit in defendant's contention.

Finding merit in defendant's seventh assignment of error, we vacate defendant's guilty plea and the trial court's judgment on the failure to appear charge. In defendant's trial for murder, we find no prejudicial error. The result is:

91 CRS 8628—Failure to Appear—GUILTY PLEA AND JUDGMENT VACATED.

89 CRS 21617—First-Degree Murder—NO ERROR.

STATE OF NORTH CAROLINA v. JEFFREY CHARLES MOORE

No. 76A93

(Filed 30 December 1994)

1. Homicide § 503 (NCI4th)— first-degree felony murder—discharging firearm into property—victim shot outside house

The trial court did not err in a first-degree murder prosecution which resulted in a felony murder conviction based on discharging a firearm into occupied property by denying defendant's motion to dismiss the felony murder charge where defendant had a violent and strained relationship with his girlfriend, who lived with her sister and her sister's boyfriend, Calvin Lineberger; after a fight defendant returned to the residence several times but his girlfriend refused to see him; the victim, defendant's girlfriend,

and others were inside when they heard gunshots and realized that bullets were coming into the house from the front yard; the victim went to confront defendant in the front yard with a gun; witnesses heard shots; the victim was seriously wounded when he returned to the house; each time he attempted to go outside another round was fired into the house; the firing from outside continued until law enforcement officers arrived. The underlying felony of discharging a firearm into occupied property began the moment defendant started firing shots into the residence and continued until police sirens were heard. Defendant's actions constituted a series of connected events forming one continuous transaction constituting one count of discharging a firearm into occupied property; the victim did not break the chain when he went outside to confront defendant.

Am Jur 2d, Homicide § 46.

What constitutes termination of felony for purpose of felony-murder rule. 58 ALR3d 851.

2. Homicide § 503 (NCI4th)— first-degree murder—felony murder—discharging firearm into occupied property—instructions—temporal relationship between killing and felony

The trial court did not err in its instructions in a first-degree murder prosecution which resulted in a felony murder conviction based on discharging a firearm into occupied property where the court's use of the words "while committing the felony of discharging a firearm into occupied property" was sufficiently broad to include the entire series of relevant events beginning with the original shooting into the house and continuing until the sirens were heard and the shooting ceased. The victim did not break the chain of events by going outside to defend his home.

Am Jur 2d, Homicide § 46; Trial §§ 1077 et seq.

What constitutes termination of felony for purpose of felony-murder rule. 58 ALR3 851.

3. Criminal Law § 872 (NCI4th)— first-degree murder—felony murder—jury's request for further instructions—no error

The trial court did not err in a first-degree murder prosecution which resulted in a felony murder conviction where defendant contended that the court had disavowed its authority to satis-

fy the jury's request for an explanation of felony murder, but the jury was not asking for written instructions as defendant contended and the court reinstructed the jury as requested. When the jury later asked another question concerning the temporal relationship between the killing and the underlying felony, the trial court determined that the instruction as given adequately explained the law and twice offered to charge the jury again on the law pertaining to felony murder.

Am Jur 2d, Trial §§ 1109, 1110.

4. Homicide §§ 612, 707 (NCI4th)— first-degree murder—instructions—self-defense

The trial court did not err in a first-degree murder prosecution by instructing the jury that it could return a verdict of voluntary manslaughter for imperfect self-defense only if defendant reasonably believed it was necessary to kill in self-defense; moreover, there was no plain error in the voluntary manslaughter instruction because, in finding defendant guilty solely of first-degree murder based on felony murder, the jury specifically rejected premeditated and deliberate murder, second-degree murder, and voluntary manslaughter.

Am Jur 2d, Homicide §§ 519 et seq.

Homicide: modern status of rules as to burden and quantum of proof to show self-defense. 43 ALR3d 221.

5. Evidence and Witnesses § 256 (NCI4th)— first-degree murder—victim's possession of sawed-off shotgun—irrelevant

The trial court did not err in a first-degree murder prosecution which resulted in a felony murder conviction by sustaining the State's objection to portions of defendant's cross-examination of a prosecution witness concerning the illegality of the deceased's possession of a sawed-off shotgun. Although defendant argues that the evidence would have established self-defense, previous testimony disclosed that the victim had not brought this weapon out of the bedroom and that the sawed-off shotgun was not involved in the fatal shooting. Furthermore, defendant was convicted solely under the felony murder rule; self-defense is not an available defense to felony murder except in special circumstances not present here.

Am Jur 2d, Evidence §§ 307 et seq.

6. Criminal Law § 1340 (NCI4th)— first-degree murder—felony murder—discharging a firearm into occupied property—judgment for discharging firearm not arrested—error

The trial court erred by imposing judgment on defendant's conviction for discharging a firearm into occupied property where that crime was the underlying felony for a felony murder conviction.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 46.

Justice FYRE concurs in the result.

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 20 January 1992 Criminal Session of Superior Court, Catawba County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for discharging a firearm into occupied property was allowed 13 July 1993. Heard in the Supreme Court 15 March 1994.

Michael F. Easley, Attorney General, by Clarence J. DelForge, III, Assistant Attorney General, for the State.

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

PARKER, Justice.

Defendant was charged in indictments, proper in form, with the first-degree murder of Calvin Lineberger and discharging a firearm into occupied property. The case was tried capitally on the basis of both premeditated and deliberate murder and felony murder. Defendant was convicted of first-degree murder under the felony-murder rule only and was found guilty as charged on the remaining offense. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended life imprisonment. Upon this recommendation defendant was sentenced to life imprisonment for the murder conviction and a concurrent term of ten years' imprisonment for the discharging of a firearm into occupied property conviction.

The State presented evidence at trial tending to show that defendant and his girlfriend, Pamela Weaver, had a strained and violent relationship. On 26 December 1990 Pamela left defendant and moved in with her sister, Ronzylie Brown, and her sister's boyfriend, Calvin Lineberger, on Edna Street in Catawba, North Carolina. Two days later, on 28 December 1990, defendant went to the Lineberger residence around midday to persuade Pamela to come home with him. When she failed to respond to his pleas, defendant became angry and bit her on the forehead. As Pamela broke away and ran down the hallway, defendant threw a knife at her which stuck in the bedroom door as she closed it behind her. Lineberger came out of the bathroom, retrieved the knife, and told defendant to leave.

Defendant returned to the residence on several occasions throughout the day but Pamela refused to see him. On the last such visit, Lineberger went outside to tell defendant that he could not come inside the house to talk with Pamela. Lineberger went back inside and sat at the kitchen table with Ronzylie, Pamela, and Christopher Brown, Ronzylie's oldest son. A few moments later they heard gunshots and realized that bullets were coming into the house from the front yard. Everyone immediately dropped to the floor while Lineberger went to retrieve his guns from the bedroom. He returned with a .357 blue steel revolver and a .22 caliber rifle which he handed to Ronzylie. Christopher also had a rifle. With his gun in hand, Lineberger decided to confront defendant in the front yard.

Witnesses then heard as many as six loud shots from Lineberger's .357 pistol, quickly followed by numerous smaller shots. When Lineberger returned to the kitchen, he was seriously wounded. He was able to reload the pistol with Christopher's help but each time he attempted to go back outside another round of shots was fired into the house. The firing from outside continued until law enforcement officers arrived in response to a neighbor's telephone call for assistance. Defendant ran from the premises when he heard the approaching sirens.

When Detective Broome of the Catawba County Sheriff's Department arrived at defendant's mother's house a few moments later, he found defendant standing on the front porch with his arms above his head stating, "I give up." After being informed of his *Miranda* rights, defendant stated that Lineberger started the entire incident. Detective Broome again advised defendant of his rights when they reached the Catawba County Justice Center and defendant signed a written

waiver of rights form. When told Lineberger was in surgery, defendant stated that "the m—— f—— better die because he will go through this again only he will be dead." Calvin Lineberger died on 1 January 1991.

Dr. Joseph Vogel, a regional state pathologist with the North Carolina Medical Examiner's office, testified as an expert in forensic pathology. He performed the autopsy on 2 January 1991 at Catawba Memorial Hospital. He noted that the victim had received two gunshot wounds: one in the right upper abdomen injuring the liver, stomach, and bowels and one in the right buttock. The cause of death was severe bowel infection secondary to an abdominal gunshot wound.

Although defendant's weapon was never found, the bullets taken from the victim's body were .22 caliber as were the numerous shell casings found in the front yard. Defendant did not testify and presented no evidence.

[1] In his first assignment of error, defendant contends the trial court erred in denying his motions to dismiss the charge of felony murder predicated on discharging a firearm into occupied property. The trial court instructed the jury to find defendant guilty of felony murder if it found that defendant killed Lineberger *while* he was committing the underlying felony of discharging a firearm into occupied property. In essence, defendant contends that since the State's own evidence shows that defendant shot Lineberger *outside* the house, the evidence fails to support felony murder based on the court's instructions. We disagree.

The law in North Carolina is that

> [a] killing is committed in the perpetration or attempted perpetration of a felony for 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.

State v. Hutchins, 303 N.C. 321, 345, 279 S.E.2d 788, 803 (1981). Here, the underlying felony of discharging a firearm into occupied property began the moment defendant started firing shots into the Lineberger residence and continued until police sirens were heard and defendant ceased firing. Defendant's actions constituted not several unrelated events but a series of connected events forming one continuous transaction constituting one count of discharging a firearm into occupied

property. Lineberger did not break the chain of events when he went outside to confront defendant.

[2] Defendant additionally contends that the trial court erred in failing to instruct the jury more broadly regarding the temporal relationship between the killing and the underlying felony. Defendant argues that the court expressly conditioned a verdict of guilty of felony murder on a finding that the killing occurred while defendant was firing into the house. Relying on the plain meaning of "while," defendant contends the State's evidence contradicts any argument that defendant killed Lineberger at the same time he was firing into the occupied residence. Defendant's argument must fail.

"[T]o support convictions for a felony offense and related felony murder, all that is required is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction." *State v. Cook*, 334 N.C. 564, 574-75, 433 S.E.2d 730, 735-36 (1993). The trial court's use of the words "while committing the felony of discharging a firearm into occupied property" was sufficiently broad to include the entire series of relevant events beginning with the original shooting into the house and continuing until the sirens were heard and the shooting ceased. There is no question but that the house was occupied during this time frame. Witnesses testified that gunshots were being fired into the home before the confrontation in the yard between the two men began and continued well after Lineberger had been shot and went back inside the house. Lineberger did not break the chain of events by going outside to defend his home. *See State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985). This assignment of error is overruled.

[3] In his next assignment of error, defendant contends the trial court erred by twice disavowing its authority to satisfy the jury's request for an explanation of the law on the felony-murder rule concerning the temporal link between the killing and the underlying felony. Defendant first argues the trial court erred in disavowing its authority to give written instructions to the jury. After the jury began its deliberations, the jury foreperson sent a note to the trial court. The trial judge informed counsel of the content of the note as follows:

> Here is the question that the jury. Provide the law as charged to the jury on the first degree murder, second degree murder and voluntary manslaughter, all of the points under each item that must be proven. Now if they are asking for the instructions to take to the jury room, the court will deny that request and I will

> instruct the court officer that if they have any further question they may write that out. Any comments.

When the jury returned to the courtroom, the trial judge asked the foreperson to explain the question and the foreperson responded:

> We would like to have explained to us again the law as to first degree murder, second degree and voluntary manslaughter and also on the point that we need to find to find the defendant guilty.

The trial court then inquired if the jury wished him to go over all the instructions again, and receiving an affirmative answer, the trial judge repeated the requested instructions. From this colloquy the record is clear that the jurors were not asking for written instructions. Defendant now asserts that the trial court erred in refusing to present the jury with written instructions as allowed by *State v. McAvoy*, 331 N.C. 583, 591, 417 S.E.2d 489, 494 (1992). The trial court did not err as it reinstructed the jury as requested.

Furthermore, while we held in *McAvoy* that the trial court has the authority to provide the jury with written instructions upon request, we noted that:

> The trial court repeated the requested instructions in their entirety, thereby complying with the essence of the jury's request. Defendant gives no reason, and we find none, why giving the requested instructions orally did not serve the same purpose as written instructions.

331 N.C. at 591, 417 S.E.2d at 495.

Later during its deliberations, the jury informed the court it had another question. When the jury had been summoned back into the courtroom, the foreman informed the court that "[w]e have a question concerning if a death results from a shooting that took place outside of the dwelling after it was shot into, is that considered as a result of the shooting in the house since that had already occurred before." The foreman declined the court's offer to repeat the instructions on felony murder. The judge then stated that "it would not be property [sic] for me to say anything further as to this question. The law that applies to this case is what I have given to you in the instructions in the list of things that the state has to prove and I will give it to you again." The foreman again refused the court's offer.

We note first that defendant has waived this portion of his assignment of error in that he failed to object to this portion of the jury

charge at trial and failed to argue it on appeal as plain error. N.C. R. App. P. 10(b)(2), (c)(4). However, in an effort to prevent manifest injustice to defendant, we will review the merits of defendant's argument. N.C. R. App. P. 2.

The trial court bears the burden of "declar[ing] and explain[ing] the law arising on the evidence relating to each substantial feature of the case." *State v. Everette*, 284 N.C. 81, 87, 199 S.E.2d 462, 467 (1973). Defendant does not contend that the court improperly instructed the jury on the law governing the temporal relationship between the killing and the underlying felony; rather, defendant contends the court failed in its duty to give additional instructions to the jury in response to a clearly articulated request for an explanation of the requisite temporal relationship.

N.C.G.S. § 15A-1234(a) provides:

> (a) After the jury retires for deliberation, the judge may give appropriate additional instructions to:
>
> (1) Respond to an inquiry of the jury made in open court; or
>
> (2) Correct or withdraw an erroneous instruction; or
>
> (3) Clarify an ambiguous instruction; or
>
> (4) Instruct the jury on a point of law which should have been covered in the original instructions.

N.C.G.S. § 15A-1234(a) (1988). However, the trial court is not required to repeat instructions which have been previously given absent an error in the charge. *State v. Hockett*, 309 N.C. 794, 800, 309 S.E.2d 249, 252 (1983). "[N]eedless repetition is undesirable and has been held erroneous on occasion." *State v. Dawson*, 278 N.C. 351, 365, 180 S.E.2d 140, 149 (1971). Furthermore, the trial court "shall not be required to . . . explain the application of the law to the evidence." N.C.G.S. § 15A-1232 (1988).

In *State v. Weddington*, 329 N.C. 202, 404 S.E.2d 671 (1991), the trial court refused to specifically address the jury's question of whether the intent to kill essential to the offense of first-degree murder must have existed at the time of the act which caused the death. The trial court determined that repeating the pertinent portions of the instructions in their entirety would answer the jury's question. In holding that defendant's trial was free from prejudicial error, this Court stated:

> The trial court is in the best position to determine whether further instructions will be needed to prevent an undue emphasis being placed on a particular portion of its instructions. The trial court is not required to frame its instructions with any greater particularity than is necessary to enable the jury to understand and apply the law to the evidence bearing upon the elements of the crime charged.

Weddington, 329 N.C. at 210, 404 S.E.2d at 677 (citations omitted).

In *Hockett*, the trial court refused to answer the jury's questions concerning the differences between first- and second-degree sexual offense and between armed robbery and common law robbery. In ordering a new trial, we stated that "the trial court should have at least reviewed the elements of the offenses if it was not going to directly answer the [jury's] question as defense counsel had requested." *Hockett*, 309 N.C. at 802, 309 S.E.2d at 253.

In the present case the trial court determined that the instruction as given adequately explained the law defining felony murder and twice offered to charge them again on this subject. The foreman refused both offers. Assuming *arguendo* that the trial court erred in refusing to further clarify the temporal relationship between the killing and the underlying felony, we hold that based on *Weddington* and *Hockett*, the error was harmless since the court twice offered to reinstruct the jury on the law pertaining to felony murder. This assignment of error is overruled.

[4] In his next assignment of error, defendant contends the trial court committed plain error by instructing the jury that it could return a verdict of voluntary manslaughter for imperfect self-defense only if defendant reasonably believed it was necessary to kill in self-defense. Defendant concedes that this issue has consistently been decided contrary to his position. *State v. Rose*, 335 N.C. 301, 330, 439 S.E.2d 518, 534 (1994), *cert. denied*, ––– U.S. ––––, 129 L. Ed. 2d 883 (1994); *State v. McAvoy*, 331 N.C. 583, 601, 417 S.E.2d 489, 500-01 (1992); *State v. Maynor*, 331 N.C. 695, 700, 417 S.E.2d 453, 456 (1992). We decline defendant's request to revisit our earlier, well-reasoned holdings in *Rose*, *McAvoy*, and *Maynor*. Moreover, any error in the voluntary manslaughter instruction fails to rise to plain error since in finding defendant guilty solely of first-degree murder based on the felony-murder rule, the jury specifically rejected premeditated and deliberate murder, second-degree murder, and voluntary manslaugh-

ter. *Rose*, 335 N.C. at 331, 439 S.E.2d at 534. This assignment of error is overruled.

[5] Defendant next argues that the trial court erred by sustaining the State's objection to portions of defendant's cross-examination of a prosecution witness concerning the illegality of the deceased's possession of a sawed-off shotgun. Relying on *State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489, defendant contends that evidence of Lineberger's knowledge of the criminal prohibition in N.C.G.S. § 14-288.8(c)(3) against the possession of a sawed-off shotgun was relevant to the question of whether Lineberger was the aggressor in the entire episode or, at the very least, the aggressor in the fatal exchange of gunfire outside the house. Thus, defendant argues the evidence, if admitted, would have established either perfect or imperfect self-defense.

In *McAvoy*, the defendant was a bartender who illegally possessed a pistol while on duty in the bar and who shot and killed the victim with the pistol. At issue in the case was whether or not defendant killed the victim in self-defense. This Court held that Rule 611(b)[1] of the North Carolina Rules of Evidence permitted the prosecutor to cross-examine the bar manager concerning the illegality of possessing a gun in a bar pursuant to N.C.G.S. § 14-269.3. The Court explained that

> [e]vidence that defendant carried the gun into the club in violation of criminal law was relevant to the manner in which he possessed the gun at the time of the killing in the present case and, thus, "of consequence to the determination of the action." Therefore, it was "relevant evidence" tending to establish facts surrounding the killing of the victim by defendant and a proper subject to explore during cross-examination.

McAvoy, 331 N.C. at 593, 417 S.E.2d at 496 (quoting N.C.G.S. § 8C-1, Rule 401 (1988)).

In the present case, the victim, Calvin Lineberger, owned numerous guns, including a sawed-off shotgun. During the cross-examination of Ronzylie Brown, defense counsel attempted to ask the following questions:

> Q. [Defense Counsel] How long did he have it [the sawed off shotgun].

1. N.C.G.S. § 8C-1, Rule 611(b) (1992) provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility."

A. [Mrs. Brown] He had it for a while because it had been pawn[ed] to him.

Q. Pawn[ed] to him.

A. Yes.

Q. How long had he had it.

A. I guess about four years.

Q. Four years lying under the mattress?

A. Yes.

Q. Did you ever have any conversation with him about that gun being illegal or against the law being sawed off?

MR. PARKER: [Prosecutor] Objection.

COURT: Sustained.

Q. Did you know it was illegal to own a gun like that?

MR. PARKER: Objection.

COURT: Sustained.

Q. Did you ever see him shooting it.

A. No, never.

Q. Did you ever hear him shooting it.

A. No.

Previous testimony disclosed that Lineberger had not brought this weapon out of the bedroom and that the sawed-off shotgun was not involved in the fatal shooting. Thus, the critical distinction between the pistol in *McAvoy* and the shotgun here is that in *McAvoy* the pistol was the murder weapon, and the victim was killed in the bar into which defendant illegally carried the gun. Here, the fact that the victim kept under his mattress an illegal weapon which had nothing to do with the events leading up to his death is irrelevant. The trial court properly sustained the State's objection to defendant's cross-examination on this subject. Furthermore, since defendant was convicted of first-degree murder solely under the felony-murder rule, whether Lineberger was or was not the aggressor when he went outside to confront defendant would have no effect on the outcome of this case. Except in special circumstances not present under the facts

of this case, self-defense is not an available defense to felony murder. *State v. Bell*, 338 N.C. 363, 450 S.E.2d 710 (1994). This assignment of error is without merit.

[6] Defendant next contends that the trial court erred in imposing judgment on defendant's conviction for discharging a firearm into occupied property since this crime was the underlying felony used for the conviction of defendant for the felony murder of Calvin Lineberger. We agree and arrest judgment on this conviction accordingly.

This Court has consistently held that

> [w]hen a defendant is convicted of first degree murder pursuant to the felony murder rule, and a verdict of guilty is also returned on the underlying felony, this latter conviction provides no basis for an additional sentence. It merges into the murder conviction, and any judgment imposed on the underlying felony must be arrested.

State v. Silhan, 302 N.C. 223, 261-62, 275 S.E.2d 450, 477 (1981). *See also State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988); *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518; *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563, *cert. denied*, 434 U.S. 998, 54 L. Ed. 2d 493 (1977); *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972).

In the present case the jury specifically found defendant not guilty of first-degree murder on the basis of malice, premeditation, and deliberation but guilty of first-degree murder under the felony-murder rule. Because the predicate felony was discharging a firearm into occupied property, the trial court could not impose an additional ten-year sentence for this conviction. Therefore, judgment on the discharging a firearm into occupied property conviction must be arrested.[2]

Finally, in a related assignment of error, defendant argues that the trial court erred in imposing the maximum sentence for discharging a firearm into occupied property without complying with the requisite procedure of weighing aggravating and mitigating factors. This argument is moot since we have arrested judgment on the separate judgment for discharging a firearm into occupied property.

2. We note, however, that there will be no change in the duration of defendant's sentence since the trial court ran defendant's ten-year sentence for discharging a firearm into occupied property concurrently with his life sentence for felony murder.

NO. 91CRS626—FIRST-DEGREE MURDER: NO ERROR.

NO. 91CRS2782—DISCHARGING A FIREARM INTO OCCUPIED PROPERTY: JUDGMENT ARRESTED.

Justice FRYE concurs in the result.

STATE OF NORTH CAROLINA v. THADDEUS SWINDLER

No. 509A93

(Filed 30 December 1994)

Evidence and Witnesses § 1009 (NCI4th)— inmate's letter—admission under residual hearsay exception—prejudicial error

The trial court in a first-degree murder trial erred by admitting into evidence under the residual hearsay exception of N.C.G.S. § 8C-1, Rule 804(b)(5) a jail inmate's letter to a detective concerning statements allegedly made by defendant about the murder where (1) the trial court failed to make any particularized findings of fact or conclusions of law regarding whether the letter possessed "equivalent guarantees of trustworthiness"; (2) the inmate had no personal knowledge of the events to which he referred in the letter; (3) the inmate was not motivated to speak the truth but rather to say what the police wanted to hear in order to make a deal; (4) while the inmate never recanted his statement, he refused to acknowledge at trial that he wrote the letter, that the letter was in his handwriting, or that he wrote the address on the envelope; (5) the inmate was unavailable because he refused to testify; (6) the letter contained many inaccuracies; (7) the inmate had the opportunity to obtain specific facts about the murder without actually talking with defendant because he was in the courtroom during defendant's probable cause hearing; and (8) the trial court improperly considered corroborating evidence to support the letter's trustworthiness. Since the author of the letter was not subject to full and effective cross-examination by defendant, defendant's rights under the Confrontation Clause were violated by its admission, and the State failed to show that this error was harmless beyond a reasonable doubt where the letter contained the only evidence of defendant's motive to kill the victim; the letter provided the greatest evidence of premeditation and

deliberation; and the letter contained the most specific admission of defendant's guilt.

Am Jur 2d, Evidence §§ 701 et seq.

Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5). 75 ALR4th 199.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Wood, J., at the 8 March 1993 Criminal Session of Superior Court, Guilford County, upon a jury verdict of guilty of first-degree murder in a noncapital trial. Heard in the Supreme Court 11 October 1994.

Michael F. Easley, Attorney General, by Thomas S. Hicks, Assistant Attorney General, for the State.

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

PARKER, Justice.

Defendant Thaddeus Swindler was charged in a proper bill of indictment with first-degree murder in the death of Joe Daniel Moore. At the noncapital trial, defendant was found guilty as charged and sentenced to life imprisonment. The evidence at trial tended to show the following. On 27 October 1992, defendant visited the Conoco station in High Point, North Carolina, numerous times in order to purchase beer. Defendant also went to the Iloco Mart, which was across the street from the Conoco Station, once that night and bought some wine. While at the Iloco Mart, defendant told the clerk that he was "p——- off at an old man." The clerk then noticed a gun in defendant's pants. Later that night the victim went to the Conoco station to buy some tobacco; defendant was also in the store at this time. Defendant was in line behind the victim and followed the victim out of the store. Soon after the two men left the Conoco station, the clerk at the Conoco station heard an ambulance go by the store.

Some time after leaving the Conoco station, and before getting home, the victim was shot three times. The victim died on Oakwood Street, near his home and in the vicinity of the convenience stores. The fatal wound was a gunshot wound to the back. Eyewitnesses testified that there were two black men involved in the shooting. One witness saw one of the black men shoot the victim in the back three times. The eyewitnesses all saw the assailants run toward Kivett

Drive after the shooting. One witness, who did not actually observe the shooting, saw defendant and another black man run past her immediately after the shooting.

While responding to the call about the murder, Detective Mark Cockerham saw Jay Bryant, Perry Hunter, and defendant get into a cab. Cockerham had been called to Jay Bryant's home on English Street on an earlier occasion; Cockerham noted that Bryant's home was in the same area as the murder. Cockerham decided to stop the cab and ask defendant and his friends some questions. After asking the men a few questions, Cockerham asked if they would come down to the police station for further questioning. At the police station, hand wipings were done on Hunter and defendant to determine if they had fired a weapon recently. The results of the wipings were not conclusive and did not establish that defendant had recently fired a weapon.

At trial, Efrem Colson, an inmate in the Guilford County jail, testified that while in jail he had heard defendant say that he had "murdered the motherf——-." Also during the trial, a letter written by James Benny Quick to Detective Michael Dunn was read into evidence over defendant's objection. Quick was an inmate in jail with defendant. Quick had been in the courtroom during defendant's probable cause hearing. The letter stated:

> On 11/18 of '92, I, James Quick, [being of] full mind and body, spoke with inmate Thaddeus Swindler pertaining to a murder he claims to [have] commit[ed] on Oakwood Street, High Point, North Carolina. From my understanding of this murder from Mr. Swindler is that he and some friends had rented some type of housing duplex from Mr. J.D. Moore. However, sometime later, Mr. Moore evicted the tenant; and due to that eviction Mr. Swindler and friends plotted to kill Mr. Moore as revenge. Also, on the night of supposed murder, Mr. Swindler stated to me that he, Swindler, had seen Mr. Moore at this store and followed him home where he fired three shots at Mr. Moore and later fled toward English Road where a police officer stopped him for questioning. Ended conversation with Mr. Thaddeus Swindler. 11/19/92.

At the bottom of the letter it stated: "I have no knowledge of what this information would do for the courts or the—or the victim's family. Therefore, I ask that my name not be revealed for [the] safety of my wife and kids. Sincerely yours, James Quick."

Early in the investigation of this crime, the police believed that defendant may have rented a home from the victim and that a dispute may have developed between the two men because the victim had evicted defendant. However, the police were unable to find any evidence that supported this proposition, and this theory of motive was not mentioned at trial except as it was set forth in the letter.

Defendant testified on his own behalf that on the night of the murder, he had been drinking with Bryant and that he had gone to the Iloco and Conoco stations on several occasions that evening to buy beer. Defendant testified that he did not own a gun but that he had a black Sony Walkman on the night of the murder. Later that night, Bryant, defendant, and Hunter decided to go to an adult bookstore. Bryant and Hunter called for a cab while defendant made his last trip to the Conoco station for beer. As he was walking back from the store, defendant heard an ambulance going to Oakwood Street.

The jury was instructed that it could find defendant guilty of first-degree murder on the basis of premeditation and deliberation or find defendant not guilty. The jury found defendant guilty of first-degree murder, and defendant was sentenced to life imprisonment.

In his first assignment of error, defendant contends that the trial court erred in admitting the hearsay testimony of an out-of-court statement under the residual hearsay exception, Rule 804(b)(5). N.C.G.S. § 8C-1, Rule 804(b)(5) (1992). At trial, defendant objected to the reading of the letter written by James Benny Quick. Defendant now argues, in part, that the trial court improperly determined that the evidence was trustworthy enough to warrant introduction under Rule 804(b)(5), and admission of the statement violated his federal and state constitutional rights to confront witnesses, to a fair trial, and to due process of law. We agree.

The United States Supreme Court has noted that

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Ohio v. Roberts, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980) (quoting *Dutton v. Evans*, 400 U.S. 74, 89, 27 L. Ed. 2d 213, 227 (1970)). Hearsay evidence that does not fall within a firmly rooted exception is deemed "presumptively unreliable and inadmissible for Confrontation Clause purposes." *Lee v. Illinois*, 476 U.S. 530, 543, 90 L. Ed. 2d 514, 528 (1986), *quoted in Idaho v. Wright*, 497 U.S. 805, 818, 111 L. Ed. 2d 638, 654 (1990).

Rule of Evidence 804(b)(5) provides for the admission of hearsay statements when the declarant is unavailable and the statement is not covered by any specific exception, but is determined to have "equivalent circumstantial guarantees of trustworthiness." N.C.G.S. § 8C-1, Rule 804(b)(5). "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)." *State v. Peterson*, 337 N.C. 384, 391, 446 S.E.2d 43, 48 (1994). Initially, the trial court must find that the declarant is unavailable. *Triplett*, 316 N.C. at 8, 340 S.E.2d at 740. A declarant is deemed 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). In this case, the declarant, James Quick, was put on the stand on two occasions and refused to testify. Quick stated numerous times that he pled the Fifth. Even when ordered to testify by the trial court, Quick refused to do so. He even refused to acknowledge whether he had written the letter at issue. The trial court then concluded that James Quick was "unavailable."

After determining if a declarant is unavailable, the trial court must then 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 (quoting N.C.G.S. § 8C-1, Rule 804(b)(5) (1986))).

In determining whether a hearsay statement possesses "equivalent circumstantial guarantees of trustworthiness" so that it may be admitted under Rule 804(b)(5), the court should consider

> (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability.

State v. Nichols, 321 N.C. 616, 624, 365 S.E.2d 561, 566 (1988). The trial court should make findings of fact and conclusions of law when determining if an out-of-court hearsay statement possesses the necessary circumstantial guarantee of trustworthiness to allow its admission. *See 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); *State v. Triplett*, 316 N.C. at 10, 340 S.E.2d at 742.

In this case, the trial court failed to make any particularized findings of fact or conclusions of law regarding whether the letter possessed "equivalent circumstantial guarantees of trustworthiness." In ruling that the letter had characteristics of trustworthiness so that it was admissible, the court simply stated that: "I think that there are some indications that this is a truthful statement." This conclusion alone is an inadequate determination that a statement contains the "equivalent circumstantial guarantees of trustworthiness" necessary to allow its admission under the residual hearsay rule.

Additionally, reviewing this statement in light of the four considerations to determine trustworthiness as set forth in *Nichols*, the letter should not have been admitted. 321 N.C. at 624, 365 S.E.2d at 566. First, we note that Quick had no personal knowledge of the events to which he referred in the letter. No evidence suggests that Quick was anywhere in the vicinity of the murder when it occurred. Second, Quick was not motivated to speak the truth, but rather was motivated to say what the police wanted to hear. Quick had many past convictions and was in jail on pending charges at the time of defendant's trial. When Quick talked to Detective J.L. Grubb, he wanted to know

what the police "could do for him" with regard to his pending charge. Quick obviously wanted to make some type of deal with the police. The motivation present in this case was not for Quick to speak the truth, but rather for him to say what the police wanted to hear, so he could benefit. Third, while Quick never recanted his statement, when questioned at trial he refused to acknowledge that he wrote the letter, that the letter was in his handwriting, or even that he wrote the address on the envelope in which the letter came. Finally, Quick was unavailable because he had refused to testify. This Court has noted that "if the declarant is unavailable under Rule 804(a)(2) because he '[p]ersists in refusing to testify concerning the subject matter of his statement despite a court order to do so' the court must weigh this as a factor against admitting declarant's statement." *State v. Nichols*, 321 N.C. at 625 n.2, 365 S.E.2d at 566-67 n.2.

The letter at issue contained many inaccuracies. The letter stated that defendant had rented housing from the victim and had been evicted and that the eviction was the reason defendant had shot the victim. Detective Grubb acknowledged that originally the police believed defendant had been evicted by the victim. However, no evidence had developed to support this fact. Detective Grubb indicated that this portion of the letter was "totally without basis." The letter also indicated that the assailants had run toward English Road after shooting Mr. Moore. However, all the eyewitnesses stated that Mr. Moore's assailants ran toward Kivett Drive, which was in the opposite direction from English Road. The letter also lacked trustworthiness because Quick had the opportunity to obtain specific facts regarding the murder without actually talking to the defendant. Quick was in court with defendant during defendant's probable cause hearing.

We also note that one of the reasons the trial court admitted the letter into evidence was that portions of the letter were corroborated by other evidence that had been presented. However, "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright*, 497 U.S. at 822, 111 L. Ed. 2d at 657. Corroborating evidence should not be used to support a hearsay statement's particularized guarantee of trustworthiness. *Id.* at 823, 111 L. Ed. 2d at 657. For the foregoing reasons, we conclude that the letter simply did not contain the "inherent trustworthiness" necessary to allow its admission.

We must now consider whether the trial court's erroneous admission of Quick's out-of-court statement was prejudicial to defendant.

> A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

N.C.G.S. § 15A-1443(b) (1988).

The declarant of the letter not having been subject to full and effective cross-examination by defendant, defendant's rights under the Confrontation Clause were violated. *See California v. Green*, 399 U.S. 149, 158, 26 L. Ed. 2d 489, 497 (1970). Thus, the State must show that any error was harmless beyond a reasonable doubt, a burden which the State, in our view, cannot carry in the present case. The letter contained the only evidence of defendant's motive to kill the victim. The letter also provided the greatest evidence that the murder was committed after premeditation and deliberation. In addition, the letter contained the most specific admission of defendant's guilt in the murder. One other witness testified that defendant had said he had killed the "motherf——-," but that witness did not know where the murder to which defendant was referring had occurred. Additionally, multiple witnesses testified that they saw two black men running away from the body, and one witness saw a black man shoot the victim and run away. However, only one witness actually identified defendant as running away from the body; that particular witness did not see defendant shoot the victim. On this record we cannot conclude as a matter of law that the error was harmless beyond a reasonable doubt.

Accordingly, the verdict and judgment below are vacated and defendant is awarded a new trial.

NEW TRIAL.

STATE OF NORTH CAROLINA v. CLARENCE STEVENSON BEAMER

No. 244A92

(Filed 30 December 1994)

1. Criminal Law § 794 (NCI4th)— murder, burglary, robbery, arson—acting in concert—instruction on common plan not given—no error

There was no error in a noncapital prosecution for first-degree murder, armed robbery, first-degree burglary, and second-degree arson in the instruction on acting in concert where the court refused to instruct the jury as defendant requested that it must find that defendant was acting pursuant to a common plan to commit a crime. It was not necessary for the jury to find the defendant intended to kill the victim in order to find him guilty of first-degree murder; if the victim was killed in the perpetration of an armed robbery or burglary in which the defendant participated, he is guilty of first-degree murder. The evidence showed the defendant intended that the crimes of burglary, armed robbery, and arson be committed and that he participated in them, and the charge was adequate as to these three crimes.

Am Jur 2d, Trial §§ 1255 et seq.

2. Evidence and Witnesses § 850 (NCI4th)— arson—statement explaining smell of petroleum—hearsay

The trial court did not err in a prosecution for multiple offenses including arson where defendant's teacher had testified for the State that she smelled petroleum on defendant's bookbag and clothes two days after the fire and the court would not let defendant question the teacher on cross-examination as to the explanation defendant gave when she questioned him. The testimony of the teacher as to what the defendant had told her was hearsay and does not come within any exception to the hearsay rule.

Am Jur 2d, Evidence §§ 658 et seq.

3. Criminal Law § 762 (NCI4th)— murder, burglary, robbery, arson—instructions—reasonable doubt—moral certainty

The trial court did not err in a noncapital prosecution for first-degree murder, armed robbery, first-degree burglary, and second-degree arson by using the phrase moral certainty in its instruction on reasonable doubt.

Am Jur 2d, Trial § 1385.

4. Evidence and Witnesses § 716 (NCI4th)— murder, burglary, robbery, arson—testimony concerning defendant's classroom odor—not probative—not prejudicial

There was no prejudicial error in a noncapital prosecution for first-degree murder, armed robbery, first-degree burglary, and second-degree arson where defendant's teacher testified on direct examination that there was an odor of feces about defendant in the classroom two days after the crime and that she thought he had had a bowel movement, which he did when under stress, and testified on cross-examination that this had happened to defendant fifteen or twenty a times in the past. The testimony had little probative value but did not have a tendency to prejudice defendant.

Am Jur 2d, Appeal and Error §§ 776-779, 797-809.

5. Criminal Law § 687 (NCI4th)— murder, burglary, robbery, arson—requested instruction on seeking truth—denied

The trial court did not err in a noncapital prosecution for first-degree murder, armed robbery, first-degree burglary, and second-degree arson by not giving defendant's requested jury instruction on seeking truth. Although defendant argued that the court must give at least the substance of a requested instruction that is supported by the evidence, this was a general statement of the jury's duties and defendant did not identify the evidence supporting the request.

Am Jur 2d, Trial §§ 1092 et seq.

6. Arson and Other Burnings § 37 (NCI4th)— second-degree arson—no instruction on willful and malicious damage to real or personal property by use of explosive or incendiary device—no plain error

There was no plain error in a prosecution for multiple offenses including second-degree arson where the court did not charge the jury that it could find defendant guilty of willful and malicious damage to real or personal property by the use of any explosive or incendiary device as a lesser included offense. The State's evidence was strong as to every element of second-degree arson.

Am Jur 2d, Trial §§ 1427 et seq.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

7. Indictment, Information, and Criminal Pleadings § 50 (NCI4th)— indictment alleging burglary with intent to commit larceny—charge on burglary with intent to commit robbery

There was no prejudicial error in a noncapital prosecution for first-degree murder, armed robbery, first-degree burglary, and second-degree arson where the indictment alleged that defendant committed first-degree burglary by breaking and entering with intent to commit larceny and the court charged the jury that it could find the defendant guilty of first-degree burglary if it found the defendant or someone acting in concert with him intended to commit armed robbery at the time of the breaking and entering. The jury had to find that defendant intended to commit a crime with more elements than the crime alleged in the indictment; this was error favorable to the defendant.

Am Jur 2d, Indictments and Informations §§ 260 et seq.

8. Criminal Law § 1156 (NCI4th)— first-degree burglary—aggravating factors—armed with deadly weapon—weapon used to force entry—finding as aggravating factor erroneous

A resentencing hearing was ordered for a first-degree burglary conviction where the court found as an aggravating factor that defendant was armed with a deadly weapon at the time of the crime and the State had to prove that defendant and his accomplice forced their way into the victim's mobile home in order to prove a breaking and entering, an element of burglary, and the State proved this element by proving that defendant's accomplice held a gun on the victim so that the two men were able to enter the mobile home. N.C.G.S. § 15A-1340.4(a)(1)

Am Jur 2d, Criminal Law §§ 598, 599.

9. Criminal Law § 1218 (NCI4th)— burglary — mitigating factors—minor role—not found—no error

The trial court did not err when sentencing defendant for first-degree burglary by not finding the statutory mitigating factor that defendant played a minor role in the commission of the offense. A review of the record clearly shows that the evidence was not uncontroverted that defendant played only a minor role in the commission of the offense; in fact, it appears that defend-

ant was a knowing and active participant in the burglary and other crimes.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Rousseau, J., at the 20 January 1992 Criminal Session of Superior Court, Yadkin County. The defendant's motion to bypass the Court of Appeals as to additional judgments was allowed. Heard in the Supreme Court 15 February 1993.

The defendant, who was sixteen years old at the time of the alleged crimes, was tried for first-degree murder, armed robbery, first-degree burglary, and second-degree arson. The State did not seek the death penalty.

The State's evidence, including a confession by the defendant, showed that on the night of 20 February 1991, the defendant and an accomplice went to a mobile home occupied by Henry Rufus Shaffner. They knocked on the door. Mr. Shaffner opened the door and said, "[w]hat do you boys want?" The accomplice drew a gun and said, "[w]e want your money." The defendant and the accomplice then entered the mobile home. The accomplice forced Mr. Shaffner at gunpoint to go to the bedroom and give him money. While they were in the bedroom the accomplice took possession of a .38 caliber Colt revolver which belonged to Mr. Shaffner.

The accomplice then forced Mr. Shaffner to return to the living room where he shot Mr. Shaffner to death with his own pistol. At the accomplice's direction, the defendant went outside the mobile home and brought a jug to the accomplice which the accomplice filled with oil. The accomplice and defendant then carried Mr. Shaffner's body to the bedroom and covered the floor of the mobile home with the oil. The accomplice then set the floor on fire. The mobile home was completely destroyed.

The defendant did not introduce evidence. The jury convicted the defendant on all the charges against him. The defendant was sentenced to life in prison for first-degree murder. He was sentenced to forty years in prison on the first-degree burglary charge and twelve years in prison on the second-degree arson charge. Judgment was arrested on the armed robbery charge. The sentences are to be served consecutively.

The defendant appealed.

Michael F. Easley, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

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

WEBB, Justice.

[1] The defendant's first assignment of error deals with the court's charge on acting in concert. The defendant asked the court to charge that in order to convict him of a crime on the theory of acting in concert, the jury must find that he was "acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." The court refused to give this charge and instructed the jury as follows:

> Now, members of the jury, for a person to be guilty of a crime, it is not necessary that he, himself, do all the acts necessary to constitute that crime.
>
> If a defendant is present, and with one or more persons, act together with a common purpose to commit armed robbery, each of them is held responsible for the acts of the others done in the commission of that armed robbery, as well as any other crime, such as murder, arson and burglary, committed by the other in the, in the furtherance of that common purpose.

During its deliberations, the jury asked for further instructions and the court repeated this charge.

The defendant contends it was error not to charge as he requested that the jury must find he was acting pursuant to a common plan to commit a crime before he could be found guilty of that crime. The jury found the defendant guilty of felony murder. It was not necessary for the jury to find the defendant intended to kill the victim in order to find him guilty of first-degree murder. *State v. Shrader*, 290 N.C. 253, 225 S.E.2d 522 (1976). If the victim was killed in the perpetration of an armed robbery or burglary in which the defendant participated, he is guilty of first-degree murder. N.C.G.S. § 14-17 (1993). It was not necessary to charge on intent as to the charge of murder. The evidence showed the defendant intended that the crimes of burglary, armed robbery, and arson be committed, indeed he participated in

them. The charge was adequate as to these three crimes. *State v. Joyner*, 297 N.C. 349, 355-358, 255 S.E.2d 390, 394-396 (1979).

[2] The defendant next assigns error to the sustaining of an objection to a question he asked of a State's witness on cross-examination. The defendant's teacher testified for the State that two days after the fire, she smelled petroleum on the defendant's bookbag and clothes. On cross-examination, the court would not let the defendant question the teacher as to what explanation the defendant gave her when she questioned him about the smell of the petroleum. The witness would have testified that he told her that he had worked on a car and the fuel line "had busted on him." The defendant argues that this was relevant evidence and it was error to exclude it.

The court was correct in sustaining this objection. The testimony of the teacher as to what the defendant had told her was hearsay testimony and does not come within any exception to the hearsay rule. It was not error to exclude it. *State v. Stanton*, 319 N.C. 180, 191, 353 S.E.2d 385, 392 (1987); *State v. Price*, 301 N.C. 437, 449, 272 S.E.2d 103, 111 (1980).

[3] The defendant argues under his next assignment of error that the court did not correctly instruct the jury in regard to reasonable doubt. The court instructed as follows:

> Now, a reasonable doubt is not a vain, imaginary or fanciful doubt, but it's a sane and rational doubt. It's a doubt based on common sense.
>
> When it's said that you, the jury, must be satisfied of the Defendant's guilt beyond a reasonable doubt, it is meant that you must be fully satisfied or entirely satisfied, or satisfied to a moral certainty of the truth of the charge.
>
> If, after considering, comparing and weighing the evidence, or lack of evidence, the minds of the jury are left in such a condition that you cannot say that you have an abiding faith to a moral certainty in the Defendant's guilt, then you would have a reasonable doubt. Otherwise, not.

The defendant, relying on *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990), says this charge unconstitutionally reduces the State's burden of proof of beyond a reasonable doubt. This assignment of error is overruled pursuant to *State v. Moseley*, 336 N.C. 710, 445 S.E.2d 906 (1994).

[4] The defendant next assigns error to certain testimony by his teacher who testified for the State. The teacher testified that on 22 February 1991, the defendant was in her classroom and there was the odor of a feces about him. She thought he had had a bowel movement, which he did when under stress. On cross-examination, she testified this had happened to the defendant fifteen or twenty times in the past.

The defendant contends this evidence was not relevant to any issue in the case and was very prejudicial. We agree with the defendant that this testimony had little probative value. We do not believe, however, that it had a tendency to prejudice the defendant. It was not reversible error. N.C.G.S. § 15A-1443(a) (1988). This assignment of error is overruled.

[5] The defendant next argues that it was error for the court not to give the following jury instruction from the Pattern Jury Instructions:

> The highest aim of every legal contest is the ascertainment of the truth. Somewhere within the facts of every case, the truth abides, and where truth is, justice steps in garbed in its robes and tips the scales. In this case you have no friend to reward, you have no enemy to punish; you have no anger to appease or sorrow to assuage. Yours is a solemn duty to let your verdict speak the everlasting truth.

N.C.P.I.—Crim. 101.36 (1978).

The defendant argues that when a party requests an instruction that is supported by the evidence, the court must give the jury at least the substance of the instruction. *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976). He does not say what evidence supported this requested instruction. It is a general statement as to the jury's duties. It is not necessary to include it in a jury charge. This assignment of error is overruled.

[6] The defendant next assigns error to the court's failure to charge the jury that it could find the defendant guilty of willful and malicious damage to real or personal property by the use of any explosive or incendiary device as a lesser included offense of second-degree arson. The defendant did not object to the court's failure to so charge and we must examine this assignment of error under the plain error rule.

Assuming that the willful and malicious damage to real or personal property by an explosive or incendiary device is a lesser included offense of second-degree arson, we hold it was not plain error to fail to charge on it. We adopted the plain error rule in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983), in which we said:

> "[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 660, 300 S.E.2d at 378, quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982) (footnotes omitted) (emphasis in original).

We do not believe the failure to charge on willful and malicious damage to real or personal property by the use of any explosive or incendiary device was plain error as we have defined it. The State's evidence in this case was strong as to every element of second-degree arson. We cannot hold that the failure to give the jury an opportunity to convict the defendant of another crime can be fairly said to have had a probable impact on the jury's finding that the defendant was guilty of second-degree arson. Nor do we believe it can be said it was error so fundamental that it prevented the defendant from receiving a fair trial or that it affected the public reputation of judicial proceedings.

This assignment of error is overruled.

[7] The defendant next assigns error to a part of the charge. The indictment alleged that defendant committed first-degree burglary by a breaking and entering with intent to commit larceny. The court charged the jury that it could find the defendant guilty of first-degree burglary if it found the defendant or someone acting in concert with him intended to commit armed robbery at the time of the breaking and entering of the mobile home. The defendant says the court

charged the jury on a crime not supported by the indictment and this was error. *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984).

Larceny is a lesser included offense of armed robbery. *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988); *State v. Barton*, 335 N.C. 741, 441 S.E.2d 306 (1994). When the court charged the jury that it could find the defendant guilty of first-degree burglary if it found the defendant or someone acting in concert with him intended to commit armed robbery at the time of the breaking and entering, it charged that it must find the defendant and his accomplice had committed a crime which included larceny. The jury had to find he intended to commit a crime with more elements than the crime alleged in the indictment. This was error favorable to the defendant.

This assignment of error is overruled.

[8] The defendant next assigns error to the finding of an aggravating factor used to enhance the sentence for first-degree burglary. The court found as an aggravating factor that the defendant was armed with a deadly weapon at the time of the crime. He says that the court thus used evidence necessary to prove an element of the offense to find this aggravating factor, which is error. We believe this assignment of error has merit.

N.C.G.S. § 15A-1340.4(a)(1) provides in part:

> Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . .

In this case, the State had to prove the defendant and his accomplice forced their way into the mobile home in order to prove a breaking and entering, an element of burglary. *State v. Smith*, 311 N.C. 145, 316 S.E.2d 75 (1984). The State proved this element by proving the defendant's accomplice held a gun on Mr. Shaffner so that the two men were able to enter the mobile home. This evidence should not have been used to find an aggravating factor. For this error, there must be a resentencing hearing on the conviction of first-degree burglary. *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983).

[9] The defendant assigns error to the trial court's failure to find as a statutory mitigating factor in his burglary conviction that the defendant played a minor role in the commission of the offense. The defendant argues that the evidence presented at trial was uncontroverted that he played a minor role in the commission of the burglary in that

he did nothing to further either the burglary or any of the other offenses which were subsequently committed.

In *State v. Hood*, 332 N.C. 611, 422 S.E.2d 679 (1992), *cert. denied*, —— U.S. ——, 123 L. Ed. 2d 659 (1993), this Court stated:

> The trial court is required to find a statutory mitigating factor under the Fair Sentencing Act only if the evidence supporting that factor is uncontradicted and there is no reason to doubt its credibility; even then, the trial court is free to determine what weight it will give such a mitigating factor in sentencing under N.C.G.S. § 15A-1340.4(a). *State v. Jones*, 309 N.C. 214, 219, 306 S.E.2d 451, 455 (1983). To show that the trial court erred in failing to find a statutory mitigating factor, the defendant bears the burden of persuading the reviewing court that the evidence is so manifestly credible and so clearly supports the mitigating factor that no reasonable inferences to the contrary can be drawn. *Id.*

Id. at 623, 422 S.E.2d at 685-686.

A review of the record clearly shows that the evidence was not uncontroverted that the defendant played only a minor role in the commission of the offense. In fact, it appears to show that he was a knowing and active participant in the burglary, as well as with the other crimes. The defendant has failed to establish that the evidence is so manifestly credible and so clearly supports the mitigating factor that he played only a minor role that no reasonable inferences to the contrary can be drawn.

This assignment of error is overruled.

FIRST-DEGREE MURDER: NO ERROR.

FIRST-DEGREE BURGLARY: REMANDED FOR RESENTENCING.

SECOND-DEGREE ARSON: NO ERROR.

STATE v. CONAWAY

[339 N.C. 487 (1995)]

STATE OF NORTH CAROLINA v. JOHN LEE CONAWAY

No. 389A92

(Filed 10 February 1995)

1. Jury § 157 (NCI4th)— first-degree murder—jury selection—requirement that defendant pass on remaining jurors after challenges

The trial court did not err during jury selection in a first-degree murder prosecution where the prosecutor passed an initial group of twelve jurors to defendant for questioning; defendant conducted a *voir dire* and exercised peremptory challenges to exclude six of the prospective jurors; the court required defendant to pass on the six remaining jurors; and defendant contends that he may have had further questions for that group. The trial court complied with N.C.G.S. § 15A-1214; defendant's response when asked if he was satisfied with the six remaining jurors was not sufficient to inform the court that he wished to ask additional questions. When a defendant peremptorily challenges some prospective jurors but wishes to continue asking questions of those remaining in the panel before passing them back to the prosecution, he must inform the trial court that he wishes to continue questioning the remaining prospective jurors.

Am Jur 2d, Jury § 215.

2. Jury § 146 (NCI4th)— first-degree murder—jury selection—preselection instructions

The trial court did not err during jury selection for a first-degree murder by refusing to give defendant's requested preselection instruction where defendant argued that at least one prospective juror was confused about the law governing capital sentencing. The actual instructions given by the judge were substantively similar to those requested by defendant.

Am Jur 2d, Jury §§ 201, 202.

3. Jury §§ 227, 226 (NCI4th)— first-degree murder—jury selection—challenge for cause—no rehabilitation

The trial court did not err during jury selection in a first-degree murder prosecution by excusing a prospective juror for cause and by failing to allow defendant to rehabilitate this juror. The juror gave conflicting answers about her opposition to the

death penalty and her ability to set aside her own beliefs and follow the law, and defendant failed to preserve rehabilitation for appellate review because he failed to make any request to rehabilitate the juror.

Am Jur 2d, Jury § 290.

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

4. Jury § 262 (NCI4th)— first-degree murder—jury selection—death penalty—peremptory challenges—removal of hesitant jurors

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to prevent the prosecutor from exercising peremptory challenges to remove prospective jurors who were not challengeable for cause but who nevertheless expressed some hesitancy concerning the death penalty.

Am Jur 2d, Jury §§ 233 et seq.

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

5. Evidence and Witnesses § 2479 (NCI4th)— first-degree murder—sequestration of witnesses—denied

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion to sequester three codefendants expected to testify against him at trial. Defendant gave no reason for suspecting that the State's witnesses would tailor their testimony to accord with the testimony of previous witnesses, other than the general concern that such tailoring was possible because each codefendant had a stake in the outcome of this case. Further, there is nothing in the record to suggest that any of the codefendants were present in the courtroom during the testimony of another codefendant.

Am Jur 2d, Trial §§ 240 et seq.

Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case. 74 ALR4th 705.

6. Homicide § 552 (NCI4th)— first-degree murder—refusal to instruct on second-degree murder—no error

The trial court did not err in a first-degree murder prosecution by denying defendant's request for an instruction on second-degree murder where the evidence supported all of the elements of first-degree murder, including premeditation and deliberation, and no evidence was presented to support a conviction of second-degree murder.

Am Jur 2d, Trial §§ 1427 et seq.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

7. Jury § 93 (NCI4th)— first-degree murder—possible relationship of juror to codefendant—revealed during trial—no voir dire

The trial court did not err during a first-degree murder prosecution by denying defendant's motion to *voir dire* a juror at the beginning of the sentencing proceeding on whether he was related to a codefendant who testified against defendant. Although defendant's counsel advised the court that his secretary had received an anonymous telephone call which indicated that the juror was a cousin of the codefendant, defendant did not bring this to the court's attention until nine days later, the case having been heard on four of the intervening days. Given defendant's critical delay in bringing the alleged telephone call to the court's attention and the lack of substantiating evidence, the trial court did not abuse its discretion in denying defendant's motion.

Am Jur 2d, Jury §§ 195 et seq.

8. Criminal Law § 1322 (NCI4th)— first-degree murder—sentencing—parole eligibility

The trial court did not err in a first-degree murder sentencing proceeding by denying defendant's motion to argue parole eligibility. The North Carolina Supreme Court has consistently held that evidence concerning parole eligibility is not a relevant consideration during jury selection, closing argument, or jury deliberation in a capital sentencing, and *Simmons v. South Carolina*, 129 L. Ed. 133 is limited to those situations where the alternative to a sentence of death is life imprisonment without the possibility of parole.

Am Jur 2d, Trial §§ 286, 1443.

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

9. Evidence and Witnesses § 2899 (NCI4th)— first-degree murder—cross-examination of defendant—length of prior sentences

There was no plain error in a first-degree murder prosecution in denying defendant's motion *in limine* to exclude evidence of the length of his prior sentences. Although the Unites States Supreme Court held in *Gardner v. Florida*, 430 U.S. 349, that it is a violation of due process to impose a death sentence based at least in part on information which the defendant has no opportunity to deny or explain, the evidence in this case reflects no evidence that was not known or available to defendant which was relied on by the jury. Defendant chose to testify in his own behalf, the evidence of defendant's prior convictions and sentences was properly admitted for impeachment purposes, and defendant actually addressed the evidence during his own direct examination. Furthermore, there is no evidence that the prosecutor attempted to connect defendant's prior Maryland sentences to improper parole considerations; defendant was the only party to inform the jury of the time remaining on his Maryland sentences.

Am Jur 2d, Witnesses §§ 484 et seq.

10. Criminal Law § 454 (NCI4th)— first-degree murder—prosecutor's argument—parole

There was no plain error in a first-degree murder sentencing hearing where defendant contends that the prosecutor implicitly argued parole eligibility by reiterating that defendant had been paroled for prior Maryland convictions. The prosecutor's reference to the time remaining on defendant's Maryland sentences was based on properly admitted evidence or a reasonable inference therefrom, the prosecutor referred to defendant's parole as a part of his argument that a life sentence would not be an effective sentence since, according to the testimony of defendant's own expert, defendant could not be helped by the therapeutic or rehabilitative processes available to him in prison, and the argument was not based on future dangerousness but on the ineffectiveness of a prison sentence.

Am Jur 2d, Trial §§ 575, 576.

Prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 ALR3d 1137.

11. Criminal Law § 468 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—photographs of victims

There was no error in a first-degree murder sentencing hearing where defendant contended that photographs of the victims' partially decomposed bodies were not relevant to sentencing and should not have been shown to the jury during the prosecutor's closing argument, but the record reflects only that pictures of the victims while living were shown to the jury during this argument. Assuming that the photographs of the bodies were shown to the jury during the prosecutor's closing argument, all of the evidence properly admitted during the guilt determination stage is competent for consideration by the jury at sentencing, and photographs which depict the circumstances of the murder are relevant and admissible at sentencing.

Am Jur 2d, Trial §§ 505 et seq.

12. Criminal Law § 447 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—condition of victims' bodies

The trial court did not err in a first-degree murder sentencing hearing by allowing the prosecutor to argue, allegedly while showing the jury photographs of the victims, that the jurors should remember the condition of the victims' bodies when they were removed from the woods seven days after the murders. The prosecutor's alleged use of the photographs and his reference to the condition of the victims' bodies when they were removed from the woods did not exceed the scope of the evidence, and the reference was made as a part of the argument that the victims were unique individuals who were now dead and whose deaths represented a unique loss to their families. Defendant made no showing that the use of the photographs was excessive or repetitive.

Am Jur 2d, Trial §§ 664 et seq.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3d 8.

13. Criminal Law § 463 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—within the scope of evidence

The trial court did not err in a first-degree murder sentencing hearing by overruling defendant's objection to the prosecutor's

argument that the second victim begged for his life after defendant shot and killed the first. The argument did not exceed the scope of the evidence admitted at trial and was within the permissible scope of jury argument during a capital sentencing procedure.

Am Jur 2d, Trial §§ 554 et seq.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

14. Criminal Law § 447 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—victims' last thoughts

The trial court did not err in a first-degree murder sentencing hearing by overruling defendant's objections to the prosecutor's argument that the jury should consider the victims' last thoughts before death. This was the same type of victim impact argument approved by the United States Supreme Court. The prosecutor made no attempt to credit the victims with any particular thoughts; the argument merely served to remind the jury that the victims were sentient beings with close family ties before they were murdered by defendant, it was supported by the facts in evidence or reasonable inferences therefrom, and it was not so prejudicial as to render defendant's trial fundamentally unfair.

Am Jur 2d, Trial §§ 664 et seq.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3d 8.

15. Criminal Law § 442 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—role of jury

There was no plain error in a first-degree murder prosecution where the prosecutor informed the jury that it was the voice and conscience of the community. This argument encouraged the jury to sentence defendant to death without improperly demanding such action on the basis of the community's desires for a conviction, nor did the argument encourage the jury to sentence defendant to death as a general deterrent to first-degree murder.

Am Jur 2d, Trial §§ 567 et seq.

Prejudicial effect of prosecuting attorney's argument to jury that people of city, county, or community want or expect a conviction. 85 ALR2d 1132.

16. Criminal Law § 1347 (NCI4th)— first-degree murder—sentencing—aggravating circumstances—course of conduct

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury on the course of conduct aggravating circumstance where defendant argued that the supporting evidence was duplicative of evidence supporting other aggravating circumstances. There was substantial separate evidence supporting each of the aggravating circumstances. N.C.G.S. § 15A-2000(e)(11).

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.

17. Criminal Law § 1320 (NCI4th)— first-degree murder—sentencing—aggravating circumstances—instructions—use of same evidence to support more than one aggravating circumstance

There was no plain error in a first-degree murder sentencing hearing where the court failed to instruct the jury that it could not use the same evidence to support more than one aggravating circumstance in light of the substantial separate evidence supporting each aggravating circumstance.

Am Jur 2d, Trial §§ 1441 et seq.

18. Criminal Law § 1340 (NCI4th)— first-degree murder—sentencing—aggravating circumstance—murders in the commission of kidnapping—felony murder not submitted

The trial court did not err during a first-degree murder sentencing hearing in submitting the aggravating circumstance that the murders occurred during the kidnapping of the victims where the prosecutor had refused to request a felony murder instruction during the guilt-innocence phase of the trial. *State v. Cherry*, 298 N.C. 86, prohibits the submission of the underlying felony as an

aggravating circumstance only when defendant is convicted solely of felony murder. N.C.G.S. § 15A-2000(e)(5).

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 46.

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

19. Criminal Law § 1325 (NCI4th)— first-degree murder—sentencing—instructions—mitigating circumstances

The trial court did not err in a first-degree murder sentencing hearing in its instruction on mitigating circumstances where the court used the Pattern Jury Instruction, which uses the word "may" regarding consideration of mitigating circumstances. Virtually identical challenges to this instruction for the consideration of mitigating evidence in Issues Three and Four have been rejected.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

20. Criminal Law § 1348 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—definition

The trial court did not err in a first-degree murder sentencing hearing in its definition of mitigating circumstances in its instructions to the jury. The instructions given did not preclude the jury from considering any aspect of defendant's character or background or any of the circumstances of the killing, which defendant may have presented as a basis for the imposition of a sentence less than death.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

21. Criminal Law § 1363 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—defendant conceived in rape

The trial court did not err in a first-degree murder sentencing hearing by refusing to submit the nonstatutory mitigating circumstance that defendant was conceived when his mother was raped at age thirteen. The trial court properly concluded that the fact that defendant was conceived through rape had no logical rela-

tionship to his moral culpability for these murders and the court based its decision at least in part on the fact that there was no evidence that defendant even knew of the circumstances of his conception prior to the murders.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

22. Jury § 103 (NCI4th)— first-degree murder—jury selection—individual voir dire and sequestration of prospective jurors

The trial court did not err in a first-degree murder prosecution by denying defendant's motion for individual *voir dire* and sequestration of prospective jurors.

Am Jur 2d, Jury § 197.

23. Jury § 141 (NCI4th)— first-degree murder—jury selection—parole eligibility—questions not allowed

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to *voir dire* prospective jurors about their misconceptions concerning parole eligibility for a sentence of life imprisonment.

Am Jur 2d, Jury §§ 201, 202.

24. Constitutional Law § 371 (NCI4th)— first-degree murder—death penalty—constitutional

The North Carolina death penalty is constitutional.

Am Jur 2d, Criminal Law § 628.

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

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

A death penalty for two first-degree murders was not disproportionate where the aggravating circumstances were supported by the evidence, nothing in the record suggests that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and the death penalty was proportionate to other cases in which the death penalty was affirmed, considering both the crime and the defendant. In this case, defendant deliberately set out to steal a car; he looked around the streets of Hamlet

for a suitable target and intentionally robbed the Pantry and kidnapped the two victims at gunpoint; he stole a car from one of the victims and used it to drive the victims to an isolated spot outside Hamlet; he ordered the two victims to get out of the car and follow him into the woods, where he forced them to get down on their knees and then deliberately shot both victims in the back of the head at close range; and, after he shot the first victim, the second victim begged defendant for his life before being killed. The record is devoid of any evidence suggesting that defendant showed any concern for the lives of his victims or any remorse for his actions; he did not seek any medical attention for his victims or cooperate with the authorities; the evidence showed that defendant fled the state after the murders and continually denied his participation in these crimes after his arrest; and the evidence further showed that defendant committed these murders in the perpetration of two other felonies, first-degree kidnapping and armed robbery, and that these murders were coldly calculated and planned to eliminate any witnesses to his crimes.

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.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Helms, J., at the 5 October 1992 Special Criminal Session of Superior Court, Richmond County, upon a jury verdict of guilty of two counts of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments imposed for two counts of first-degree kidnapping, one count of robbery with a dangerous weapon, and one count of misdemeanor larceny was granted 20 December 1992. Heard in the Supreme Court 13 September 1994.

Michael F. Easley, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, for the State.

DeVore & Acton, P.A., by Fred W. DeVore, III, for defendant-appellant.

PARKER, Justice.

Defendant was tried capitally on indictments charging him with the first-degree murders of Paul DeWitt Callahan and Thomas Amos Weatherford. The jury returned verdicts finding defendant guilty of both counts of first-degree murder on the theory of premeditation and deliberation. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death for each murder. Execution was stayed on 16 November 1992 pending defendant's appeal. The jury also found defendant guilty of the first-degree kidnapping of Paul DeWitt Callahan, the first-degree kidnapping of Thomas Amos Weatherford, robbery with a dangerous weapon, and misdemeanor larceny. The trial court sentenced defendant to forty years' imprisonment for kidnapping Paul DeWitt Callahan, forty years' imprisonment for kidnapping Thomas Amos Weatherford, forty years' imprisonment for robbery with a dangerous weapon, and two years' imprisonment for misdemeanor larceny, each sentence to run consecutively. For the reasons discussed herein, we conclude the jury selection, guilt-innocence phase, and sentencing proceeding of defendant's trial were free from prejudicial error; and the death sentence is not disproportionate.

On the evening of 22 August 1991, Thomas Amos Weatherford and Paul DeWitt Callahan were in the Pantry store located on Highway 177 South in Hamlet, North Carolina. Weatherford was working as the night-shift clerk. Callahan, his roommate, had driven Weatherford to work at 11:00 p.m. and stayed at the store with him for several hours that night.

On 22 August 1991, defendant was living with his girlfriend at the Tall Pines housing project in Hamlet, North Carolina. Defendant, who was on parole for crimes committed in Maryland, had moved to North Carolina during the summer of 1991 to help take care of his grandparents, who lived nearby in Rockingham, North Carolina. Defendant's move to North Carolina violated the conditions of his Maryland parole because he had not received permission from his parole officer for the move. Evidence showed that defendant had stolen a .25-caliber handgun from his grandmother's purse prior to 22 August

1991, which also was in violation of the terms of his Maryland parole. Defendant kept the handgun in a drawstring bag at his girlfriend's apartment.

During the afternoon of 22 August 1991, defendant went shopping in Rockingham with Kelly Harrington and Ralph Crump. That evening defendant also met Michael McKinnon and Kevin "Keith" Scott in Rockingham. The men returned to Hamlet, and defendant met McKinnon, Harrington, and Scott in the parking lot of the Quail Hollow housing project. Quail Hollow is located across the street from the Tall Pines project where defendant was living with his girlfriend.

Around 10:00 p.m., the four men went to the West Hamlet Grocery Store on their way to Scott's house. Defendant, who was the only one in the group old enough to purchase alcohol, bought a six-pack of Bull malt liquor in sixteen-ounce cans and a liter of Wild Irish Rose fortified wine. The four men then went to Scott's house, which was located about half a mile from the store in the Taylor Place neighborhood. They sat on the front porch and drank all of the alcohol as they discussed taking a trip to Washington, D.C., New York, and New Jersey. Defendant expressed his desire to obtain a car so he could get back to Washington, D.C. At that time, defendant's only means of transportation was a bicycle he used to get around Hamlet and to visit his grandparents in Rockingham.

After consuming all of the alcohol, the four men walked back to the Tall Pines housing project so that defendant could talk with his girlfriend. He went inside the apartment for several minutes while the other men waited outside. When he returned, he was carrying a blue or red drawstring bag. He told the other men that he was fighting with his girlfriend, whom he was supposed to marry the next weekend, and that the police had come to her apartment looking for him. As the four men walked away from the Tall Pines housing project, defendant asked the others if they knew where he could get a car to use to get back to Washington, D.C. When the others told him that they did not know where he could obtain a car, he indicated that he could get one without specifying how he would do so. Defendant kept saying, "I got to do something."

The evidence showed that the four men began to walk around the streets of Hamlet. Defendant started looking for a car he could steal to drive back to Washington, D.C. He went into the street twice with the intention of flagging down a car and stealing it, but was unsuccessful both times.

Sometime between 1:30 a.m. and 1:45 a.m. on 23 August 1991, the four men went to the Pantry store on Highway 177 South in Hamlet. Defendant told the other men to wait outside while he went into the store to get more beer. While inside the Pantry, defendant stole $78.00 from the cash register and kidnapped Weatherford and Callahan at gunpoint.

McKinnon, Harrington, and Scott all testified at trial that several minutes after defendant left them to go into the Pantry, he drove up in a dark-colored car. This car was later identified as belonging to Callahan. The two victims were in the front seat of the car with defendant, who was pointing a gun at them. Defendant told McKinnon, Harrington, and Scott to get into the car. The three men got into the backseat of the car, and defendant drove away from the Pantry.

Defendant drove around Hamlet and out onto Highway 74 towards Fayetteville. He asked the victims about the condition of the car and whether it would make it to Florida, threatening them that if they lied to him about the car, he would kill them. He also threatened to "burn their a—" if they tried to turn their heads to look at the three men in the backseat of the car. He handed the gun to McKinnon, who put the gun between the victims' faces to show them it was real. McKinnon then gave the gun back to defendant, who slapped at least one of the victims on the head with the gun.

After defendant passed the Coca-Cola plant on Highway 74, he stopped the car on the side of the road in an isolated area and said, "This is a good spot right here." He told the victims that he had to go to the bathroom and ordered them to get out of the car. McKinnon, Harrington, and Scott remained in the car, while defendant walked the victims into the woods. McKinnon, Harrington, and Scott were unable to see defendant once he entered the woods, but they heard two gunshots fired several seconds apart.

The State's evidence tended to show that after getting out of the car, defendant walked the victims eighty-seven feet into the woods. He ordered the victims to get on their knees, and he shot both of them one time at point-blank range in the back of the head. The evidence did not indicate which victim was shot first. When defendant returned to the car, he told the other three men that he had made the two men get on their knees and shot them both in the back of the head. He also told the other men that after he shot the first man, the second victim begged defendant for his life before defendant killed him. Defendant

stated that "them m——— f——— don't deserve to live." He also told the other three men that they had nothing to worry about because "deadmen can't talk."

At approximately 1:45 a.m. on the morning of 23 August 1991, R.L. Wheeler and Gary Allen stopped at the Pantry on Highway 177 South in Hamlet. When they were unable to find the clerk anywhere on the premises of the store, they called the police. Officer Amery Griffin and Officer Don Norton of the Hamlet Police Department answered the call and arrived at the Pantry at 2:00 a.m. When they arrived at the Pantry, they were unable to locate either of the victims, both of whom they had seen in the store earlier that night as they drove by the Pantry on patrol. The officers found the cash register closed, with a "no sales" receipt on it indicating that the cash register had been opened but no sale had been made. The manager of the Pantry subsequently determined that approximately $78.00 had been stolen out of the cash register. Nothing else was missing from the store.

On 29 August 1991, Army Sergeant Daniel Poe was flying his ultralight plane near Hamlet looking for his lost dog. He was flying at a height of approximately five hundred feet over Highway 74 when he noticed something white on the ground in the woods. Poe took a closer look and saw the victims' bodies lying on the ground in the woods about eighty-seven feet from Highway 74. Sergeant Poe landed his ultralight plane and called the police.

SBI Special Agent Aprille Sweatt investigated the crime scene. She testified that she observed the bodies at the scene and that both victims had been shot in the left back side of the head. Agent Sweatt supervised the search of the area and took custody of all the physical evidence found at the crime scene.

Detective Sam Jarrell of the Hamlet Police Department examined the crime scene using a metal detector and found two .25-caliber semiautomatic shell casings and a .25-caliber lead projectile. He testified that one of these shell casings was found approximately four feet beyond the victims' heads.

After the murders defendant and the three other men drove to Washington, D.C. Harrington got into the front seat with defendant and took turns with defendant and McKinnon driving the car. The men stopped at a gas station in Fayetteville, North Carolina; at another filling station near Smithfield, North Carolina; and at a Denny's restaurant in Virginia.

The men arrived in Washington, D.C., around 8:00 a.m. on 23 August 1991. Defendant visited with his brother and stepfather that afternoon. None of the men had brought any clothes with them from North Carolina, so defendant and McKinnon went and bought some clothes and toothbrushes. Late that afternoon, defendant went to Cambridge, Maryland, to visit two friends and to see his mother.

McKinnon, Harrington, and Scott stayed with defendant's brother and with Harrington's cousin Darlene for two nights and then went to Maryland to stay with Harrington's brother. The three men returned to Hamlet on or about 30 August 1991 and confessed their participation in these murders to the Hamlet police.

On 25 August 1991, while standing on the street talking to a friend from prison, defendant was arrested in Cambridge, Maryland. Defendant attempted to elude the Maryland police. Officer Thomas Hurley of the Cambridge Police Department chased defendant into some weeds near a cemetery. When defendant was searched, a .25-caliber handgun and six .25-caliber rounds of ammunition were found in his possession. Defendant initially claimed that the police officers planted the gun on him, but later he told Officer Hurley that he had taken the gun out of his grandmother's purse when he was in Rockingham, North Carolina. When he was arrested, he told Officer Hurley that he knew he was "going away for a long time."

SBI Special Agent Eugene Bishop, who was accepted by the trial court as an expert in forensic firearms identification, conducted a forensic examination of the .25-caliber handgun found in defendant's possession when he was arrested. Agent Bishop testified at trial that the gun casings found at the crime scene had been fired from defendant's handgun.

Chief Medical Examiner John D. Butts performed the autopsy on Amos Weatherford and determined that he died from a single gunshot wound to the back of the head. Dr. Butts also supervised the autopsy of Paul Callahan, who also died from a single gunshot wound to the back of the head. Dr. Butts, who was accepted as an expert in pathology at trial, testified that the two men would have died or been rendered unconscious almost immediately after being shot.

Detective Sam Jarrell testified that on 31 August 1991, he traveled to Cambridge, Maryland, where he retrieved a brass key that had been found in defendant's possession at the time of his arrest. Detective Jarrell used this brass key to unlock the front door to the victims' apartment in Hamlet, North Carolina.

The State's evidence further tended to show that while he was in the Richmond County jail awaiting trial for these murders, defendant had an argument with another inmate, Boyd Bostic. Bostic was in a solitary confinement cell because he had been to the dentist and was on medication. Defendant was in a nearby cell, banging on the walls and making a lot of noise. Bostic asked defendant to stop making so much noise. An argument ensued, during which defendant told Bostic that "I done (sic) killed two m—— f—— already."

At trial, defendant admitted that he had previously been convicted of five counts of breaking and entering and two counts of unauthorized use of a motorized vehicle. He testified that he had received a combined sentence of thirty-nine years for these crimes and that he had been paroled on 25 October 1990.

At the close of the State's evidence, defendant moved to dismiss all charges against him. The trial court denied the motion.

Defendant's evidence included his own testimony. He stated he moved to North Carolina in July 1991 to help care for his grandmother, who lived in Rockingham. Defendant testified that he did not participate in the murders of Amos Weatherford or Paul Callahan. He further testified that he did not learn about the murders until he was moved from the Dorchester County jail in Cambridge, Maryland, to Baltimore, Maryland, after being arrested on 25 August 1991 for violating his parole.

Defendant testified that in early August 1991 he stole a loaded gun from his grandmother's purse because of a fight he had gotten into at a Rockingham basketball court. During the rest of the time he was in North Carolina, he carried the gun with him in a little red bag.

Defendant indicated that in early August of 1991, he moved in with his girlfriend at the Tall Pines housing project, where he was living on 22 August 1991. Defendant admitted spending much of that evening with Harrington, whom he had known in Washington, D.C., and with McKinnon and Scott, whom he had just met that day. The men initially met in Rockingham, where defendant had gone shopping. Defendant testified that the only means of transportation he had at that time was a bicycle.

According to defendant's testimony, when he returned to Hamlet on 22 August, his girlfriend told him that the police had come to her apartment looking for him. They argued, and defendant went to his girlfriend's apartment and packed his bags. He left his bags inside the

apartment and met McKinnon, Harrington, and Scott across the street, in the parking lot of the Quail Hollow housing project. Defendant purchased beer and fortified wine at the West Hamlet Grocery Store, and the four men went down the street one half of a mile to Scott's house in the Taylor Place neighborhood. They sat on Scott's front porch and drank all the alcohol.

Defendant further testified that when they left Scott's house, they walked back towards Tall Pines. The men talked about taking a trip to Washington, D.C., New Jersey, and New York. Defendant told Harrington about his fight with his girlfriend. Defendant claimed that when the men got to Tall Pines, Scott and McKinnon indicated they were going to walk Harrington halfway to South Hamlet, where he was staying with a friend. Defendant testified that he gave Harrington his gun for protection during his walk to South Hamlet. He claimed that he did not see the handgun again until the early morning hours of 23 August 1991, when Harrington put it back into his red bag during the drive to Washington, D.C.

After the other men left Tall Pines, defendant went back into his girlfriend's apartment. Defendant claimed that he got into another argument with his girlfriend and then left. He sat on a park bench near the apartment and drank another beer. From where he was sitting, defendant could see the road between Tall Pines and Quail Hollow. After a while, a black car pulled up. Defendant identified this car as the one later determined to belong to the victim, Callahan. Defendant testified that Scott, McKinnon, and Harrington were all in the car when it pulled up to the Tall Pines housing project.

Defendant testified that Scott, who was driving the car, hollered at defendant to come get in the car. Defendant ran over and got into the back of the car on the passenger's side. Scott told defendant that the car belonged to his uncle.

Defendant testified that the men drove around for a long time. They stopped at a gas station in Fayetteville, North Carolina, and all four of them went into the gas station. He claimed that by this time, he knew they were going to Washington, D.C.

Defendant drove the car when they left Fayetteville on Interstate 95 North. He took turns with McKinnon and Harrington driving the car to Washington, D.C. During the time defendant was driving, Harrington returned his .25-caliber handgun to defendant's red bag.

When the men got to Washington, D.C., defendant put his red bag with the handgun inside it into the trunk of the car.

The four men visited defendant's stepfather and brother; and then, as none of the men had brought anything with them from North Carolina, defendant and McKinnon went downtown and bought them all some clothes and toothbrushes.

Defendant left Washington, D.C., late that evening to go to Cambridge, Maryland, to visit some friends and to see his mother. McKinnon, Harrington, and Scott stayed in Washington, D.C., at defendant's brother's house. Defendant drove the car to Cambridge. Defendant testified that he told the other men he would return in a few hours, but car trouble prevented him from returning to Washington, D.C., for several days.

Defendant spent two days in Cambridge, Maryland, before his arrest on 25 August 1991. At the time of his arrest, he was carrying the .25-caliber handgun he stole from his grandmother's purse. Defendant was standing on the street talking to a man he had known in prison when he was approached by Officer Hurley of the Cambridge Police Department. He testified that he attempted to run away from Officer Hurley because he had a gun in his possession and knew that he was in violation of his parole. Defendant testified that he had twenty-three years to serve on his sentence if he was caught violating his parole. On cross-examination, defendant indicated that he did not attempt to throw the gun away while he was being chased by the police because it was his grandmother's and that if anything had been done with the gun, it could be traced back to his grandmother.

On cross-examination, defendant admitted that he violated the terms of his parole by quitting his job and moving from Maryland without permission from his parole officer. He claimed the reason he told Officer Hurley that he was going away for a long time was because he knew he was in violation of his parole and had twenty-three years left on his sentence.

Further during cross-examination, defendant denied ever speaking with Boyd Bostic or confessing to committing these murders to him in the Richmond County jail while awaiting trial.

At the close of all the evidence, defendant renewed his motion to dismiss all the charges against him. The trial court denied this motion. The jury found defendant guilty as charged on all counts.

Evidence relevant to the sentencing proceeding of defendant's capital trial will be addressed later in this opinion.

JURY SELECTION ISSUES

[1] Defendant first contends that the trial court committed reversible error by failing to afford him the opportunity to make a full inquiry into the fitness and competency of all the prospective jurors during jury selection, thereby depriving him of the right to a trial by a fair and impartial jury. After questioning a number of prospective jurors during jury selection, the prosecutor passed an initial group of twelve jurors to defendant for questioning. Defendant conducted a *voir dire* of this initial group, after which he thanked all the prospective jurors in the panel and exercised peremptory challenges to exclude six of these prospective jurors. The following exchange then took place:

> THE COURT: All right; are you satisfied with the remainder?
>
> MR. SHARPE [defense counsel]: Are we going to be required to pass on them now? I didn't know whether we would be required to pass on them.
>
> THE COURT: Yes, you have to pass on them.
>
> MR. SHARPE: (No response).
>
> THE COURT: You have to pass on them.
>
> MR. SHARPE: We're satisfied.

Defendant claims that exchange with the trial court required him to pass on the remaining prospective jurors in the initial group without allowing him to make any further inquiry into their fitness and competency to serve on his jury although he may have had further questions he wished to ask of them before passing them back to the State. For the following reasons, we reject defendant's argument.

A review of the record reveals that the trial court complied with the statutory procedure for selecting the jury. Section 15A-1214 of the North Carolina General Statutes governs the jury selection process and provides:

> (d) The prosecutor must conduct his examination of the first 12 jurors seated and make his challenges for cause and exercise his peremptory challenges. If the judge allows a challenge for cause, or if a peremptory challenge is exercised, the clerk must immediately call a replacement into the box. When the prosecu-

tor is satisfied with the 12 in the box, they must then be tendered to the defendant. Until the prosecutor indicates his satisfaction, he may make a challenge for cause or exercise a peremptory challenge to strike any juror, whether an original or replacement juror.

(e) Each defendant must then conduct his examination of the jurors tendered him, making his challenges for cause and his peremptory challenges. If a juror is excused, no replacement may be called until all defendants have indicated satisfaction with those remaining, at which time the clerk must call replacements for the jurors excused. The judge in his discretion must determine order of examination among multiple defendants.

(f) Upon the calling of replacement jurors, the prosecutor must examine the replacement jurors and indicate satisfaction with a completed panel of 12 before the replacement jurors are tendered to a defendant. Only replacement jurors may be examined and challenged. This procedure is repeated until all parties have accepted 12 jurors.

N.C.G.S. § 15A-1214(d)-(f) (1988). This scheme requires the prosecution to indicate satisfaction with a complete panel of twelve before tendering it to the defendant, while allowing the defendant to exercise challenges, indicate satisfaction with the remaining jurors, and pass a partial panel back to the prosecution.

The trial court complied with this statute in the instant case. Although initially the trial court mistakenly required the prosecution to pass on the remaining jurors in the panel before proceeding with the examination of any replacement jurors, in violation of N.C.G.S. § 15A-1214(d), it corrected this mistake prior to the time the prosecution first passed the completed panel to defendant for questioning. Defendant conducted an extensive *voir dire* of the twelve prospective jurors on the initial panel after it was passed to him by the prosecution. After asking these twelve prospective jurors a series of consecutive questions, defendant thanked each of them and used peremptory challenges to remove six of them from the panel. At this time, in compliance with N.C.G.S. § 15A-1214(e), the trial court asked defendant if he was satisfied with the remaining jurors. Rather than answering the judge's question, defendant asked if he was going to be required to pass on the remaining jurors now and commented that he did not know whether he would have to pass on the remaining jurors at that time. This response was insufficient to inform the trial court

that defendant wanted to ask additional questions of the remaining jurors before passing them back to the prosecution. Defendant's comment was reasonably interpreted by the trial court as an indication of uncertainty on the part of defendant about the requirement in N.C.G.S. § 15A-1214(e) that he indicate satisfaction with all the remaining jurors before passing the panel back to the prosecution for examination of replacement jurors. The trial court's statement that defendant had to pass on the remaining jurors was an attempt to explain the jury selection procedure to defendant, not an attempt to cut off further questioning of the remaining prospective jurors before passing them back to the State if defendant so desired.

Although no particular form for motions and objections is required to preserve an issue for appeal, a party must make his or her objection to a ruling clearly known to the trial court. N.C.G.S. § 15A-1446(a) (1988); N.C. R. App. P. 10(b). When a defendant peremptorily challenges some prospective jurors but wishes to continue asking questions of those remaining in the panel before passing them back to the prosecution, he must inform the trial court that he wishes to continue questioning the remaining prospective jurors. In the instant case, defendant failed to object to the trial court's statement that he must pass on the remaining jurors or to clarify for the trial court that he was asking to continue questioning the prospective jurors rather than expressing uncertainty about the jury selection procedure.

As the trial court acted in compliance with the jury selection procedure set forth in N.C.G.S. § 15A-1214 and reasonably interpreted defendant's comment to be an expression of confusion about the jury selection procedure, the trial court's action was not error, and this assignment of error is overruled.

[2] Defendant next contends that the trial court erred when it denied his motion that a preselection instruction be given to all the potential jurors to clarify the law governing capital sentencing. Defendant argues that at least one prospective juror was confused about the law governing capital sentencing and that the questioning of this prospective juror created an unacceptable risk that other jurors could have become confused during the jury *voir dire*. Defendant submitted a proposed instruction to the trial court he claims would have eliminated this confusion and clarified the capital sentencing law for the prospective jurors. We find defendant's contention to be without merit.

The trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled, and its rulings in that regard will not be reversed absent a showing of an abuse of its discretion. *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991); *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979). A review of the record indicates that the trial court correctly instructed the potential jurors about the law governing the capital sentencing process. The actual instructions given by the trial judge were substantively similar to those requested by defendant. Defendant's argument is purely speculative. The trial court did not err in refusing to give defendant's requested preselection instruction, and this assignment of error is overruled.

[3] Defendant next contends that the trial court erred in excusing prospective juror Watkins for cause upon the State's motion and by failing to allow defendant to rehabilitate this prospective juror. The transcript indicates that during the State's *voir dire* of prospective juror Watkins, the following exchange occurred:

Q. . . . .

Mrs. Watkins?

A. Juror #10: Yes (nods).

Q. Do you believe in the death penalty?

A. Juror #10: No.

Q. Can you think of—would you automatically vote against the death penalty no matter what the State would prove to you in a case?

A. Juror #10: It depends.

. . . .

Q. You told me you didn't believe in the death penalty?

A. Juror #10: No (nods).

Q. Would you automatically vote for life in prison if those were the only choices you've got; would you automatically vote for life in prison?

A. Juror #10: Yes.

Q. Could you consider the death penalty as punishment in a first degree murder case?

A. Juror #10: Yeah (sic).

THE COURT: Let me ask you, you seem to be giving inconsistent answers.

You say you would automatically vote for life imprisonment sentence?

JUROR #10: Yes.

THE COURT: Does that mean, then, that you would not consider the death penalty?

JUROR #10: No.

THE COURT: In any case?

JUROR #10: No.

THE COURT: Under any circumstances?

JUROR #10: (No response).

THE COURT: Ma'am?

JUROR #10: I said it depends.

THE COURT: I'm sorry.

JUROR #10: I said it depends.

THE COURT: Oh, it depends?

JUROR #10: Yes (nods).

THE COURT: Are there some circumstances, then, where you think you would consider the death penalty?

JUROR #10: Maybe.

THE COURT: Ma'am?

JUROR #10: I said, maybe.

THE COURT: Well, I need to know whether you would or would not.

JUROR #10: Yeah (sic).

THE COURT: Ma'am?

JUROR #10: Yes.

THE COURT: Thank you, Mrs. Watkins.

. . . .

Q. Mrs. Watkins, will you be able to follow the law that the Judge instructs you on, he's going to tell you what the law is at the end of the case;

Will you be able to follow that law, even if you would disagree with it?

A. Juror #10: (No response).

Q. Let's say, he tells you the law, and you say, "That's the stupidest law I've ever heard of, I don't think that ought to be a law";

It's your duty as a jury [sic] to follow the law as the Judge tells you;

Are you going to be able to do that, put aside your personal belief and follow the law?

A. Juror #10: No (nods).

. . . .

Q. Will you be able to follow the law if you disagree with it?

A. Juror #10: I'll follow the law.

Q. What?

A. Juror #10: I said I would follow the law.

Q. You are going to follow the law?

A. Juror #10: Yes.

Q. Even if you disagree with it?

A. Juror #10: (No response).

Q. Even if you disagree with it, are you still going to follow it?

A. Juror #10: No (nods).

Q. You won't follow it if you disagree with it?

A. Juror #10: No.

Q. If he reads you something, and you disagree with it, are you going to just disregard it?

A. Juror #10: What was that?

MR. BRAGG: The State would like to challenge Mrs. Watkins based on cause.

THE COURT: You can have a seat, ma'am, thank you. You may have a seat.

(At this time, Juror Number Ten, Sarah Ann Watkins, left the jury box and resumed her seat in the audience.)

MR. SHARPE: We object.

THE COURT: Okay.

Although defendant objected to prospective juror Watkins' excusal for cause, he made no request to rehabilitate her.

The primary goal of the jury selection process is to ensure selection of a jury comprised only of persons who will render a fair and impartial verdict. *State v. Kennedy*, 320 N.C. 20, 26, 357 S.E.2d 359, 363 (1987). Whether to allow a challenge for cause in jury selection is a decision ordinarily left to the sound discretion of the trial court, and that decision will not usually be reversed on appeal except for abuse of discretion. *State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992); *Kennedy*, 320 N.C. at 28, 357 S.E.2d at 364. "Nevertheless, in a case . . . in which a juror's answers show that [she] could not follow the law as given . . . by the trial judge in his instructions to the jury, it is error not to excuse such a juror." *State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992).

The standard for determining when a potential juror may be excluded for cause because of his views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)); *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). Prospective jurors with reservations about capital punishment must be able to "state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149 (1986); *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993). However, a prospective juror's bias or inability to follow the law does not have to be proven with unmistakable clarity. *State v. Locklear*, 331

N.C. at 248, 415 S.E.2d at 731-32; *State v. Davis*, 325 N.C. at 624, 386 S.E.2d at 426. "[T]here will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." *Wainwright v. Witt*, 469 U.S. at 426, 83 L. Ed. 2d at 852-53.

In the instant case, the record shows that when questioned by the prosecutor, prospective juror Watkins gave conflicting answers about her opposition to the death penalty and her ability to set aside her own beliefs and follow the law. The conflicting answers given by prospective juror Watkins left the impression that Watkins would be unable to fairly and impartially follow the law. *Wainwright v. Witt*, 469 U.S. at 426, 83 L. Ed. 2d at 852. Accordingly, the trial court did not err in granting the prosecutor's challenge of prospective juror Watkins for cause.

As defendant failed to make any request to rehabilitate prospective juror Watkins, he has failed to preserve for appellate review his contention that the trial court erred in failing to allow rehabilitation of this prospective juror. *State v. Wiggins*, 334 N.C. 18, 30, 431 S.E.2d 755, 762 (1993). This assignment of error is overruled.

[4] Next, defendant argues that the trial court erred in denying his pretrial motion to prevent the prosecutor from exercising peremptory challenges to remove prospective jurors who were not challengeable for cause but who nevertheless expressed some hesitancy concerning the death penalty. Defendant contends that such use of peremptory challenges by the prosecution resulted in a jury composed exclusively of jurors who favored the death penalty, depriving him of his constitutional right to a trial by a fair and impartial jury composed of a cross section of the community and in violation of his right to be free from cruel and unusual punishment. Defendant relies on *Gray v. Mississippi*, 481 U.S. 648, 95 L. Ed. 2d 622 (1987), to support his argument.

Defendant contends that in *Gray*, a plurality of the United States Supreme Court suggested that review of the use of peremptory challenges by the prosecutor to remove potential jurors not otherwise excludable for cause but who express hesitancy about the death penalty may be required. *Id.* Defendant contends that this reading of *Gray* indicates that the prosecutor's use of peremptory challenges to remove such jurors was unconstitutional.

This Court has consistently rejected this argument and has interpreted *Gray* as holding that there is no constitutional infirmity with such a use of peremptory challenges by the prosecutor to remove potential jurors who the prosecutor feels would be hesitant to vote to impose the death penalty. *E.g.*, *State v. Jones*, 336 N.C. 229, 443 S.E.2d 48, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 423 (1994), *reh'g denied*, —— U.S. ——, 130 L. Ed. 2d 676, 63 U.S.L.W. 3517 (1995); *State v. Bacon*, 326 N.C. 404, 390 S.E.2d 327 (1990). Defendant has not provided any compelling arguments why we should abandon our prior interpretation of *Gray v. Mississippi*; and we, therefore, decline to do so. We conclude that there was no error in the trial court's denial of defendant's motion.

GUILT-INNOCENCE PHASE ISSUES

[5] Defendant contends that the trial court committed reversible error by denying his motion to sequester the three codefendants expected to testify against him at trial. Defendant requested that the three codefendants be sequestered during the presentation of the State's evidence based on the importance of their testimony to the State's case against him and a general concern that the witnesses might change their testimony to corroborate one another at trial.

"[A] motion to sequester witnesses is addressed to the discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing of abuse." *State v. Woods*, 307 N.C. 213, 220, 297 S.E.2d 574, 579 (1982). One of the purposes of sequestering witnesses is to prevent them from tailoring their testimony after that of earlier witnesses. *State v. Pittman*, 332 N.C. 244, 254, 420 S.E.2d 437, 442 (1992).

In this case defendant has failed to show that the trial court abused its discretion by denying his motion to sequester these three witnesses during the presentation of the State's evidence. In his motion defendant gave no reason for suspecting that the State's witnesses would tailor their testimony to accord with the testimony of previous witnesses, other than the general concern that such tailoring was possible because each codefendant had a stake in the outcome of this case. Further, there is nothing in the record to suggest that any of the codefendants were present in the courtroom during the testimony of another codefendant. Defendant has not shown any prejudice from the denial of this motion, and we hold the court's ruling on the motion to be without error.

[6] Next, defendant contends that the trial court erroneously denied his request for a jury instruction on second-degree murder. Defendant asserts that there was evidence in the record from which the jury could have reasonably found that although he killed the two victims, he did not do so with premeditation and deliberation and that, therefore, it was reversible error for the court to refuse to instruct the jury on second-degree murder. For the following reasons, we reject defendant's argument.

The test for determining whether the jury must be instructed on second-degree murder is whether there is any evidence in the record which would support a verdict of second-degree murder. *State v. Strickland*, 307 N.C. 274, 285, 298 S.E.2d 645, 653 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). " 'It is unquestioned that the trial judge must instruct the jury as to a lesser-included offense of the crime charged, when there is evidence from which the jury could find that the defendant committed the lesser offense.' " *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835 (1994) (quoting *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993)). However, if the State's evidence is sufficient to satisfy its burden of proving each element of first-degree murder, including premeditation and deliberation, and there is no evidence other than defendant's denial that he committed the crime to negate these elements, the trial court should not instruct the jury on second-degree murder. *Id.* at 634-35, 440 S.E.2d at 835 (citing *State v. Strickland*, 307 N.C. at 293, 298 S.E.2d at 658).

The United States Supreme Court has indicated that in cases where one or more elements of the offense charged remain in doubt but the defendant is clearly guilty of some offense, the jury is likely to resolve its doubts in favor of a conviction rather than to acquit the defendant altogether. *Beck v. Alabama*, 447 U.S. 625, 634, 65 L. Ed. 2d 392, 401 (1980). In such cases, an instruction on a lesser-included offense must be given to reduce the risk of an unwarranted conviction. *Id.* at 635, 65 L. Ed. 2d at 401. However, due process requires an instruction on a lesser-included offense only "if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Id.*

The evidence in this case supports all the elements of first-degree murder, including premeditation and deliberation. Premeditation requires that the act have been thought out beforehand for some peri-

od of time, no matter how brief. *State v. Conner*, 335 N.C. at 635, 440 S.E.2d at 836; *State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980). Deliberation requires that the defendant have the intent to kill, carried out in a cool state of blood, in furtherance of a fixed design or to accomplish an unlawful purpose, and not under the influence of a violent passion, suddenly aroused by a lawful or just cause or legal provocation. *Conner*, 335 N.C. at 635, 440 S.E.2d at 836; *State v. Hamlet*, 312 N.C. 162, 170, 321 S.E.2d 837, 842-43 (1984). The State's evidence showed that defendant wanted to steal a car to drive to Washington, D.C., the night of 22 August 1991; he kidnapped the victims from the Pantry in Hamlet; he stole Paul Callahan's car and held the victims at gunpoint while driving around Hamlet; he threatened to kill the victims if they turned their heads to look at any of the other occupants of the car or if they lied to him about the condition of the car; he drove the car out on a rural road and stopped in an isolated spot; when he stopped the car, he commented to the other passengers that "[t]his is a good spot right here"; he ordered the victims to get out of the car and follow him into the woods; he forced the victims to get down on their knees and shot one of them in the head while the other begged for his life; he then shot and killed the other victim. This evidence is more than sufficient to support a finding of two unprovoked and calculated murders. Defendant's testimony was that he did not commit the murders. No evidence was presented to support a conviction of second-degree murder. Therefore, the trial court did not err by refusing to instruct the jury on this lesser-included offense.

SENTENDING PROCEEDING ISSUES

In the sentencing proceeding, the State resubmitted all evidence offered during the guilt-innocence phase.

Defendant's evidence included testimony from his cousin, Cynthia McRae, and Dr. Brad Fisher, a psychologist.

Cynthia McRae testified that defendant moved to North Carolina during the summer of 1991 to help her take care of their ailing grandmother. She indicated that defendant helped bathe their grandmother, washed her clothes, went grocery shopping for her, and cleaned her house. She testified that even after he moved to Hamlet to live with his girlfriend, he rode his bicycle to Rockingham to help take care of his grandmother.

Ms. McRae further testified that defendant was conceived when his mother was raped at age thirteen. Defendant's mother remarried when he was approximately one year old. She had other children, and defendant's stepfather treated the other children better than he treated defendant. She testified that defendant's stepfather would get drunk and physically beat defendant and his mother.

Defendant was placed in the custody of the Division of Social Services when he was twelve years old, when his mother decided she did not want her children any longer. Defendant repeatedly ran away from foster homes to be with his mother or his grandmother. When defendant was fourteen years old, he was sentenced to imprisonment in an adult prison for breaking and entering.

Dr. Brad Fisher was accepted by the court as an expert in clinical forensic psychology. He interviewed defendant twice in September 1992. Dr. Fisher also reviewed other psychological and psychiatric diagnoses, DSS records, and information from family members. He testified that defendant was undersocialized and aggressive and that he had major psychological difficulties stemming from his abandonment by his mother when he was a child; but in Dr. Fisher's opinion, defendant was not psychotic nor did he suffer from a major mood or thought disorder. He testified that in the past, defendant had received a variety of diagnoses, including being schizophrenic, probably psychotic, depressed, suicidal, schizoid, and having minimal brain disfunction. In Dr. Fisher's opinion, these varied diagnoses suggested that defendant was subject to tremendous chaos, neglect, abuse, and abandonment as a child, which resulted in a disturbance very difficult to definitively diagnose at an early age.

Dr. Fisher testified that defendant was disturbed and out of control by age fourteen, when he was sent to an adult prison. His time in prison came at a critical time in his development and led to "a different set of learning and problems that continued into [defendant's] adult life." He further testified that the time defendant spent serving his sentence in an adult prison exacerbated defendant's difficulties with expressing his emotions. He testified that he thought defendant's difficulties in expressing his emotions stemmed not only from his early abandonment, but from the need to survive and adapt to life in an adult prison by covering his emotions.

Dr. Fisher testified, based on the reports and records he had seen, that defendant had developed problems with drug and alcohol abuse at an early age. On cross-examination, he testified that he believed

that defendant was beyond the reach of therapeutic help or rehabilitation, based not only on defendant's thirteen years of parental neglect, abandonment, and abuse, but also on the years he spent in an adult prison learning how tough he needed to be to survive there.

The State offered rebuttal evidence consisting of the testimony of Dr. C.W. Lin, a psychiatrist at Dorothea Dix Hospital who was accepted as an expert in psychiatry by the court. Dr. Lin, who works with the Pretrial Evaluation Center, testified that he interviewed defendant in March 1992 and examined defendant's psychological and psychiatric diagnoses, DSS records, and records from the Maryland Department of Corrections. He performed psychological testing on defendant and found him competent to stand trial. He testified that defendant knew the difference between right and wrong and that defendant did not have a significant mood or thought disorder, but manifested impulsive, unpredictable, and potentially assaultive tendencies.

The same three aggravating circumstances were submitted to the jury for each murder: (i) the murder was committed while defendant was engaged in the commission of a kidnapping, N.C.G.S. § 15A-2000(e)(5) (1988); (ii) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and (iii) the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). The jury found the existence of all three of these aggravating circumstances.

Sixteen mitigating circumstances were submitted to the jury. The three statutory mitigating circumstances submitted to the jury were (i) defendant's lack of a significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (ii) his incapacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, N.C.G.S. § 15A-2000(f)(6); and (iii) any other circumstance arising from the evidence which one or more jurors found to have mitigating value, N.C.G.S. § 15A-2000(f)(9). The jury declined to find the existence of any of these statutory mitigating circumstances.

The two nonstatutory mitigating circumstances submitted to and found by the jury were that (i) as a result of a number of relatively short-term placements in foster homes, relatives' homes, youth homes, and detention, defendant was deprived of the family nurturing and bonding that is necessary to healthy emotional development; and (ii) defendant was in adult prison from his fourteenth birthday until

his twenty-third birthday, a particularly critical time in a young person's development. The jury declined to find twelve additional nonstatutory mitigating circumstances.

Pursuant to N.C.G.S. § 15A-2000(b)(2), the jury unanimously found for both murders that the mitigating circumstances found were outweighed by the aggravating circumstances found. Further, under N.C.G.S. § 15A-2000(b)(3), when considered with the mitigating circumstances, the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty for both murders. Consequently, the jury recommended that defendant be sentenced to death for both murders.

[7] Defendant first contends that the trial court erred by denying his motion to *voir dire* juror Waddell at the beginning of the sentencing proceeding on whether he was related to Kelly Harrington, one of the codefendants who testified against defendant during the State's case-in-chief. The jury returned a verdict of guilty late in the afternoon on Thursday, 15 October 1992. Court was recessed on 16 October and over the weekend. On 19 October 1992, at the beginning of the sentencing proceeding, defendant's counsel advised the court that on 10 October 1992, his secretary had received an anonymous phone call at the office in which the caller indicated that juror Waddell was a cousin of codefendant Harrington. Defense counsel requested that the trial judge make inquiry of the juror as to his relationship, if any, to Harrington and implied that the juror might not have been entirely honest in his response to questions on *voir dire*. Defense counsel could cite the trial court no authority entitling him to the motion.

Defendant now argues that the denial of his motion to *voir dire* juror Waddell about this alleged relationship was a violation of his constitutional right to trial by a fair and impartial jury. Defendant premises this contention on the importance of Harrington's testimony to the State's case against defendant and the potential that juror Waddell could not have been impartial towards the defendant.

Once a jury has been impaneled, any further challenge to a juror is a matter within the trial court's sound discretion. *State v. Harris*, 323 N.C. 112, 123, 371 S.E.2d 689, 696 (1988). The only evidence that defendant presented in support of his motion was the anonymous telephone call alleging that juror Waddell and Harrington might be cousins. Defendant presented no other evidence to support his suspicions. Further, although defense counsel knew of this alleged telephone call on 10 October 1992, he did not bring it to the attention of

the court until nine days later at the start of the sentencing proceeding after his client had been found guilty of these two first-degree murders. This case was heard on four of the intervening days between the time defense counsel received the phone call and the time he brought it to the court's attention. During this time defendant presented evidence and arguments for the jury's consideration at the guilt-innocence stage of his trial.

Given defendant's critical delay in bringing this alleged telephone call to the trial court's attention and the lack of evidence to substantiate this alleged anonymous telephone call, the trial court did not abuse its discretion in denying defendant's motion to *voir dire* juror Waddell about his possible relationship to Kelly Harrington. This assignment of error is overruled.

[8] Defendant next contends that the trial court erred by denying his motion to argue parole eligibility at his sentencing hearing. Defendant argues that in light of his two first-degree murder convictions, his kidnapping convictions, his robbery with a dangerous weapon conviction, and his misdemeanor larceny conviction, the evidence that he would be virtually ineligible for parole if he received life imprisonment for these murders was a relevant consideration for the jury at sentencing. Defendant argues that a great many jurors have misconceptions about parole eligibility, and in light of these misconceptions, fundamental fairness required that he be permitted to educate the jury regarding parole eligibility. He further argues that in light of the prosecutor's argument that the jury was the conscience of the community, which defendant contends encouraged the jury to give him the death penalty to protect the community, the refusal of the trial court to permit him to argue parole eligibility violated his due process right to rebut the prosecutor's argument. We conclude that the trial court properly denied defendant's motion.

In *California v. Ramos*, 463 U.S. 992, 1013 n.30, 77 L. Ed. 2d 1171, 1188 n.30 (1983), the United States Supreme Court indicated that in situations where a defendant is eligible for parole, states reasonably may conclude that such parole eligibility information should be excluded from consideration by the jury. The Court stated that "States are free to provide greater protections in their criminal justice system than the Federal Constitution requires" and ruled that the decision to permit juries to consider parole eligibility information was best left up to the states. *Id.* at 1013-14, 77 L. Ed. 2d at 1189.

This Court has consistently held that evidence about parole eligibility is not a relevant consideration during jury selection, closing argument, or jury deliberation in a capital sentencing proceeding because it does not reveal anything about the defendant's character or record or about any circumstance of the offense. *State v. Price*, 337 N.C. 756, 759, 448 S.E.2d 827, 829 (1994); *State v. Payne*, 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994); *State v. Bacon*, 337 N.C. 66, 98, 446 S.E.2d 542, 558 (1994), *cert. denied*, --- U.S. ---, 130 L. Ed. 2d 1083 (1994).

This Court has recently held that the United States Supreme Court decision in *Simmons v. South Carolina*, 512 U.S. ---, 129 L. Ed. 2d 133 (1994), does not affect our prior holdings on this issue. *Simmons* is limited to those situations where the alternative to a sentence of death is life imprisonment without the possibility of parole. *State v. Price*, 337 N.C. at 763, 448 S.E.2d. at 831; *State v. Payne*, 337 N.C. at 516, 448 S.E.2d at 99. In *Simmons v. South Carolina*, the Court ruled that in situations where the defendant is not eligible for parole, the sentencing jury must be informed of that fact if the prosecutor argues future dangerousness as a basis for the imposition of the death penalty. 512 U.S. at ---, 129 L. Ed. 2d at 146. The Court acknowledged its earlier *Ramos* decision and distinguished it from the life-without-possibility-of-parole situation. *Id.* at ---, 129 L. Ed. 2d at 145.

In the instant case, defendant would have been eligible for parole if given a life sentence.[1] Applying the foregoing principles, we hold that evidence concerning his parole eligibility was not required to be presented to the jury and overrule this assignment of error.

[9] In his next assignment of error, defendant alleges that the trial court erred in denying his motion *in limine* to prohibit the State from introducing evidence of the length of any sentences previously received by defendant for crimes committed in other states.

When he was fourteen years of age, defendant was convicted in Maryland of five counts of breaking and entering and two counts of unauthorized use of a motor vehicle. On 1 November 1982, he received a combined sentence of thirty-nine years in prison for those crimes. Defendant was paroled on 25 October 1990. During cross-

1. Pursuant to a statutory amendment, North Carolina now has life without parole, N.C.G.S. § 15A-1380.5 (Supp. 1994). For offenses occurring after 1 October 1994, the judge is required to instruct the jury that a sentence of life imprisonment means a sentence of life without parole. N.C.G.S. § 15A-2002 (Supp. 1994).

examination by the State, defendant was asked about these prior convictions and the individual sentence imposed for each one. Defendant contends that from this evidence, the jury would have been able to determine that he only served eight years on his thirty-nine-year sentence and that this cross-examination was an implicit and improper use of parole considerations on the part of the prosecutor.

Defendant asserts that the denial of his motion *in limine* to exclude the evidence of the length of his prior sentences harmed him in two respects. First, the evidence of the length of time he actually served in prison for his prior crimes inaccurately portrayed his potential parole eligibility for these two first-degree murders. Second, taken with the trial court's denial of his motion to present parole eligibility evidence, the admission of this evidence unconstitutionally deprived him of the opportunity to deny or explain some of the evidence used by the prosecution as the basis for the imposition of the death penalty against him. For the following reasons, we reject defendant's argument.

A motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial. *See State v. Wilson*, 289 N.C. 531, 537, 223 S.E.2d 311, 315 (1976); *Beaver v. Hampton*, 106 N.C. App. 172, 176, 416 S.E.2d 8, 11 (1992), *affirmed in part on other grounds and vacated in part on other grounds*, 333 N.C. 455, 427 S.E.2d 317 (1993). A criminal defendant is required to interpose at least a general objection to the evidence at the time it is offered. *State v. Wilson*, 289 N.C. at 537, 223 S.E.2d at 315. Having failed to object when this evidence was offered at trial, defendant must show that the trial court committed plain error by denying his motion *in limine* and by allowing the prosecutor to question defendant about his Maryland convictions and sentences. *State v. Syriani*, 333 N.C. 350, 376, 428 S.E.2d 118, 132, *cert. denied*, ––– U.S. ––––, 126 L. Ed. 2d 341 (1993), *reh'g denied*, ––– U.S. ––––, 126 L. Ed. 2d 707 (1994).

Defendant relies on *Gardner v. Florida*, 430 U.S. 349, 51 L. Ed. 2d 393 (1977), to support his contention that the admission of this evidence renders his death sentence unconstitutional. In *Gardner* the United States Supreme Court indicated that it is a violation of due process to impose a death sentence based, at least in part, on the basis of information which the defendant has no opportunity to deny

or explain. *Id.* at 362, 51 L. Ed. 2d at 404. In that case the defendant had been sentenced to death by the trial judge, who based his decision in part on the confidential section of a presentence report which was not provided to the defendant and was, therefore, completely irrebuttable by the defendant.

The instant case is distinguishable from *Gardner v. Florida*. In this case the record reflects no evidence that was not known or available to defendant which was relied on by the jury as part of its decision to sentence defendant to death. Defendant chose to testify in his own behalf; therefore, the evidence of defendant's prior convictions and the sentences for those convictions was properly admitted by the trial court for impeachment purposes pursuant to Rule 609(a) of the North Carolina Rules of Evidence. *State v. Lynch*, 334 N.C. 402, 408, 432 S.E.2d 349, 352 (1993). A review of the record discloses that not only was defendant afforded a full opportunity to explain or rebut this impeachment evidence at trial, but that defendant actually addressed this evidence during his own direct examination. Defense counsel specifically questioned defendant about these prior convictions, including questions about defendant's sentences and parole.

Unlike *Gardner*, where the objectionable evidence was completely unknown and unavailable to the defendant, in the instant case defendant himself brought to the attention of the jury the evidence which he now contends was used by the State as an implicit and improper parole argument. During direct examination, defendant informed the jury that he had not served his full sentence in Maryland before he was paroled. In explaining why he ran from the Maryland police officers when they tried to question him, defendant testified that he attempted to avoid arrest because he was in violation of his parole and "had twenty-three years back-up time" left on his Maryland sentence. We find defendant's contention that he was unable to rebut this evidence to be without merit.

Further, no evidence in the instant case suggests that the prosecutor attempted to connect defendant's Maryland sentences to improper parole considerations. The permissible scope of inquiry into a criminal defendant's prior convictions 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 at 409, 432 S.E.2d at 352. Although he questioned defendant on cross-examination about the sentences he received for each crime and noted that they added up to thirty-nine years, the prosecutor made no attempt to question defendant about

how much time he actually served on each sentence before he was paroled or to have defendant testify how much time was left on his combined sentence when he was paroled. Defendant was the only party to inform the jury of the time remaining on his Maryland sentences.

In light of the above, we conclude there was no error, much less plain error, in the trial court's denial of defendant's motion *in limine* to exclude this evidence.

[10] In a related assignment of error, defendant contends that the trial court erred by allowing the prosecutor, over defendant's objections, to implicitly argue parole eligibility concepts during his closing argument to the jury. Defendant concedes that there was no direct discussion of parole eligibility but contends that in his closing argument, the prosecutor implicitly argued parole eligibility for these two murders by reiterating that defendant had been paroled without serving his complete sentence for his prior Maryland convictions. Defendant argues that this argument violated his right to due process pursuant to *Gardner v. Florida*, 430 U.S. 349, 51 L. Ed. 2d 393, because he was prevented from rebutting these parole eligibility concepts.

During his closing argument, the prosecutor stated that:

> John Conaway had absconded from the State of Maryland. He was a convicted felon. He came to Richmond County, North Carolina. He took two men—he robbed them, he kidnapped them, and brutally executed them in the woods.
>
> Ladies and gentlemen, this case calls for only one verdict. And that verdict is death.
>
> From the lips of their own expert, Doctor Brad Fisher, ladies and gentlemen, their own expert said, that John Conaway is beyond the reach of therapeutic and rehabilitative process.
>
> What does that mean? It means he can't be helped. He's beyond the help of the resources that they have in prison. They can't help him. Even after spending eight years in prison, and having twenty-two years hanging over his head, if he violated his parole, John Conaway couldn't stop. He chose not to be stopped.
>
> If he receives life in prison, ladies and gentlemen, John Conaway is going to eat, he's going to sleep——
>
> MR. SHARPE: OBJECT to this line of argument, Your Honor.

While defendant objected to the prosecutor's argument, he did not object to the part of the argument in which the prosecutor made reference to defendant's violation of his Maryland parole. Therefore, this argument is reviewable only to determine whether the prosecutor's argument was so grossly improper that the trial court erred by failing to intervene *ex mero motu* to correct the error. *State v. Sexton*, 336 N.C. 321, 377, 444 S.E.2d 879, 911, *cert. denied*, — U.S. —, 130 L. Ed. 2d 429 (1994). A prosecutor in a capital trial is entitled to argue all the facts submitted into evidence, as well as any reasonable inferences therefrom. *State v. McCollum*, 334 N.C. 208, 223, 433 S.E.2d 144, 152 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 895, *reh'g denied*, — U.S. —, 129 L. Ed. 2d 924 (1994).

The prosecutor's reference to the time remaining on defendant's Maryland sentences was based on properly admitted evidence or a reasonable inference therefrom and did not infect the trial with prejudice in violation of defendant's due process rights. This was a direct reference to defendant's own testimony during direct examination; and, as we noted above, defendant had a full opportunity at trial to explain or rebut this evidence.

Viewed in its entire context, the prosecutor's argument was not directed toward defendant's eventual parole if defendant was not given the death penalty. The prosecutor referred to defendant's Maryland parole as a part of his argument that a life sentence would not be an effective sentence in this case since defendant could not be helped by the therapeutic or rehabilitative processes available to him in prison according to the testimony of defendant's own expert witness. The prosecutor was emphasizing to the jury that defendant continued to engage in criminal activity, despite the time he had served in prison and the threat of returning to prison for an additional twenty-three years if he committed further criminal activity in violation of his parole. We reject defendant's contention that this was an implicit argument that if defendant was not given the death penalty for these two murders, he would eventually be eligible for parole.

Further, we note that this argument was not based on the future dangerousness of defendant but on the ineffectiveness of a prison sentence as a punishment for this defendant. As we noted above, since defendant would have been eligible for parole and the prosecutor made no argument about his future dangerousness, defendant was not entitled to present parole eligibility evidence under *Simmons v. South Carolina*, 512 U.S. —, 129 L. Ed. 2d 133. Since there was no

error in the prosecutor's reference to defendant's violation of his Maryland parole, the trial court did not err in failing to intervene *ex mero motu*; and this assignment of error is overruled.

[11] Defendant next contends that the prosecutor made several other improper closing arguments at sentencing, entitling him to a new sentencing hearing. We address each of his contentions in order and find them all to be without merit.

First, defendant argues that the trial court erred in allowing the prosecutor, over defendant's objections, to show the jury photographs of the victims' partially decomposed bodies. Defendant claims that although these photographs may have been properly admitted during the guilt-innocence phase of his trial, the use of these photographs was irrelevant to the issues to be decided at sentencing.

A review of the transcript does not support defendant's contention that photographs depicting the partially decomposed bodies of the victims were shown to the jury during the prosecutor's closing argument. The record reflects only that pictures of the victims while living were shown to the jury during this argument. Assuming *arguendo* that photographs depicting the partially decomposed bodies were actually shown to the jury during the prosecutor's closing argument, we still do not find this to be error on the facts of this case.

All of the evidence properly admitted during the guilt determination stage of a capital trial is competent for consideration by the jury at sentencing, as long as the court determines it has probative value. N.C.G.S. § 15A-2000(a)(3). Photographs which depict the circumstances of the murder, the condition of the body, or the location of the body when found are relevant and admissible at sentencing, even when the victim's identity and the cause of death are not in dispute at trial. *State v. Lee*, 335 N.C. 244, 279, 439 S.E.2d 547, 565, *cert. denied*, — U.S. —, 130 L. Ed. 2d 162, *reh'g denied*, — U.S. —, 130 L. Ed. 2d 532 (1994). This is true even if the photographs are gory or gruesome. *State v. Rose*, 335 N.C. 301, 319, 439 S.E.2d 518, 528, *cert. denied*, — U.S. —, 129 L. Ed. 2d 883 (1994).

Such properly admitted photographs may be used by the prosecutor during his closing argument to argue any reasonable inferences which may be drawn from the evidence to enable the jury to reach a proper sentencing recommendation. *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152. Further, defendant is entitled to a new sen-

tencing hearing only if the prosecution's argument exceeds the scope of the evidence and " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Id.* (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986)).

While defendant has not identified which photographs depicting the victims' partially decomposed bodies were shown to the jury, a review of the transcript discloses that two photographs of each victim were used during the testimony of Dr. Butts during the guilt-innocence phase to illustrate his testimony about the autopsies of the victims and the gunshot wounds to their heads.

Based on the foregoing principles, the photographs allegedly depicting the partially decomposed bodies of the victims were admissible at this sentencing hearing. The photographs depicted for the jury the manner in which the two victims were shot and the precise location of the gunshot wounds. These photographs depicting the circumstances of the victims' deaths, including that their bodies were left to decompose and to be subjected to the ravages of the elements, were relevant to the issues to be determined during the sentencing proceeding. *See State v. Lee*, 335 N.C. at 279, 439 S.E.2d at 564.

[12] Next, defendant contends that the trial court erred allowing the prosecutor to argue, over defendant's objections, that the jurors should remember the condition of the victims' bodies when they were removed from the woods seven days after the murders. At the time the prosecutor made this argument, defendant contends, the prosecution was showing the jury photographs of the victims' bodies after seven days of decomposition. Relying on *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752, defendant claims that the partially decomposed condition of the victims' bodies when they were found had no bearing on any material issues at sentencing and was an improper argument.

As noted above, the record does not support defendant's contention that photographs depicting the partially decomposed bodies of the victims were ever shown to the jury during the sentencing proceeding. Assuming *arguendo* that they were shown to the jury, the photographs depicting the partially decomposed condition of the victims' bodies when found and the nature and location of the victims' gunshot wounds were properly admitted into evidence and were, therefore, competent for consideration by the jury at sentencing. N.C.G.S. § 15A-2000(a)(3). Viewed in the context of his entire argu-

ment, the prosecutor's alleged use of the photographs and his reference to the condition of the victims' bodies when they were removed from the woods seven days after the murders did not exceed the scope of the evidence and were not improper. *State v. McCollum*, 334 N.C. at 224, 433 S.E.2d at 152. The reference was made as a part of his argument to the jury that the victims were unique individuals whose deaths represented a unique loss to their families. *Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735 (1991). This reference emphasized to the jury that the victims were now dead and that defendant was the person responsible for their deaths. In *Payne*, the United States Supreme Court upheld such victim impact arguments unless the victim impact evidence was so prejudicial that it rendered the trial fundamentally unfair. *Id.*

Defendant further contends that in light of the expressed concern of several prospective jurors about viewing gruesome photographs, the use of the photographs depicting the partially decomposed bodies of the victims was excessive and designed to inflame the passions of the jury. A new sentencing hearing may be warranted when an excessive number of photographs depicting the same scene and having no additional probative value is used solely to inflame the jury. *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). However, defendant has made no showing that the alleged use of these four photographs, two of each victim's body, was excessive or repetitive, other than the bare claim that some jurors might have been upset by the gruesome pictures of the victims' bodies. In light of the probative nature of the photographs, we reject this argument. In the instant case, the prosecutor's argument was not so prejudicial as to render defendant's trial fundamentally unfair, and we find no error on the part of the trial court in overruling defendant's objection.

[13] Next, defendant contends that the trial court erred in overruling his objection to the prosecutor's argument that after defendant shot and killed the first victim, the second man begged defendant for his life. A review of the record reveals, however, that this argument did not exceed the scope of the evidence admitted at trial. Two witnesses, Kevin Scott and Michael McKinnon, testified at trial that when defendant returned to the car after the murders, he told them that he made the victims get down on their knees and that after he shot the first victim, the other begged defendant for his life. We find the prosecutor's statement to have been within the permissible scope of jury argument during a capital sentencing procedure. Hence, the trial court did not err in overruling defendant's objection.

[14] Defendant next contends that the trial court erred in overruling his objections to the prosecutor's argument that the jury should consider the victims' last thoughts before death. Defendant claims this argument was calculated to inflame the passions and prejudices of the jury, in violation of his state and federal constitutional rights to be free from cruel and unusual punishment.

However, viewed in the context of his entire argument, this argument constitutes the same type of victim impact argument approved by the United States Supreme Court in *Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720. The prosecutor was attempting to inform the jury of the unique losses suffered by the parents and siblings of the victims, and especially by Amos Weatherford's three-year-old son, as a result of defendant's actions. This type of victim impact argument enables the jury to assess meaningfully defendant's moral culpability and blameworthiness. *Id.* at 825, 115 L. Ed. 2d at 735.

As noted above, this type of argument is permissible unless the evidence is so prejudicial that it renders the trial fundamentally unfair. *Id.* The prosecutor made no attempt to credit the victims with any particular thoughts. This argument merely served to remind the jury that the victims were sentient beings with close family ties before they were murdered by defendant. This argument was supported by the facts in evidence or reasonable inferences therefrom and was not so prejudicial as to render defendant's trial fundamentally unfair. The trial court did not err in overruling defendant's objection.

[15] Finally, defendant cites to a short passage taken from the prosecutor's closing argument in which the prosecutor stated:

> You twelve jurors are the collective conscience of this community. You must come together, and by your verdict tell the citizens of this county, the citizens of this state, and even the citizens of this nation, that the premeditated and deliberate first degree murder of Amos Weatherford and Paul Callahan—that those murders are going to be punished by death.

Defendant claims that this argument blatantly encouraged the jury to sentence defendant to death to deter other crimes, to ignore the evidence, and to yield to the public's demand for punishment. As defendant failed to object at trial, our review is limited to determining whether the remarks were so grossly improper as to require the trial court to intervene *ex mero motu*. *State v. Sexton*, 336 N.C. 321, 377, 444 S.E.2d 879, 911.

Prosecutorial comments reminding the jury that it is acting as the voice and conscience of the community are permissible. *State v. McCollum*, 334 N.C. at 226, 433 S.E.2d at 153; *State v. Soyars*, 332 N.C. 47, 61, 418 S.E.2d 480, 488 (1992). Arguments that emphasize the public sentiment about a particular crime and demand that the jury convict and punish the defendant in compliance with this public sentiment are impermissible. *State v. Scott*, 314 N.C. 309, 312, 333 S.E.2d 296, 298 (1985). Arguments that encourage the jury to convict a defendant as a general deterrence to this type of crime are also impermissible. *State v. Kirkley*, 308 N.C. 196, 215, 302 S.E.2d 144, 155 (1983), *overruled in part on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). However, in so holding, this Court specifically noted that such arguments are not so grossly improper as to require the trial court to intervene *ex mero motu* to correct this error. *Id.* Further, prosecutorial arguments for death based on the deterrent effect on this particular defendant are permissible. *State v. Gibbs*, 335 N.C. 1, 69, 436 S.E.2d 321, 360 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994); *State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760.

Viewed in light of the foregoing principles, the prosecutor's comment informing the jury that it was the voice and conscience of the community was permissible. This argument encouraged the jury to sentence defendant to death without improperly demanding such action on the basis of the community's desires for a conviction. Nor did this argument encourage the jury to sentence defendant to death as a general deterrent to first-degree murder. Even if the prosecutor's comments could have been interpreted as a general deterrence argument, such error was not so grossly improper as to require the trial court to intervene *ex mero motu* to correct it. This assignment of error is overruled.

[16] Next, defendant argues that the trial court erred in instructing the jury on the "course of conduct" aggravating circumstance. Three aggravating circumstances were submitted to the jury for each murder: (i) was the murder committed while defendant was engaged in the commission of a kidnapping, N.C.G.S. § 15A-2000(e)(5); (ii) was the murder committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and (iii) was the murder a part of a course of conduct which included the commission of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11). Defendant argues that for each murder, the evidence supporting the course of conduct aggravator was duplicative of evidence supporting the kidnapping aggravating cir-

cumstance and the pecuniary gain aggravating circumstance. Defendant also contends that the trial court's instruction on the "course of conduct" aggravating circumstance failed to inform the jury that it could not use the same evidence to find more than one aggravating circumstance. We reject defendant's arguments.

In *State v. Quesinberry*, 319 N.C. 228, 239, 354 S.E.2d 446, 452 (1987), this Court held that it is error for the trial court to submit multiple aggravating circumstances supported by the same evidence in a capital case. The submission of more than one aggravating circumstance supported by the same evidence "amount[s] to an unnecessary duplication of the circumstances enumerated in the statute, resulting in an automatic cumulation of aggravating circumstances against the defendant." *State v. Goodman*, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979). However, where there is separate substantial evidence to support each aggravating circumstance, it is not improper for each aggravating circumstance to be submitted even though the evidence supporting each may overlap. *State v. Jennings*, 333 N.C. 579, 627-28, 430 S.E.2d 188, 213-14, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 602 (1993).

The trial court's submission of N.C.G.S. § 15A-2000(e)(5), (e)(6), and (e)(11) aggravating circumstances for each murder in the instant case did not violate *Quesinberry* because there was substantial separate evidence supporting each of these aggravating circumstances. The (e)(5) circumstance was based on the evidence that each murder was committed during the commission of the kidnapping of the victims. The (e)(6) circumstance was based on the evidence that defendant robbed the store, taking $78.00 from the cash register, and that he stole Paul Callahan's automobile. The (e)(11) circumstance was based on the evidence that defendant killed two victims. Evidence that a defendant killed more than one victim is sufficient to support the submission of the course of conduct aggravating circumstance. *See State v. Jones*, 327 N.C. 439, 452, 396 S.E.2d 309, 316-17 (1990). Therefore, there was no error in submitting each of these aggravating circumstances for the jury's consideration.

[17] This Court has held that the trial court should instruct the jury that it cannot use the same evidence as a basis for finding more than one aggravating circumstance. *State v. Jennings*, 333 N.C. at 628, 430 S.E.2d at 214. However, while the trial court should have so instructed the jury in this case, defendant failed to object to its failure to do so at trial, and therefore plain error analysis applies. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193.

We find the trial court's failure to instruct the jury that it could not use the same evidence to support more than one aggravating circumstance does not rise to the level of plain error. In light of the substantial separate evidence supporting each aggravating circumstance, it is improbable that the jury would have reached a different result in finding the aggravating circumstances had the trial court not failed to so instruct. *State v. Jennings*, 333 N.C. at 628, 430 S.E.2d at 215. Therefore, we overrule this assignment of error.

[18] We note that in connection with the submission of the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that these murders occurred during the commission of the kidnapping of the victims, defendant argues that the prosecutor's refusal to request an instruction on felony murder in the guilt-innocence phase of the trial violated the spirit of this Court's holding in *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). In *State v. Cherry*, this Court recognized that the submission of aggravating circumstances based on the underlying felony in a felony-murder trial is unconstitutional since otherwise a defendant convicted of felony murder would automatically have one aggravating circumstance pending against him at sentencing; whereas, a defendant convicted of premeditated and deliberate murder would enter the sentencing proceeding with no aggravating circumstances pending against him. *Id.* at 113, 275 S.E.2d at 568.

Defendant argues that by submitting kidnapping and robbery to the jury as separate crimes and then refusing to have the jury instructed on the charge of felony murder, the prosecutor was able to use these underlying felonies as aggravating circumstances against defendant at sentencing when they otherwise would have been subsumed by the felony-murder charge.

Although defendant failed to preserve this claim on appeal by failing to raise it in an assignment of error, we address this argument only to make clear that the prosecutor's actions were in full compliance with the law of North Carolina. *State v. Cherry* prohibits the submission of the underlying felony as an aggravating circumstance only when defendant is convicted solely of felony murder. *Id.* If defendant had been charged and convicted of both premeditated and deliberate murder and felony murder, the underlying felony of kidnapping would properly have been submitted as an aggravating circumstance. *State v. Sexton*, 336 N.C. 321, 377, 444 S.E.2d 879, 911; *State v. McNeil*, 324 N.C. 33, 57, 375 S.E.2d 909, 923 (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). We conclude defendant's argument is without merit.

[19] By his next assignment of error, defendant contends that the trial court's instruction on the capital sentencing procedure unconstitutionally made the consideration of mitigating evidence discretionary with the jury during sentencing. Defendant further contends that the trial court's instruction erroneously defined "mitigating circumstances" thereby unconstitutionally limiting the mitigating evidence the jury could consider. For the following reasons, we reject defendant's contentions.

The trial court charged the jury in accordance with the North Carolina Pattern Jury Instructions on the consideration of mitigating evidence in capital sentencing. In connection with Issue Three, the court instructed the jury that if it found one or more mitigating circumstances, it must weigh the aggravating circumstances against the mitigating circumstances. The court then charged, "Now, when deciding this Issue, each juror may consider any mitigating circumstance or circumstances that the juror determines to exist by a preponderance of the evidence in Issue Two."

In the instructions on Issue Four, the court charged the jury that if it found the aggravating circumstances to outweigh the mitigating circumstances, it must also consider whether the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. The trial court instructed the jury that in making this determination, it must consider the aggravating circumstances in connection with any mitigating circumstance found by one or more of the jurors. The court then charged, "When making this comparison, each juror may consider any mitigating circumstance, or circumstances[,] that juror determines to exist by a preponderance of the evidence."

Defendant contends that the use of the word "may" in these instructions indicated to the jury that it need not consider mitigating circumstances at all in making these determinations. This Court has repeatedly rejected virtually identical challenges to this instruction for the consideration of mitigating evidence in Issue Three and Issue Four. In *State v. Lee*, 335 N.C. 244, 286-87, 439 S.E.2d 547, 569-70, this Court held that the Pattern Jury Instruction does not make consideration of mitigating evidence discretionary with the jurors. We indi-

cated that this instruction unambiguously instructs the jury that it must weigh the mitigating circumstances against the aggravating circumstances and that the next sentence, in which the word "may" is used, merely "describes which mitigating circumstances are to be considered by the jurors in this weighing process." *Id.* at 287, 439 S.E.2d at 569. "The word 'may' indicates that each juror is allowed to consider those mitigating circumstances that he or she may have found to exist by a preponderance of the evidence." *Id.*; *see also State v. Jones*, 336 N.C. 229, 259, 443 S.E.2d 48, 63 (language of similar instruction permits jurors to consider all mitigating circumstances).

[20] Further, in connection with this assignment of error, defendant contends that the trial court erroneously defined the concept of a "mitigating circumstance" in its instructions to the jury. The trial court defined a "mitigating circumstance" as follows:

> [A] mitigating circumstance is a fact, or a 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 reduces the moral culpability of the killing, and makes it less deserving of extreme punishment than other first degree murders.

Defendant claims that this charge unfairly restricted the jury from considering the full range of defendant's character and background, as well as the totality of the circumstances surrounding the killings, as a basis for giving him a sentence less than death.

A review of the record discloses that after the above instruction was given, the jury was further instructed that

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

Further, the jury was later instructed that it should consider not only all the mitigating circumstances listed on the verdict form but also "any others which you deem to have mitigating value."

In *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306, *cert. denied*, — U.S. —, 130 L. Ed. 2d 650 (1994), this Court rejected a similar chal-

lenge to this same definition of "mitigating." In that case, the jury was given virtually the same definition of a "mitigating circumstance" and was also further instructed to consider any aspect of the defendant's character and record and any circumstances of the murder which the defendant contended was a basis for a sentence less than death when determining mitigating circumstances. *Id.* at 122, 443 S.E.2d at 327. That jury was also further instructed to consider not only the statutory mitigating circumstances, but any others which it deemed to have mitigating value. *Id.* In *Robinson*, this Court held that "the instructions as given, which are virtually identical to the North Carolina Pattern Jury Instructions, are a correct statement of the law of mitigation." *Id.* at 122, 443 S.E.2d at 328; *see also State v. Artis*, 325 N.C. 278, 326, 384 S.E.2d 470, 497 (1989) (holding that the North Carolina Pattern Jury Instructions are a correct statement of the law of mitigation), *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).

We conclude that the instructions given in the instant case did not preclude the jury from considering any aspect of defendant's character or background or any of the circumstances of the killing, which defendant may have presented as a basis for the imposition of a sentence less than death. This assignment of error is overruled.

[21] Defendant next contends that the trial court erred in refusing to submit the nonstatutory mitigating circumstance that defendant was conceived when his mother was raped at age thirteen. In order for defendant to succeed on his claim that the trial court erred by refusing to submit his proffered nonstatutory mitigating circumstance, he must show that:

> (1) the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury. Upon such showing by the defendant, the failure by the trial judge to submit such nonstatutory mitigating circumstance to the jury for its determination raises federal constitutional issues.

State v. Benson, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988); *see State v. Green*, 336 N.C. 142, 182, 443 S.E.2d 14, 37-38, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994).

The jury found two nonstatutory mitigating circumstances: (i) that as the result of his repeated placement in foster care, relatives' homes, group homes, and detention, defendant had been deprived of the family nurturing and bonding necessary for healthy emotional development; and (ii) that defendant was in an adult prison between the ages of fourteen and twenty-three, a particularly critical time in a young person's time of development. Defendant argues that the jury could reasonably have found the fact that he was conceived when his mother was raped at age thirteen to have mitigating value and that there was sufficient evidence in the record to require that this circumstance be submitted to the jury for its consideration. He argues that the evidence that he was conceived when his mother was raped was consistent with the two nonstatutory mitigating circumstances found by the jury and should have been submitted to the jury. We find defendant's argument to be without merit.

This Court has previously approved the definition of a mitigating circumstance as "a fact or group of facts, which . . . may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders." *State v. Lee*, 335 N.C. 244, 288-89, 439 S.E.2d 547, 570-71; *see State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981). In the instant case, the trial court properly concluded that the fact that defendant was conceived through a rape has no logical relationship to his moral culpability for these murders. The trial court based its decision not to submit this nonstatutory mitigating circumstance, at least in part, on the fact that there was no evidence that defendant even knew of the circumstances of his conception prior to the murders. In light of the above, defendant has not established that the jury could reasonably have concluded that this evidence had mitigating value. This assignment of error is overruled.

PRESERVATION ISSUES

[22] Defendant raises three additional issues which he concedes have been decided against him by this Court. In the first of these issues, defendant contends that the trial court erred in denying his pretrial motion for individual *voir dire* and sequestration of prospective jurors. Defendant recognizes that this Court has consistently denied relief on this basis. *See, e.g., State v. Skipper*, 337 N.C. 1, 57, 446 S.E.2d 252, 283 (1994); *State v. Robinson*, 336 N.C. 78, 131, 443 S.E.2d 306, 333; *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. After careful consideration, we decline to depart from our prior holdings on this issue and overrule this assignment of error.

[23] In the next of these assignments of error, defendant contends that the trial court erred in denying his motion to *voir dire* prospective jurors about their misconceptions concerning parole eligibility for a sentence of life imprisonment. Defendant recognizes that this Court has consistently rejected this argument. *See, e.g., State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559; *State v. Syriani*, 333 N.C. 350, 399, 428 S.E.2d 118, 145. As we indicated above, the subject of parole eligibility is not relevant to the issues in a capital sentencing proceeding because it does not reveal anything about the defendant's character or record or about any circumstances of the crime. *State v. Payne*, 337 N.C. 505, 516, 448 S.E.2d 93, 99. The trial court did not abuse its discretion by denying defendant's motion.

[24] In the last of these assignments of error, defendant contends that the trial court erred in denying his motion to strike the death penalty on the grounds that the North Carolina death penalty statute and, therefore, defendant's death sentence are unconstitutional. Defendant asserts that the death penalty as administered in North Carolina, and on its face, constitutes cruel and unusual punishment; violates defendant's rights to due process and equal protection; is arbitrary, capricious, and discriminatory; involves subjective discretion on the part of the jury; and in appellate review and otherwise violates fundamental constitutional rights.

Defendant recognizes that this Court has consistently upheld the constitutionality of the North Carolina death penalty statute. *See, e.g., State v. Jones*, 336 N.C. 229, 261, 443 S.E.2d 48, 64; *State v. McHone*, 334 N.C. 627, 644, 435 S.E.2d 296, 306 (1993), *cert. denied*, —— U.S. ——, 128 L. Ed. 2d 220 (1994); *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). After careful consideration of this issue, we decline to depart from our previous holdings and overrule this assignment of error.

PROPORTIONALITY

[25] Having found defendant's trial and capital sentencing procedure to be free of prejudicial error, we are required by statute to review the record and determine (i) whether the record supports the jury's finding of the aggravating circumstances upon which the court based its sentence of death; (ii) whether the sentence was imposed under the

influence of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2); *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161.

The existence of the following three aggravating circumstances was found by the jury for each murder: (i) that the murder was committed while defendant was engaged in the commission of kidnapping, N.C.G.S. § 15A-2000(e)(5); (ii) that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and (iii) that the murder was a part of a course of conduct in which defendant engaged which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11).

We have conducted a thorough review of the transcript, record on appeal, and briefs and oral arguments of counsel; and we conclude that the jury's finding of each of these aggravating circumstances was supported by the evidence. We also conclude that nothing in the record suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, we consider whether the imposition of the death penalty in this case is proportionate to other cases in which we have affirmed the death penalty, considering both the crime and the defendant. *State v. Robinson*, 336 N.C. 78, 133, 443 S.E.2d 306, 334; *State v. Brown*, 315 N.C. 40, 70, 337 S.E.2d 808, 829. The purpose of conducting 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, *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also serves "[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).

We compare this case to similar cases within a pool consisting of

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

State v. Syriani, 333 N.C. 350, 400, 428 S.E.2d 118, 146 (quoting *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983)). Only cases found to be free from error in both the guilt-innocence and sentencing phases are considered in conducting this review. *State v. Goodman*, 298 N.C. 1, 35, 257 S.E.2d 569, 591.

In *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542, this Court clarified the composition of the pool so as to account for post-conviction relief awarded to death-sentenced defendants:

> 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 107, 446 S.E.2d at 564. "[A] conviction and death sentence affirmed on direct appeal is presumed to be without error, and . . . a post-conviction decision granting relief to a convicted first-degree murderer is not final until the State has exhausted all available appellate remedies." *Id.* at 107 n.6, 446 S.E.2d at 564 n.6.

Our consideration on proportionality review is limited to cases roughly similar as to the crime and the defendant, but we are not bound to cite every case used for comparison. *State v. Syriani*, 333 N.C. at 400, 428 S.E.2d at 146. If our review of similar cases reveals that juries have consistently returned death sentences in those other cases, a strong basis exists for concluding that the death sentence in the instant case is not excessive or disproportionate. *Id.* at 401, 428 S.E.2d at 146. However, if juries have consistently returned life sentences in these similar cases, a strong basis exists for concluding that

the death sentence in the instant case is excessive or disproportionate. *Id.*

Characteristics distinguishing the instant case include (i) a calculated murder of two victims committed while defendant was engaged in the commission of another felony in order to eliminate witnesses to his earlier crime of robbery; (ii) fear on the part of the victims, who were kidnapped and held at gunpoint; (iii) a cold-blooded killing of the second victim, who was on his knees and begging defendant to spare his life after defendant shot the first victim in the back of the head; and (iv) defendant's failure to show any remorse for these two murders.

Defendant was convicted of both first-degree murders on the theory of premeditation and deliberation. He was also convicted of two counts of first-degree kidnapping, one count of robbery with a firearm, and one count of misdemeanor larceny. For each murder, the jury found each of the three submitted aggravating circumstances: (i) that the murder was committed while defendant was engaged in the commission of a kidnapping, (ii) that the murder was committed for pecuniary gain, and (iii) that the murder was part of a course of conduct in which defendant engaged which included other crimes of violence against another person.

Of the sixteen mitigating circumstances submitted, the jury found two, neither of which was a statutory mitigating circumstance. The mitigating circumstances found related to defendant's (i) repeated placements in foster homes, relatives' homes, youth homes, and detention which deprived him of family nurturing necessary to healthy emotional development and (ii) incarceration in an adult prison from age fourteen until twenty-three, a particularly critical time in a young person's development. The jury declined to find that defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired. N.C.G.S. § 15A-2000(f)(6).

We first compare the instant case to those cases in which this Court has determined the sentence of death to be disproportionate. We note that this Court has determined the death sentence to be disproportionate on seven occasions. *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 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311

N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

Of the cases where this Court has found the death penalty disproportionate, in only two did the jury find the existence of the course of conduct aggravating circumstance. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713; *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170. We find that the instant case is further distinguishable from both *Bondurant* and *Rogers*.

In *Bondurant*, this Court found it significant that the defendant did not murder the victim in the perpetration of another felony. He did not coldly calculate the commission of the crime for a long period, but inexplicably shot his friend in the head with a pistol while drinking. He immediately showed concern for the victim's life and remorse for his actions by helping the victim receive medical treatment and by speaking with police officers about the incident. *Bondurant*, 309 N.C. at 693, 309 S.E.2d at 182.

In *Rogers*, the only aggravating circumstance submitted to the jury was the course of conduct aggravator. The defendant's course of conduct did not involve a second murder. In holding the death penalty disproportionate in that case, this Court found it significant that the murder in that case did not display the viciousness and cruelty present in the death-affirmed cases where the course of conduct aggravator was the sole aggravating circumstance found by the jury. *Rogers*, 316 N.C. at 236, 341 S.E.2d at 732.

In the instant case, defendant deliberately set out to steal a car. He looked around the streets of Hamlet for a suitable target. He intentionally robbed the Pantry and kidnapped the two victims at gunpoint. He stole a car from one of the victims and used it to drive the victims to an isolated spot outside Hamlet. He ordered the two victims to get out of the car and follow him into the woods, where he forced them to get down on their knees. He deliberately shot both victims in the back of the head at close range. After he shot the first victim, the second victim begged defendant for his life before being killed.

The record is devoid of any evidence suggesting that defendant showed any concern for the lives of his victims or any remorse for his actions. He did not seek any medical attention for his victims or cooperate with the authorities. The evidence showed that defendant fled

the state after the murders and continually denied his participation in these crimes after his arrest.

The evidence further showed that defendant committed these murders in the perpetration of two other felonies, first-degree kidnapping and armed robbery. These murders were coldly calculated and planned to eliminate any witnesses to his crimes. We find that neither *Bondurant* nor *Rogers* supports a finding of disproportionality in the instant case.

Further, we find no significant similarity between the instant case and any of the other five cases in which we have held the death penalty to be disproportionate. We note that none of the cases in which the death penalty has been held disproportionate involved the murder of more than one victim. In the instant case, defendant was convicted of two first-degree murders.

In only one case, *State v. Young*, 312 N.C. 669, 325 S.E.2d 181, were multiple aggravating circumstances found to exist. *State v. Gibbs*, 335 N.C. at 73, 436 S.E.2d at 363. In finding the death penalty to be disproportionate in *Young*, this Court focused on the jury's failure to find either the "especially heinous, atrocious or cruel" aggravating circumstance, N.C.G.S. § 15A-2000(e)(9), or the "course of conduct" aggravating circumstance, N.C.G.S. § 15A-2000(e)(11). *Id.* (citing *State v. McCollum*, 334 N.C. 208, 241, 433 S.E.2d 144, 162). The course of conduct aggravating circumstance was one of the three aggravating circumstances found by the jury in the instant case.

Further in support of his contention that his death sentence is disproportionate, defendant argues that the majority of robbery-murder cases have resulted in sentences of life imprisonment. However, this Court has long rejected any mechanical or empirical approach to the comparison of cases that are superficially similar. *State v. Robinson*, 336 N.C. at 139, 443 S.E.2d at 337. In analyzing whether the death penalty in this case is proportionate to other death-affirmed cases, our attention is focused on an " 'independent consideration of the individual defendant and the nature of the crime or crimes which he has committed.' " *Id.* (quoting *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 by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517).

There are several similar cases in the pool in which the jury has recommended a sentence of death for robbery-murders. One such case is *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 *Williams*, the defendant robbed a gas station in the middle of the night. He shot the clerk in the back of the head at close range with a shotgun and left him in a puddle of blood on the floor with part of his head blown away. *Id.* at 661, 292 S.E.2d at 248. The victim did not die immediately, but lay on the floor coughing and gagging. *Id.* The jury found as the single aggravating circumstance that the murder was committed as part of a course of conduct involving the commission by the defendant of another crime of violence against another person. *Id.* at 662, 292 S.E.2d at 249. This aggravating circumstance was based on the evidence that after the defendant shot the first clerk, he proceeded to rob a convenience store, fatally shooting another clerk. *Id.*[2]

In affirming the death penalty in *Williams*, this Court remarked on the brutality of the killings and noted that the defendant had intentionally robbed two lone employees of business establishments located in relatively isolated areas, in the middle of the night, and then with no provocation shot them to death at close range before fleeing with the money. *Id.* at 690, 292 S.E.2d at 263.

The murders at issue in the instant case are even more brutal and callous than the murder in *Williams*. In this case and in *Williams*, the defendant shot the victims for the purpose of eliminating the witnesses to his crimes. While the victim in *Williams* was shot at the scene of the robbery, both victims in the instant case endured the trauma of being kidnapped at gunpoint and threatened by defendant before he killed them. One was also physically abused. The victims were taken to a rural wooded area and forced to get on their knees. Defendant shot one victim in the head at close range after which the other begged for his life. Defendant then callously shot the second victim in the back of the head before fleeing the state with the money from the robbery and the car belonging to one of his victims.

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), also involved the murder of an armed-robbery victim for witness elimination purposes. The victims surprised the defendant while he was in the process of burglarizing

2. Defendant was tried separately for this robbery-murder; *see State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981).

the home of one of the victims. *Id.* at 634, 314 S.E.2d at 495. The defendant shot the first victim in the head when he ran to the patio of his home, killing him. *Id.* The second victim tried to escape in his truck, which got stuck in a ditch. *Id.* at 634, 314 S.E.2d at 496. The defendant forced the second man from his truck and shot him in the head. The second victim survived the defendant's attack. In affirming the defendant's death sentence, this Court noted that both the murder and attempted murder were committed after a "careful, cold and calculated determination that [the defendant] would prefer murdering these persons to risking their being able to testify against him and possibly send him back to prison." *Id.* at 648, 314 S.E.2d at 503.

In the instant case, the facts show that defendant's decision to murder the witnesses was made after more consideration and deliberation than in *Lawson*. *Lawson* involved the murder of the occupant of a private dwelling during a burglary, when the defendant expected the dwelling to be unoccupied and was unexpectedly surprised by the return of the occupant. In the instant case, defendant intentionally set out to rob the Pantry, which he knew to be occupied by the night clerk. He further kidnapped the victims and drove around Hamlet with them for some time before he drove them to an isolated area and murdered them.

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), involved a double murder committed during the course of an armed robbery of a Steak and Ale restaurant. The defendant rang the doorbell after the restaurant had closed and forced his way inside when a bartender answered the door. *Id.* at 494, 319 S.E.2d at 596. Only two employees were present in the restaurant when the defendant obtained entrance. *Id.* Once inside the restaurant, he forced the bartender to hand over the day's cash. *Id.* He saw the other employee start to get up from a chair with what might have been a weapon in his hand. *Id.* The defendant shot the man in the face with his shotgun and then shot the bartender in the neck. *Id.* The defendant left both victims to die and fled the scene. *Id.*

In *Gardner*, the jury found two aggravating circumstances: (i) that the murders had been committed for pecuniary gain; and (ii) that the murders were part of a course of conduct involving the commission of a violent crime against another person. *Id.* at 496, 319 S.E.2d at 597. The jury found two nonstatutory mitigating circumstances: (i) that the defendant's poor family history would reasonably be expect-

ed to contribute to his criminal behavior; and (ii) that the defendant's drug abuse would reasonably be expected to contribute to his criminal behavior. *Id.* In upholding the death sentence in *Gardner*, this Court stressed that these murders "were part of a violent course of conduct, and were coldblooded, calculated, and senseless." *Id.* at 514, 319 S.E.2d at 607.

The murders in the instant case were even more cold-blooded, calculated, and senseless. Further, unlike the defendant in *Gardner*, defendant in the instant case never acknowledged his participation in the murders. Finally, there was no evidence in this case that defendant thought either of the victims may have been armed or that he was provoked in any way.

Finally, this case appears to be very similar to *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306. In *Robinson*, the defendant deliberately set out to rob a restaurant. *Id.* at 136, 443 S.E.2d at 336. He roamed around the streets of High Point until he found a suitable target. *Id.* He surprised his victims and ordered them back into the store at gunpoint. *Id.* He made two victims lie on the floor and ordered the third to open the safe. *Id.* When the man was initially unable to open the safe, the defendant shot him in the leg. *Id.* at 137, 443 S.E.2d at 336. The defendant forced the man to continue his efforts to open the safe until he was successful; the defendant then stole two money bags out of the safe. *Id.* He then forced the victims to the back of the restaurant, dragging the man he had shot in the leg because he was unable to walk. *Id.* Although his accomplice suggested locking the victims in a meat cooler, the defendant thought for a few moments and then walked around the room and shot all three victims in the back of the head. *Id.* Two of the victims survived.

The jury in *Robinson* found three aggravating circumstances: (i) that the defendant had previously been convicted of a violent felony, (ii) that the murders occurred during the commission of an armed robbery, and (iii) that the murders were part of a course of conduct involving the commission of a violent crime against another person. *Id.* at 137-38, 443 S.E.2d at 336. The jury found nine mitigating circumstances, including the statutory mitigating circumstance that the defendant suffered from a mental or emotional disturbance at the time of the murders. *Id.* at 138, 443 S.E.2d at 336-37.

In affirming the death penalty in *Robinson*, this Court noted that the defendant deliberately decided to kill his victims in spite of other alternatives. *Id.* at 140, 443 S.E.2d at 338. Further, the defendant

never acknowledged his participation in the crime, and there was no evidence that he was ever provoked or threatened by the victims.

In the instant case, the jury found one of the same aggravating circumstances as found in *Robinson*, that the murders were part of a course of conduct involving the commission of a violent crime against another person, and an analogous aggravator, that the murder was for pecuniary gain. As in *Robinson*, defendant in this case decided to kill his victims after cold-blooded and calculated deliberation made while he was driving them around Hamlet in the stolen car. He never acknowledged his participation in the crimes, maintaining that his codefendants committed the murders outside of his presence. Finally, there was no evidence of any provocation or threat to defendant on the part of his victims.

In light of the above, we find that the death penalty in this case is not excessive or disproportionate.

We hold that defendant received a fair trial and capital sentencing proceeding free from prejudicial error. In comparing his case to similar cases in which the death penalty was imposed and in consideration of both the crimes and defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive.

NO ERROR.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ANTONIA MAURICE ALLEN

No. 32A94

(Filed 10 February 1995)

1. Criminal Law § 884 (NCI4th)— failure to object to instruction—question not preserved for appeal

A question concerning the trial court's instructions on aiding and abetting was not preserved for appeal under Rule 10(b)(2) where the State made a general request for an instruction on aiding and abetting as a theory of guilt of first-degree murder; defense counsel did not object when the court decided to give an instruction and did not make a specific request as to the form of

the instruction; defense counsel again did not object after the court gave its instructions on aiding and abetting; and the trial court was thus never made aware of a specific instruction sought by the parties.

Am Jur 2d, Trial §§ 1459 et seq.

2. Criminal Law § 797 (NCI4th)— aiding and abetting murder—specific intent—erroneous instructions—absence of plain error

The trial court erred by instructing the jury that defendant would be guilty of aiding and abetting a first-degree murder if, in addition to other elements, the jury found that when defendant handed a gun to the perpetrator he "should have known" or had "reasonable grounds to believe" that the perpetrator intended to kill the victim because the instructions do not convey the concept of specific intent necessary for aiding a first-degree murder committed with premeditation and deliberation. However, this error did not constitute plain error where (1) the instructions as a whole, including the court's use of the phrase "knowingly aided," conveyed to the jury that under the theory of aiding and abetting, defendant had to have the specific intent to kill the victim, had to know this was the perpetrator's intent when he handed him the gun, and intended to aid the perpetrator in the crime; (2) the erroneous portion of the instructions did not have a probable impact on the jury's guilty verdict in light of substantial evidence of defendant's intent to kill the victim; and (3) the jury's verdict of guilty of first-degree murder and its rejection of a verdict of involuntary manslaughter indicated that it did not believe defendant's testimony that he thought the perpetrator only intended to scare the victim and showed that it is improbable that the erroneous portion of the instructions had an impact on the verdict.

Am Jur 2d, Trial § 1256.

3. Criminal Law § 797 (NCI4th)— instructions—aiding and abetting murder—involuntary manslaughter—intent—no shift of burden of proof to defendant

Neither the trial court's instructions on aiding and abetting as a theory of guilt of first-degree murder nor its instructions on involuntary manslaughter shifted the burden of proof of intent to defendant when the court indicated that if defendant thought the perpetrator was only going to scare the victim, then the State had

failed to prove that defendant knew or had reasonable grounds to believe that the perpetrator was going to kill the victim, or when the court instructed that involuntary manslaughter by aiding and abetting would be the appropriate verdict under defendant's testimony that "when the [alleged perpetrator] requested that he hand him the gun and he handed him the gun, he only thought that [the alleged perpetrator's] intent was to scare . . . [the victim] with the gun." The probable interpretation of this portion of the aiding and abetting instructions was that if the State failed to prove that defendant aided and abetted the alleged perpetrator in the first-degree murder, then the jury was to consider the verdict of involuntary manslaughter, and the involuntary manslaughter instruction merely directed the jury to consider defendant's testimony. Further, the trial court's instructions on aiding and abetting and on involuntary manslaughter expressly placed on the State the burden of proving defendant's guilt of the charges beyond a reasonable doubt.

Am Jur 2d, Trial § 1256.

4. Criminal Law § 904 (NCI4th)— first-degree murder—disjunctive instruction—aider and abetter or principal—no denial of unanimous verdict

Defendant was not denied his right to a unanimous verdict by the trial court's final mandate directing the jury to find defendant guilty of first-degree murder if the State had proved beyond a reasonable doubt all of the elements of either the theory of defendant as the principal or the theory of defendant aiding and abetting another who acted as the principal since a disjunctive instruction does not lead to a fatally ambiguous verdict if it allows the jury to find a defendant guilty based on either of two underlying acts, both of which separately support a theory of guilt for only one offense; the instruction allowed the jury to consider two theories of guilt for first-degree murder, that is, that defendant alone shot the victim or that defendant aided and abetted another who shot the victim; and a finding of either of these two acts would permit the jury to return a verdict of guilty of the offense of first-degree murder.

Am Jur 2d, Criminal Law §§ 598, 559; Trial § 1437.

Appeal 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 2 September 1993 Criminal Session of Superior Court, Lee County, on a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 9 January 1995.

Michael F. Easley, Attorney General, by Thomas B. Murphy, Associate Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

WHICHARD, Justice.

Defendant was indicted for one count of first-degree murder, was tried noncapitally and found guilty, and was sentenced to life imprisonment. We find no prejudicial error.

At defendant's trial the State presented evidence that tended to show the following:

On the evening of 20 February 1992, Detective Dale Barber found the body of Jacob Bernard Smith on the side of a road in Sanford, North Carolina. Detective Barber searched the area and found two .9 millimeter gun shells about ten feet from the body.

Detective Jesse Gentry of the Sanford Police Department went to the scene but could not find anyone who had seen what had happened to the victim. Later, on 20 March 1992, Detective Gentry interviewed Antonia Maurice Allen, the defendant. Detective Gentry advised defendant of his *Miranda* rights, which he waived. Defendant then gave an oral statement, which Detective Gentry reduced to writing and defendant signed. In that statement, defendant indicated that on the night of the murder he was with Thomas Mitchell; Mitchell's girlfriend, Polly Chalmers; and Chalmers' mother, Laura Brown, from 8:00 p.m. to 11:30 p.m. They were playing cards at Chalmers' house. He further stated that he did not have his .38 caliber gun with him and that he did not go anywhere that night. He indicated that he kept his gun at his residence.

Defendant then agreed to go with Detective Gentry to his residence and retrieve the gun. Detective Gentry sent the gun, a five-round magazine that was loaded in the gun, the shells found at the scene, and two bullets that were recovered from the victim's body during the autopsy to the State Bureau of Investigation for analysis. A firearms identification expert testified that the bullets recovered from the victim's body had been fired from defendant's gun.

On 30 March 1992 Detective D.M. Smith, who received the ballistics report, arrested defendant during defendant's shift at McDonald's. At the police department Detective Smith advised defendant of his rights, which he waived. Defendant gave an oral statement, which Detective Smith reduced to writing and defendant signed. In that statement, defendant indicated that on the night of the murder, Mitchell picked him up at approximately 6:00 p.m. Defendant and Mitchell had gone earlier in the day to Goldston to have defendant's gun repaired. After Mitchell picked him up, defendant placed his gun in the glove compartment of Mitchell's car. They went to Chalmers' house. Later, they drove to Fourth and Maple Streets and saw the victim walking. Mitchell pulled over. Mitchell took defendant's gun from the glove compartment, walked up to the victim, and engaged him in conversation. The two men argued. Defendant heard two shots and Mitchell returned to the car. Mitchell then drove defendant home and returned his gun to him. Defendant further stated that he had seen Mitchell six or seven times since the shooting and that Mitchell had said nothing about it.

On the same day, after defendant gave his statement, Detective Smith arrested Thomas Mitchell. Mitchell's statement to Detective Smith was "hearing [sic] no evil, see no evil, say no evil."

On 9 April 1992 Sheriff's Detective James Parker interviewed defendant. After waiving his rights, defendant told Detective Parker he had not been involved in the shooting of the victim. He then told Parker that on the evening in question, he and Mitchell drove to the area of Fourth and Maple. The victim approached the car and spoke. Mitchell asked the victim about obtaining some marijuana, and the victim responded that he could get some for him. The victim then turned and began walking away from the car. Mitchell grabbed defendant's gun and shot the victim. Mitchell then took defendant home.

Detective Parker further questioned defendant, who told him the reason the victim was shot was because Michelle Hollingsworth, the victim's girlfriend, told Mitchell and him that the victim stole her food stamps. Defendant stated that he would shoot him. He and Mitchell then got in Mitchell's car, and Mitchell stated that he would shoot the victim. They saw the victim on the street, and he approached Mitchell's car. As the victim turned to leave, Mitchell asked defendant for the gun. Defendant gave him the gun and Mitchell shot the victim three times. Defendant subsequently gave a similar statement to Cap-

tain Andy Stone of the Sanford Police Department. Detective Parker and Captain Stone testified to defendant's statements made to them from notes they had made in the interviews. Defendant did not sign the notes, and they were not reduced to a written statement.

Michelle Hollingsworth testified that she was at Chalmers' house on 20 February 1992. According to Hollingsworth, defendant also was there that night. She stated that she told Mitchell and defendant her food stamps were missing, the victim had been in the area at the time they disappeared, and she had heard that he had some food stamps he was selling. She then heard defendant say that at one time the victim and some other people had pulled a gun on him. She did not recall either Mitchell or defendant saying anything else about the incident that night.

Polly Chalmers, who has a child by Mitchell, also testified about the food stamp discussion that occurred in her home on 20 February 1992. According to Chalmers, defendant asked Hollingsworth if she wanted him to "take care of it," and he commented that he had a "beef" with the victim. She stated that Mitchell stayed with her the rest of the evening and did not leave until the next morning. She and Mitchell did not go to bed until 2:00 a.m. because they were playing cards.

Thomas Mitchell testified that he and defendant had gone to Goldston about a month and a half prior to the shooting to get defendant's gun repaired. On the day of the crime, he and defendant left McDonald's, where Mitchell worked with defendant, and went to Chalmers' house. The conversation about the food stamps occurred, and Mitchell testified that defendant told Hollingsworth he would take care of it if she wanted him to because he already had a "beef" with the victim.

Mitchell could not state how long defendant stayed at Chalmers'. He testified that he stayed at Chalmers' the entire evening. He stated that he barely knew the victim, that he did not use marijuana, and that he did not ask the victim to get him any marijuana. He had a prior conviction for assault on a female. He denied killing the victim. On cross-examination Mitchell testified that he had been charged with first-degree murder of the victim; that defendant had testified against him in Mitchell's probable cause hearing; and that the day before Mitchell testified at defendant's trial, his own case was dismissed.

Doris Princh, Hollingsworth's cousin, testified that she was at Chalmers' house when the food stamp discussion occurred. She stated that defendant told Hollingsworth he would take care of the victim because the victim had stolen her food stamps. Defendant also indicated he would take care of the victim even if Hollingsworth did not want him to because the victim previously had pointed a gun at defendant's head.

Defendant's evidence tended to show the following:

Defendant testified that on 20 February 1992 he and Mitchell left McDonald's together and went to Goldston to get a firing pin for his gun. They left Goldston at approximately 5:00 p.m. They then went to Chalmers', where he heard Princh and Chalmers have a discussion about the stolen food stamps. Defendant stated that he did not respond to the conversation and did not make any statements about the victim. He further testified that he had not had any trouble with the victim and that he did know him and saw him only occasionally.

Defendant stated that Mitchell gave him a ride from Chalmers' at approximately 10:00 p.m. Defendant was in the passenger seat, and the gun was on the seat between them. Mitchell drove to Fourth and Maple. They saw the victim, who yelled at them. Mitchell stopped his car on the right-hand side of the road. The victim was on the left-hand side. Mitchell and the victim began to speak through the window of the car. Defendant asked Mitchell to take him home. When the victim walked away from the car, Mitchell asked defendant for the gun. The safety was on and defendant thought Mitchell was only going to scare the victim with it. Defendant gave the gun to Mitchell, who began firing the gun at the victim.

Defendant heard the victim yell and saw him grab himself as he fell. Mitchell drove away and took defendant home. Twenty minutes later Mitchell, now with Chalmers in a different car, returned to defendant's house. They picked up defendant and drove to a friend's workplace.

A few days after the murder, defendant heard Mitchell tell Peter Baker, a mutual friend, that Mitchell had shot the victim. A few weeks later, Mitchell made the same statement to Baker again. Defendant again testified that he did not know Mitchell was going to shoot the victim.

On cross-examination defendant testified that his prior statements that Mitchell and the victim were talking about marijuana and

that he had heard Mitchell say he was going to shoot the victim were not true. He denied telling Detective Parker that he said he was going to shoot the victim. He further stated that he did not tell any officer that he and Mitchell talked about how to lure the victim over to the car.

Ruth Bland, manager of the McDonald's where defendant and Mitchell worked, testified that although Mitchell did not work on 20 February 1992, he came to her and asked her for a paper that would indicate that he had worked that day.

Peter Baker testified that he knew defendant and Mitchell. He corroborated defendant's testimony that Mitchell told him that Mitchell, not defendant, shot Smith. He further stated that a few weeks later he again heard Mitchell claim responsibility for shooting the victim. Baker further corroborated defendant's testimony in that Baker saw Mitchell bring defendant home at approximately 10:00 p.m. He then saw Mitchell return with Chalmers about twenty minutes later.

Charlene Wicker, defendant's girlfriend, also testified that Mitchell brought defendant home at approximately 10:30 p.m. and that he returned with Chalmers twenty minutes later and defendant left with them. She heard Mitchell tell Baker that he shot the victim.

Private Investigator Walter Yentch testified that he spoke with Baker and Wicker. They both told Yentch about Mitchell's inculpatory statement and about the times of Mitchell's arrivals and departures from defendant's home on the night of the shooting.

Yentch further testified that defendant made a statement to him. In it defendant stated that during the food stamp discussion, he jokingly asked Hollingsworth if she wanted the victim shot. Mitchell then stated that he and defendant should go shoot him. Defendant thought Mitchell was joking. They left together and drove to Fourth and Maple in the area of Mitchell's mother's home. Mitchell stopped the car when he saw the victim, who then approached the car. Defendant asked the victim about marijuana. Mitchell spoke to the victim but defendant could not hear him. The victim walked away from the car; Mitchell asked defendant to hand him the gun. Defendant thought he was going to scare the victim, so he handed him the gun. Mitchell then leaned out the window and shot the victim.

[1] Defendant first assigns as error the trial court's instructions on aiding and abetting. During the charge conference, the State re-

quested, without specification of precise form, an instruction on aiding and abetting as a theory of guilt of first-degree murder. The court agreed to give such an instruction, and defense counsel did not object. Following the court's charge to the jury, the court inquired whether there were any objections, and defense counsel again did not object.

Defendant contends that under *State v. Keel*, 333 N.C. 52, 423 S.E.2d 458 (1992), this assignment of error is preserved for appeal. He points to the following statement as supportive of his position: "The State's request, approved by the defendant and agreed to by the trial court, satisfied the requirements of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and preserved this question for review on appeal." *Id.* at 56-57, 423 S.E.2d at 461. We disagree with defendant's interpretation of *Keel*'s applicability to this case.

Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure mandates the procedure for preserving jury instruction questions for appeal. It states:

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

N.C. R. App. P. 10(b)(2). In *Keel* the State, during the charge conference, specifically requested the North Carolina Pattern Jury Instruction on the intent element of first-degree murder. The trial court agreed to give that portion of the pattern instructions and asked the defense counsel if he had any objection. The defense counsel responded that he did not. The trial court then gave an instruction that differed from the pattern instruction. Based on the State's request and the defense counsel's agreement that a specific pattern instruction be given, we determined that the defendant had satisfied Rule 10(b)(2), and we deemed the question preserved for appeal. *Keel*, 333 N.C. at 56-57, 423 S.E.2d at 461.

In other cases this Court also has considered a question regarding jury instructions preserved for appeal even though the defendant failed to object to the instructions given. In *State v. Montgomery*, 331 N.C. 559, 570, 417 S.E.2d 742, 748 (1992), the defense counsel submit-

ted a written request for the pattern jury instruction on reasonable doubt. The trial court, however, gave a different instruction to which the defense counsel did not object. We considered the question preserved because the defense counsel's specific, written request for a different instruction constituted a sufficient objection to the instruction given to satisfy Rule 10(b)(2). Similarly, in *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988), the defense counsel requested the pattern jury instruction on the defendant's failure to testify. The trial court agreed to use it but during the charge omitted it entirely. Based on the defense counsel's specific request, we considered the question preserved for appeal. *See also State v. Pakulski*, 319 N.C. 562, 574-75, 356 S.E.2d 319, 327 (1987) (where defense counsel specifically requested pattern instruction on prior inconsistent statements and instruction was omitted, question was preserved because the spirit of Rule 10(b)(2) was satisfied).

In all of these cases the trial court agreed to give specific, requested instructions but then either omitted the instruction entirely or gave one which differed from the requested instruction. As we previously have stated, "[t]he purpose of Rule 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). In *Keel*, *Montgomery*, and *Ross*, the trial court was aware of the specific instruction to be given and that the State and the defendant had no objections to its form. When the trial court in those cases failed to give the instruction or gave a different instruction from that specifically requested, we considered the purpose of Rule 10(b)(2) fulfilled because the trial court had the opportunity to instruct in the manner the parties perceived as unobjectionable.

In contrast, here the State made a general request for an instruction on aiding and abetting as a theory of guilt of first-degree murder. Defense counsel did not object when the court decided to give an instruction and did not make a specific request as to the form of the instruction. Thus, the trial court never was made aware of a specific instruction sought by the parties. After the court gave its instructions on aiding and abetting, defense counsel again did not object. Because defense counsel did not object to the instructions the court decided to give, the court never had the opportunity to cure any perceived errors in the instructions. Under these circumstances, the spirit and

purpose of Rule 10(b)(2) are not met. We therefore consider this question not preserved for appeal.

Because this question is not preserved for appeal, we may review it only for plain error. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. To constitute plain error, an instructional error must have "had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 379-80. Defendant, therefore, "must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

The trial court first instructed the jury on the theory of defendant's possible guilt as principal and delineated the elements the State would have to prove beyond a reasonable doubt to establish guilt under that theory. It then gave the following instructions on the theory of aiding and abetting:

> Now, a person may be guilty of a crime such as first-degree murder although he personally does not do any of the acts necessary to constitute that crime. A person who aids and abets another to commit a crime is guilty of that crime. You must clearly understand that if he does aid and abet he is guilty of the crime just as if he personally did—personally performed all the acts necessary to constitute the crime. Now under this theory, for you to find the defendant guilty of first-degree murder because of aiding and abetting, the State must prove three things beyond a reasonable doubt.
>
> First, that the crime of first-degree murder was committed by Thomas Mitchell. In other words, Thomas Mitchell intentionally and with malice killed Jacob Bernard Smith with a deadly weapon. And, second, that Thomas Mitchell's act was a proximate cause of Jacob Bernard Smith's death. And, third, that Thomas Mitchell specifically intended to kill Jacob Bernard Smith. And fourth, that Thomas Mitchell acted with premeditation. And, fifth, that Thomas Mitchell acted with deliberation.
>
> And the second thing that the State must prove in this connection is that this defendant, Antonia Maurice Allen, *knowingly aided* Thomas Mitchell in committing this crime. In this connection I would instruct you, if you find that when the defendant—well, when Thomas Mitchell or—if you find that Thomas Mitchell requested that this defendant hand him the pistol, and that this

> defendant handed him this pistol, and at the time that he handed him this pistol, *he should have known or he knew or he should have known that Thomas Mitchell intended to kill Jacob Bernard Smith*, then you can find that the State has proven this element as to aiding and abetting the crime of first-degree murder. However, if you cannot find this, or if you cannot find that when Thomas Mitchell requested that this defendant hand him the pistol, and that when this defendant handed him this pistol that this defendant—. If you cannot find that this defendant believed he was going to kill Jacob Bernard Smith, that on the contrary, that he believed or had a reasonable belief that he was only going to scare him with the gun, then if the State has failed to prove this, in other words, if they have failed to prove that at the time he was asked for the gun and defendant gave him the gun, that this *defendant knew or had reasonable grounds to believe that he was going to kill Jacob Bernard Smith*—the State has failed to prove this—then they have failed to prove this element of aiding and abetting first-degree murder.

(Emphasis added.)

> Now, the third thing that they're required to prove to you on this theory is that the defendant's actions, that's Antonia Maurice Allen's, caused or contributed to the commission of a crime of first-degree murder by Thomas Mitchell.

The Court then instructed on involuntary manslaughter as follows:

> Involuntary manslaughter is the unintentional killing of a human being by an unlawful act, not amounting to a felony, or an act done in a criminally negligent way. Involuntary manslaughter would only arise under the version of what happened according to what the defendant himself testified to, that is, his testimony that when Thomas Mitchell requested that he hand him the gun and he handed him the gun, he only thought that Thomas Mitchell's intent was to scare Jacob Bernard Smith with the gun. This would also be under the theory of aiding and abetting. Using a gun to scare someone, if this is done without legal justification, is an unlawful act. And if this unlawful act proximately caused Jacob Bernard Smith's death, then this would be involuntary manslaughter.
>
> So, in that connection, if you find that Thomas Mitchell did shoot Jacob Bernard Smith, and as a result of being shot, Jacob Bernard

> Smith died, and that this defendant, Antonia Maurice Allen, handed the pistol to Thomas Mitchell after Thomas Mitchell had requested that he hand him the pistol, but at the time that this request was made . . .—*that this defendant handed him the pistol he thought that Thomas Mitchell only wanted to scare Jacob Bernard Smith with the pistol*, then the most the defendant would be guilty of would be involuntary manslaughter.

(Emphasis added.)

In its final mandate the court explained the possible verdicts and directed that defendant would be guilty of aiding and abetting if, in addition to other elements, the jury found that when defendant handed Mitchell the gun "he knew or had reasonable grounds to know that his intention was to kill" the victim. It reiterated that defendant would be guilty of involuntary manslaughter, rather than first-degree murder, if defendant handed Mitchell the pistol, "and that at the time he believed Mitchell was going to scare—was only going to scare Jacob Bernard Smith, with a gun, and that it was not his intent to kill him."

The jury deliberated one hour and then returned to the courtroom. The foreperson then asked the court to reinstruct the jury on the difference between first-degree murder and involuntary manslaughter. In response the court instructed again on defendant's possible guilt as principal, defendant as aider and abettor, and involuntary manslaughter. The court stated that to find defendant guilty of aiding and abetting, the jury would have to find, in addition to other elements, that defendant "knowingly aided Thomas Mitchell in committing this crime by handing him the pistol after Thomas Mitchell had requested him [to do so], and at that time that this defendant knew or had reason to know that Thomas Mitchell intended to kill Jacob Bernard Smith." As to involuntary manslaughter, the court again stated that under this theory, the jury would have to find that defendant "at the time he handed him the gun . . . believed that Mitchell was only going to scare Jacob Bernard Smith with the gun."

[2] Defendant argues that the aiding and abetting instructions constitute error because they did not require the jury to find that defendant premeditated, deliberated or shared a criminal purpose or intent with Mitchell to kill the victim. He contends that the standards "knew or should have known" and "reasonable grounds to believe" do not satisfy the element of specific intent required for the aiding and abetting theory of first-degree, premeditated and deliberated murder. According to defendant, these instructions completely relieved the

State of proving the intent element and were plain error that probably caused the jury to reach a different result than it would have without the error.

We agree with defendant that the court's use of the phrases "should have known" and "reasonable grounds to believe" was erroneous. To be convicted as an aider and abettor, "one must be actually or constructively present at the scene, share the criminal intent with the principal, and render assistance or encouragement to him in the commission of the crime." *State v. Rogers*, 316 N.C. 203, 229, 341 S.E.2d 713, 728 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). The phrases used, in isolation, do not convey the concept of specific intent necessary for aiding and abetting a first-degree murder committed with premeditation and deliberation. *See State v. Blankenship*, 337 N.C. 543, 557-62, 447 S.E.2d 727, 734-38 (1994) (discussing specific intent required to satisfy the intent element of the similar doctrine of acting in concert for first-degree murder).

Given that the instructions were partially erroneous, we must determine whether they were plain error. " '[I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *Odom*, 307 N.C. at 661, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)). In reviewing an instruction for plain error, we must construe the charge contextually, *State v. Payne*, 337 N.C. 505, 523, 448 S.E.2d 93, 103 (1994), and "must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt," *Odom*, 307 N.C. at 661, 300 S.E.2d at 379.

Despite the court's erroneous use of the phrases "should have known" and "reasonable grounds to believe," we conclude that the instructions as a whole conveyed that under the theory of aiding and abetting, Mitchell had to have the specific intent to kill the victim; defendant had to know this was Mitchell's intent when he handed him the gun; and defendant, with that knowledge, intended to aid Mitchell in committing the crime. The court conveyed this principle by its overall instructions and specifically by its use of the phrase "knowingly aided." The probable interpretation of "knowingly aided" by the jury was that before it could find defendant guilty, it would have to determine that defendant knowingly participated in the crime based on an intent to assist Mitchell in committing it. *See State v. Woods*, 56

N.C. App. 193, 199, 287 S.E.2d 431, 435 (interpreting "knowingly aided" as clearly mandating a determination that defendant's participation "was advertent and pursuant to an intent to assist the actual perpetrator"), *cert. denied*, 305 N.C. 592, 292 S.E.2d 13 (1982). We also note that this phrase is used to describe the intent element in the North Carolina Pattern Jury Instructions on aiding and abetting. *See* N.C.P.I.—Crim. 202-20A (1989).

Further, after reviewing the entire record, we conclude that the erroneous portion of the instructions did not have a probable impact on the jury's guilty verdict. By his own admission, defendant was present at the scene of the crime and handed Mitchell his gun. Defendant further admitted that the gun had been repaired earlier on the day of the shooting. He therefore knew that the gun was in working order. The bullets obtained from the victim's body were fired from defendant's gun. Defendant gave an oral statement to Detective Parker indicating that in response to the food stamp discussion, defendant stated that he would shoot the victim. In the same statement, defendant indicated that Mitchell stated in his presence that he would shoot the victim, which tends to show that defendant knew what Mitchell's intent was when defendant handed him the gun. Evidence from several parties indicated that defendant stated that he had a "beef" with the victim, that the victim on a prior occasion had held a gun to defendant's head, and that defendant stated that he would "take care of" Hollingsworth's food stamp problem with the victim. Given this substantial evidence as to defendant's intent, we conclude that it is improbable that the erroneous portion of the court's instructions had an impact on the verdict.

The verdict itself also supports this conclusion. The jury found defendant guilty of first-degree murder and rejected the verdict of guilty of involuntary manslaughter. The verdict sheet does not indicate on which theory of guilt of first-degree murder the jury based its verdict. However, we can determine from the verdict of guilty of first-degree murder that the jury concluded either that defendant shot the victim, based on the testimony of both Mitchell and Chalmers that Mitchell was at Chalmers' all evening, or that defendant aided and abetted Mitchell in the first-degree murder by handing him the gun with the shared intent that Mitchell would kill the victim. By rejecting the verdict of involuntary manslaughter, the jury indicated that it did not believe defendant thought Mitchell only intended to scare the victim, and the instructions on involuntary manslaughter gave them the opportunity to interpret the evidence in this way. It therefore is

improbable that the erroneous portion of the instructions had an impact on the jury's verdict because the jury showed that it concluded defendant was more involved in the crime than defendant's testimony suggested.

For all of these reasons, we conclude that the instructions on aiding and abetting first-degree murder did not constitute plain error.

[3] In this assignment of error, defendant also maintains that the aiding and abetting instructions shifted the burden of proof to defendant because the court indicated that if the jury found that defendant thought Mitchell was only going to scare the victim, then the State had failed to prove that defendant knew or had reasonable grounds to believe that Mitchell was going to kill the victim. According to defendant, this statement suggested that defendant would have to prove that he thought Mitchell was only going to scare the victim.

He further contends that this alleged error was compounded by the court's instructions on involuntary manslaughter, to which defense counsel did not object. He argues that the involuntary manslaughter instructions impermissibly shifted the burden of proof on intent to defendant. The trial court instructed that involuntary manslaughter by aiding and abetting would be the appropriate verdict "under the version of what happened according to what the defendant himself testified to, that is, his testimony that when Thomas Mitchell requested that he hand him the gun and he handed him the gun, he only thought that Thomas Mitchell's intent was to scare . . . Smith with the gun."

Defendant is correct that he bears no burden of proof on the intent element, *see State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *holding modified on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986); however, neither the instructions on aiding and abetting nor the instructions on involuntary manslaughter shifted the burden to defendant. The probable interpretation of the complained-of portion of the aiding and abetting instructions was that if the State failed to prove that defendant aided and abetted Mitchell in the first-degree murder, then the jury was to consider the verdict of involuntary manslaughter. The use of the words "the State failed to prove" indicated to the jury that it was the State's burden of proof, not defendant's.

As to the involuntary manslaughter instruction, it directed the jury to consider defendant's testimony. Further, the trial court's

instructions on aiding and abetting and on involuntary manslaughter expressly placed on the State the burden of proving defendant's guilt of the charges beyond a reasonable doubt. *See State v. Corbett*, 309 N.C. 382, 402-03, 307 S.E.2d 139, 151-52 (1983) (no shift of burden of proof to defendant when court instructed, "[i]f you find the facts to be as the defendant's evidence tends to show them, then you are to acquit the defendant," and charge as a whole conveyed the proper burden of proof). We conclude that there was no error, plain or otherwise, in these portions of the court's instructions.

Because we find no plain error in the court's instructions on aiding and abetting and on involuntary manslaughter, this assignment of error is overruled.

[4] Defendant next assigns as error the trial court's final mandate to the jury. The trial court's instruction directed the jury to find defendant guilty of first-degree murder if the State had proved beyond a reasonable doubt all of the elements of either the theory of defendant as the principal or the theory of defendant aiding and abetting Mitchell, who acted as the principal. Defendant did not object to the instruction but argues that it constituted plain error in that it deprived him of his right to a unanimous jury verdict under the North Carolina Constitution. N.C. Const. art I, § 24; *see* N.C.G.S. § 15A-1237(b) (1988). He reasons that the instruction allowed a jury verdict of guilty based on some jurors voting for guilt under one theory of first-degree murder and others voting for guilt under a different theory of first-degree murder. The verdict sheet does not reveal on which theory or theories the jury based its guilty verdict. He contends, therefore, that this instruction rendered the verdict fatally ambiguous. We disagree.

We have addressed the issue of disjunctive instructions in two lines of cases. *See State v. Lyons*, 330 N.C. 298, 302-08, 412 S.E.2d 308, 312-15 (1991) (discussing the principles established in the two lines of cases). In one line we held that a disjunctive instruction leads to a fatally ambiguous verdict when it "allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*." *Id.* at 302, 412 S.E.2d at 312. In the second we held that a disjunctive instruction does not lead to a fatally ambiguous verdict if it allows the jury to find a defendant guilty based on either of two underlying acts, both of which separately support a theory of guilt for only one offense. *See, e.g., State v. Hartness*, 326 N.C. 561, 566-67, 391 S.E.2d 177, 180-81 (1990) (verdict not fatally ambiguous where statute supported conviction for taking indecent

liberties with a child upon proof of alternative acts, and instruction allowed jury verdict based on defendant's either improperly touching the child or inducing the child to touch him); *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28-29 (1985) (verdict not fatally ambiguous where statute sought to prevent only one offense, that of possession of narcotics with intent to transfer, and instruction allowed jury verdict based on either possession with intent to sell or possession with intent to deliver); *Jones v. All American Life Ins. Co.*, 312 N.C. 725, 738, 325 S.E.2d 237, 244 (1985) (verdict not fatally ambiguous where plaintiff would be barred from recovering life insurance proceeds if she participated in killing of insured and disjunctive instruction allowed jury to find either that she killed or procured the killing of the insured).

The instruction here allowed the jury to consider two theories of guilt for first-degree murder, that is, that defendant alone shot the victim or that defendant aided and abetted Mitchell, who shot the victim. Because a finding of either of these two acts would result in a verdict of guilty of the offense of first-degree murder, the disjunctive instruction was not fatally ambiguous. It therefore was not error, much less plain error. This assignment of error is overruled.

Defendant's third assignment of error is a restatement of his argument involving the instruction on involuntary manslaughter. We have addressed this issue in defendant's first assignment of error.

We conclude that defendant had a fair trial, free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. ROBERT DOUGLAS ALFORD

No. 365A93

(Filed 10 February 1995)

1. Evidence and Witnesses § 264 (NCI4th)— noncapital first-degree murder—character of victim—peacefulness

There was no prejudicial error in a noncapital first-degree murder prosecution in admitting evidence of the victim's character for peacefulness. Assuming that admission of the evidence that the victim was not known to be a violent person or to carry

a gun was error, defendant cannot show prejudice because the other challenged evidence, that the victim was not in any of the altercations at the Soul Train Lounge the night of the murder and that neither defendant nor his friends were armed, was relevant to premeditation and deliberation and to motive and was properly admitted. Moreover, defendant waived his right to raise these objections on appeal because, for each item objected to under this assignment of error, virtually the same evidence was admitted without objection at other times during the trial.

Am Jur 2d, Evidence § 373.

2. Criminal Law § 448 (NCI4th)— noncapital first-degree murder—prosecutor's argument—victim as peaceful person

There was no plain error in a noncapital first-degree murder prosecution where defendant argued that the prosecution should not have been allowed to argue that the evidence that the victim was a peaceful person who had been shot for no apparent reason was connected with the jury's determination of premeditation and deliberation. The prosecutor did not exceed the scope of the evidence or reasonable inferences therefrom and evidence of the lack of provocation was relevant to premeditation and deliberation and to motive.

Am Jur 2d, Trial § 396.

3. Evidence and Witnesses § 663 (NCI4th); Criminal Law § 447 (NCI4th)— noncapital first-degree murder—prosecutor's argument—victim's family

There was no prejudicial error in a noncapital first-degree murder prosecution where the trial court failed to rule on defendant's objection to an allegedly improper victim impact argument by the prosecutor and no plain error in the court's not intervening *ex mero motu* to prevent the prosecutor from further commenting on the impact on the victim's family. Any party is entitled as a matter of law to a ruling on an objection, but the error in failing to rule was not prejudicial because the prosecutor's comments, in the context of the entire argument, did not attempt to make sympathy for the victim or his family the focus of the jury's deliberation, did not imply that the jury should consider accountability to the victim's family or the community in reaching its verdict, and the record provides ample evidence to support defendant's first-

degree murder conviction. In the absence of a showing of prejudice, improper jury arguments do not require reversal.

Am Jur 2d, Trial §§ 396, 664 et seq.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3 8.

4. Assault and Battery § 82 (NCI4th)— noncapital first-degree murder—felony murder—discharging firearm into occupied property—instructions

There was no plain error in a noncapital first-degree murder prosecution where defendant contended that the court erred in its instruction on felony murder in that, while the court correctly defined the underlying felony, discharging a firearm into an occupied vehicle, the instruction did not inform the jury that this definition contained separate elements that must be found beyond a reasonable doubt in order for the jury to find defendant guilty of felony murder. Defendant disputed only the identity of the perpetrator; the occurrence of the underlying felony was not disputed and there is no evidence that anything other than the discharge of the firearm into the vehicle caused the victim's death. The trial court fully defined the underlying felony of discharging a firearm into occupied property, the terms used in this definition were essentially self-explanatory, and the trial court did not err in instructing on the burden of proof or the essential elements of discharging a firearm into occupied property as the underlying felony for felony murder.

Am Jur 2d, Trial §§ 2077 et seq.

5. Criminal Law § 903 (NCI4th)— noncapital first-degree murder—instructions on premeditated and deliberate murder and felony murder—disjunctive

There was no plain error in a noncapital first-degree murder prosecution where defendant contended that the court's disjunctive instructions on premeditated and deliberate murder and felony murder were fatally ambiguous in that it is impossible to determine whether the jury unanimously found that defendant actually committed either premeditated and deliberate murder or felony murder or if different jurors convicted on the basis of different theories. The actual instructions given by the trial court made it clear to the jury that it had to be unanimous on both the

verdict and the basis for that verdict and the verdict sheet returned by the jury and the jury poll indicate that the jurors did not construe the instructions to allow conviction on a basis that was not unanimous.

Am Jur 2d, Criminal Law § 892; Trial § 1437.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.

6. Evidence and Witnesses § 1694 (NCI4th)— noncapital first-degree murder—photographs of victim—admissible

The trial court did not err in a noncapital first-degree murder prosecution by admitting photographs depicting the victim's body in the backseat of an automobile which was wrecked on the way to the hospital following a shooting. The challenged photographs were used for illustrative purposes by several witnesses, nothing suggested that the photographs were used to incense the jurors or incite their prejudices and passions against defendant, and the State made no attempt to draw undue attention to these photographs.

Am Jur 2d, Evidence § 974.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2 769.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Bowen, J., at the 18 May 1993 Criminal Session of Superior Court, Robeson County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 14 September 1994.

Michael F. Easley, Attorney General, by Mary D. Winstead, Associate Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

PARKER, Justice.

Defendant was tried noncapitally on an indictment charging him with the first-degree murder of Joey Addison ("victim"). The jury

returned a verdict finding defendant guilty of first-degree murder upon the theories of (i) premeditation and deliberation and (ii) felony murder. Defendant was sentenced to life imprisonment. For the reasons discussed herein, we conclude that defendant's trial was free of prejudicial error and uphold his conviction and sentence.

The State's evidence tended to show that on the afternoon of 27 September 1992 the victim went to his mother's house to return a lawn mower and traded his smaller car for her larger 1980 Oldsmobile. Gregory Dixon, the victim's cousin, who was visiting from Washington, D.C., testified that the victim picked him up that afternoon after leaving his mother's house and the two returned to the victim's residence in Rowland, North Carolina. Jeffrey Rowdy and Gerard Bennett came over to the victim's house around 9:00 p.m. and played cards with the victim, Dixon, and some other friends. One of the men, Eugene, had firecrackers in his pockets. Around 11:00 p.m. the victim, Dixon, Rowdy, and Bennett left in the 1980 Oldsmobile and went to a local pool hall where they stayed for approximately forty-five minutes. After leaving the pool hall, the men went to the store and purchased several six-packs of beer. The men drove to the Soul Train Lounge near Fairmont and sat in the parking lot for about thirty-five minutes, drinking their beer and talking to other friends, including Reginald and Tony Roberts. During this time, the victim drank approximately a six-pack of beer. State's evidence tended to show that neither the victim nor any of his friends were armed with any weapons that night, either in the parking lot or inside the Soul Train Lounge.

After finishing their beer, the victim and his friends went into the lounge. A fight broke out between some men from Rowland and some men from Fairmont, and the manager of the bar made everyone go outside. The State's evidence tended to show that neither the victim nor his friends from Rowland were involved in the fight or in any other altercations at the Soul Train Lounge the night of 27 September 1992.

Approximately twenty minutes later the manager began to let people back into the lounge. The victim talked to the manager of the bar and told him that neither he nor his friends had been involved in the fight inside the lounge, and the manager let them reenter the bar. Another fight soon broke out. At that point the manager closed the bar for the night and made everyone leave. The State's evidence tended to show that neither the victim nor any of his friends were involved in this second altercation.

After the Soul Train Lounge was closed for a second time, the victim stood under a tree in the parking lot, talking with several friends. Firecrackers were set off in another part of the parking lot by someone, possibly by the victim's friend Eugene. The State's evidence tended to show that several shots were fired while the victim was standing in the parking lot, and the victim and his friends ran to his mother's car. The victim got into the driver's seat, Dixon got into the front passenger seat, and Rowdy and Bennett got into the backseat.

Rowdy, who was sitting directly behind the victim, testified that after the men got into the car, he heard a shot fired from his left and saw the victim slump over. Dixon testified that the victim grabbed Dixon's leg. Dixon opened his door and saw that his cousin had been shot and had blood running down his shirt. Dixon, Rowdy, and Bennett grabbed the victim and put him in the backseat of the car. At this time, the men saw a man with a rifle run in front of the car; the man was cursing at them and calling them names. He got into a car that pulled up in front of the victim's car and then drove away.

After placing the victim in the backseat of the car, Dixon, Rowdy, and Bennett rushed to the hospital, racing through the streets at a speed of eighty-five to ninety miles per hour. They passed a police officer, who chased the car until it ran off the road into a fire hydrant. The crash caused the victim's body to fall on the floor in the backseat of the car. The police officers ordered the men out of the car, and when the officers noticed the victim's body on the floor in the back, they called the rescue squad to attend to the victim.

The victim's body was transported to Southeastern General Hospital for an autopsy. Dr. Bob Andrews, a board-certified pathologist, performed the autopsy and determined that the victim died as a result of a gunshot wound to the left side of the head, just below the left ear. Andrews described the wound as being from left to right, in a straight horizontal direction, entering the head at a ninety-degree angle and passing through both hemispheres and main lobes of the brain. The autopsy revealed no evidence of any injuries to the victim's body caused by the car crash. At the time of his death, the victim's blood alcohol level was 30 milligrams per deciliter, the equivalent of .03 on a breathalyzer.

Officer Stewart McPhatter, an identification officer for the Robeson County Sheriff's Department, testified that he arrived on the scene shortly after the crash and observed the victim's body in the

backseat of the car. He searched the vehicle but did not find evidence of any weapons or ballistics inside the car.

Johnnie Leonard testified that on the night of 27 September 1992 he was at the Soul Train Lounge, where he saw both defendant and the victim. After the Soul Train Lounge was closed for the second time, he went to the parking lot. He saw his cousin, Jamie Jones, take a .22 rifle from the trunk of a red Monte Carlo and hand it to defendant, who loaded it. Leonard testified that he heard one shot fired and that he grabbed his own .38-caliber handgun and shot it into the air two times after he heard the first shot fired. Then he got into a burgundy Chevrolet Celebrity, driven by his friend Isaac Smith.

Tony Roberts testified that he saw defendant approach the victim's car, walk away several car lengths, lean on a car for leverage, and fire towards the victim's car. He saw defendant get into a car that had pulled up in front of the victim's car and blocked it. Defendant was laughing and calling the occupants of the victim's vehicle names.

Johnnie Leonard further testified that he and Isaac Smith picked up defendant and Jamie Jones in the burgundy Celebrity after the shooting. Leonard testified that defendant still had the rifle in his hands and that when he got into Smith's car, defendant told the other occupants that he had just "shot a m—— f—— in the neck." Leonard testified that since Jones did not want to walk with the rifle, he asked Leonard to hold the rifle for him and said that he would return for it later. Leonard consented and took the gun home. The next morning, after hearing that the victim was dead, Leonard told his father what had happened and turned the loaded rifle over to Detective Ricky Britt and Sheriff Bullard.

Defendant presented no evidence.

[1] Defendant first contends that the trial court committed reversible error by admitting, over defendant's objections, evidence of the victim's character for peacefulness and by permitting the prosecutor to argue this evidence to the jury during his closing argument. Specifically, defendant challenges the admission of evidence that the victim was not known to be a violent person or to carry a gun, that the victim was not involved in any altercations at the Soul Train Lounge the night of the murder, and that neither the victim nor any of his friends were armed with any weapons that evening. Defendant contends that this testimony was inadmissible character evidence pursuant to N.C.G.S. § 8C-1, Rule 404(a)(2). This rule prohibits the admission of

evidence of the victim's peaceful character in a homicide case for the purpose of proving conduct in conformity therewith unless offered by the prosecution to rebut defense evidence that the victim was the first aggressor. N.C.G.S. § 8C-1, Rule 404(a)(2) (1986). As defendant did not introduce any evidence that the victim was the first aggressor, he contends that this evidence reflecting the peaceful nature of the victim was erroneously admitted in violation of his right to a fair trial. For the following reasons, we reject defendant's arguments.

Assuming arguendo that admission of the State's evidence, that the victim was not known to be a violent person or to carry a gun, was error, defendant cannot show prejudice as required by N.C.G.S. § 15A-1443(a). The other challenged evidence, that the victim was not in any altercations at the Soul Train Lounge the night of the murder and that neither the victim nor any of his friends were armed that night, was relevant and properly admitted. This evidence was not introduced as evidence of the peaceful nature of the victim, but was introduced to support a finding of premeditation and deliberation on the part of defendant. Premeditation and deliberation are generally not susceptible of direct proof, but are mental processes which may be inferred from circumstantial evidence surrounding a murder, including lack of provocation on the part of the victim. *State v. Keel*, 337 N.C. 469, 489, 447 S.E.2d 748, 759 (1994); *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). Evidence that the victim was peaceful and unarmed the night of the murder was relevant to prove that the victim did not provoke defendant and that this murder was committed with premeditation and deliberation.

Additionally, this evidence was relevant to the State's theory for defendant's motive for murdering the victim. Although the State is not required to prove motive, evidence of the motive for a crime is competent evidence. *See State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). The State's theory was that the sole reason defendant shot the victim was that the victim was from Rowland; evidence that there was no provocation on the part of the victim was thus relevant to support this theory of defendant's motive.

Furthermore, the record reflects for each item of evidence objected to by defendant under this assignment of error, virtually the same evidence was admitted without objection at other times during the trial, either before or after defendant's objections were made. There-

fore, defendant waived his right to raise these objections on appeal. Where 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); *State v. Maccia*, 311 N.C. 222, 229, 316 S.E.2d 241, 245 (1984); *State v. Chapman*, 294 N.C. 407, 412-13, 241 S.E.2d 667, 671 (1978).

Although defendant objected at trial to the testimony of Anthony Pittman, the disc jockey at the Soul Train Lounge the night of the murder, that he had never seen the victim involved in any fights prior to the night of the murder, defendant waived his objection by later cross-examining Pittman about this same evidence. Normally, the objecting party does not waive an objection to evidence the party contends is inadmissible by trying to explain it, impeach it, or destroy its value on cross-examination. *State v. Adams*, 331 N.C. 317, 328, 416 S.E.2d 380, 387 (1992); *State v. Van Landingham*, 283 N.C. 589, 603, 197 S.E.2d 539, 548 (1973). However, the record in the instant case reveals that defendant made no attempt to explain, impeach, or destroy the value of Pittman's testimony; defendant merely asked Pittman for the same information and queried him briefly about his friendship with the victim. Thus, even if Pittman's testimony was error, defendant cannot show prejudice as he lost the benefit of his earlier objection to this testimony by eliciting testimony to the same effect from Pittman.

Applying the foregoing principles, we also hold that defendant waived his objection to the testimony of Mae Addison that she never knew her son to carry a gun since the next witness to be called was allowed to testify to the same effect without objection from defendant. Defendant also waived any objection to the testimony that the victim was peaceful and unarmed the night of the murder. Defendant raised no objection to the testimony of Gregory Dixon, the victim's cousin, who was the first witness to testify to this effect. Additionally, testimony that no one in the victim's group of friends was armed the night of the murder was elicited from several witnesses without objection. Thus, defendant also waived any objection he may have made to this testimony.

[2] Further, in connection with this assignment of error, defendant contends the trial court erred by failing to intervene *ex mero motu* to stop the prosecutor's improper closing argument to the jury. Defendant specifically argues that the prosecution should not have been

allowed to argue that the evidence that the victim was a peaceful person who had been shot for no apparent reason was connected with the jury's determination of premeditation and deliberation on the part of defendant. Defendant argues that this argument erroneously implied that offering no reason for shooting a peaceful man indicates premeditation and deliberation. Defendant claims that this argument exceeded the scope of the evidence and encouraged the jury to convict him based on improper considerations of sympathy and pity for the victim evoked by the victim's peaceful nature.

Where there is no objection at trial to a jury argument, the standard of review to determine whether the trial court should have intervened *ex mero motu* is whether the allegedly improper argument was so prejudicial and grossly improper as to interfere with defendant's right to a fair trial. *State v. Sexton*, 336 N.C. 321, 362, 444 S.E.2d 879, 902, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429 (1994); *State v. Harris*, 308 N.C. 159, 169, 301 S.E.2d 91, 98 (1983). A prosecutor must be allowed wide latitude in the argument of hotly contested cases and may argue all the facts in evidence and any reasonable inferences that can be drawn therefrom. *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). "A prosecutor's argument is not improper when it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *Id.* In the instant case, the prosecutor's argument was not so grossly improper as to require the trial court to intervene *ex mero motu*.

The prosecutor did not exceed the scope of the evidence or reasonable inferences therefrom by referring in his closing argument to the victim's peaceful nature. Contrary to defendant's claim, evidence of the lack of provocation on the part of the victim was relevant to support a finding of defendant's premeditation and deliberation and to support the State's theory of motive. Additionally, as noted earlier, defendant had waived any objections to the introduction of this evidence by failing to object to the admission of same each time it was elicited during the trial. This assignment of error is overruled.

[3] Defendant next contends the trial court erred in failing to rule on his initial objection to an allegedly improper victim impact argument made by the prosecution during closing arguments. In his closing argument, the prosecutor mentioned that the victim was "[t]aken from two parents that care" and "who loved their son." Defendant claims that this argument was improper as it was made with the inten-

tion of evoking sympathy among the jurors for the victim's family. The trial court made no ruling on defendant's objection to these statements. Defendant claims this failure to rule denied him a fair trial for the reason that sympathy for the victim is an inappropriate consideration during guilt determination. Furthermore, the error and prejudice to defendant could have been corrected at the time had the trial court immediately ruled on his objection.

Defendant also contends that the trial court erred by failing to intervene *ex mero motu* to prevent the prosecution from commenting further on the impact the murder had on the victim's family. According to defendant, the trial court's failure to rule on his initial objection to these victim impact remarks encouraged the prosecutor to make further improper arguments, thereby compounding the prejudice to defendant. After defendant's objection, the prosecutor argued that it is a terrible thing "when you have to bury a child under these type circumstances." We reject defendant's contentions.

We note first that the trial court technically erred in not ruling on defendant's initial objection to the prosecutor's argument at trial. Any party is entitled as a matter of law to a ruling on an objection. *State v. Chapman*, 294 N.C. 407, 414, 241 S.E.2d 667, 671-72; *State v. Staley*, 292 N.C. 160, 167, 232 S.E.2d 680, 685 (1977). The trial court's failure to rule was tantamount to overruling such objection. However, for the reasons which follow, this error was harmless.

Counsel must be allowed wide latitude in the argument of hotly contested cases. *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911; *State v. Britt*, 288 N.C. 699, 711, 220 S.E.2d 283, 291 (1975). However, "the jury's decision must be based solely on the evidence presented at trial and the law with respect thereto, and not upon the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in general." *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). During the guilt phase of a trial, the focus of the jury must be on guilt versus innocence; and arguments that emphasize inappropriate factors such as sympathy or pity for the victim are prejudicial. *State v. Oliver*, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1983).

In this case, the prosecutor's comments did not improperly emphasize sympathy or pity for the victim's family. Viewed in the context of his entire argument, these comments did not attempt to make sympathy for the victim or his family the focus of the jury's deliberation. The statements did not imply that the jury should consider

accountability to the victim's family or the community in reaching its verdict. *See State v. Brown*, 320 N.C. 179, 196, 358 S.E.2d 1, 13 (1987) (holding argument during guilt phase that the victim's family had only the jury to turn to for justice not so improper as to require intervention *ex mero motu*). Further, the record provides ample evidence to support defendant's first-degree murder conviction notwithstanding these remarks; therefore, these arguments could have had no prejudicial effect on the verdict. In the absence of a showing of prejudice, improper jury arguments do not require reversal. *See State v. Boyd*, 311 N.C. at 418, 319 S.E.2d at 197. This assignment of error is overruled.

[4] Defendant next contends that the trial court did not declare and explain the law arising on the evidence as required by N.C.G.S. § 15A-1232. Defendant argues that the trial court's instructions on felony murder failed to inform the jury that it must find all the elements of the underlying felony, discharging a firearm into occupied property, beyond a reasonable doubt. The trial court instructed the jury as follows:

> As to felony murder, I charge that for you to find the defendant guilty of first degree murder under the first degree felony murder rule, the State must prove four elements beyond a reasonable doubt. First, that the defendant discharged a firearm into occupied property. As a definition of discharging a firearm into occupied property, the willful or wanton and intentional discharge of a firearm into a vehicle which is occupied when the defendant knew that the vehicle was occupied by one or more persons is discharging a firearm into occupied property.
>
> The second element, that while discharging a firearm into occupied property, the defendant killed the victim with a deadly weapon.
>
> The third element, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.
>
> And fourth, that the discharging a firearm into the occupied property was committed by the use of a deadly weapon, firearm.

The final mandate to the jury was as follows:

> So, as to first degree murder under the first degree felony murder rule, if you find from the evidence beyond a reasonable

> doubt that on or about the alleged date the defendant willfully or wantonly and intentionally discharged the firearm into an occupied vehicle, and that while discharging a firearm into the occupied property or vehicle the defendant killed the victim, and that the defendant's act was the proximate cause of the victim's death, and the defendant committed the discharging a firearm into the occupied property, that is, with a deadly weapon, a firearm, your duty would be to return a verdict of guilty of first degree murder under the felony murder rule. However, if you do not so find or if you have a reasonable doubt as to one or more of these things or these elements, then you will not return a verdict of guilty of first degree murder, and you would find the defendant not guilty as to that.

Defendant argues that this instruction was plain error. Defendant's contention is that while the instruction correctly defined the underlying felony, the instruction did not inform the jury that this definition contained separate elements that must be found beyond a reasonable doubt in order for the jury to find defendant guilty of felony murder. We disagree.

The extent to which the law needs to be explained in the jury charge depends on the facts and evidence presented in the case. In *State v. Hunter*, 290 N.C. 556, 227 S.E.2d 535 (1976), *cert. denied*, 429 U.S. 1093, 51 L. Ed. 2d 539 (1977), this Court addressed a similar contention. In *Hunter*, the defendant was convicted of first-degree felony murder based on the underlying felony of attempted armed robbery. This Court held that the trial court's failure to set forth the essential elements of the underlying felony in its instructions as to what the State must prove to convict the defendant of being an accessory before the fact to felony murder was not prejudicial error when (i) the occurrence of the underlying felony was not disputed, (ii) the defendant failed to specifically request instructions on the underlying felony, (iii) the court did define the underlying felony, and (iv) the terms used to define the underlying felony were essentially self-explanatory. *Id.* at 579-80, 227 S.E.2d at 549-50.

In this case, defendant also failed to object to the instructions given at trial or to request elaboration; therefore, plain error analysis applies. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). As in *Hunter*, the occurrence of the underlying felony was not disputed in the instant case; defendant disputed only the identity of the perpetrator, and there is no evidence that anything other than the discharge of

the firearm into the vehicle caused the victim's death. Further, the trial court fully defined the underlying felony of discharging a firearm into occupied property. The trial judge defined discharging a firearm into occupied property as "the willful or wanton and intentional discharge of a firearm into a vehicle which is occupied when the defendant knew that the vehicle was occupied by one or more persons." The terms used in this definition were essentially self-explanatory. Following *State v. Hunter*, 290 N.C. 556, 227 S.E.2d 535, we hold that the trial court did not err in instructing on the burden of proof or the essential elements of discharging a firearm into occupied property as the underlying felony for felony murder. Hence, the instruction cannot be plain error.

[5] Additionally, defendant alleges that the trial court committed plain error by instructing the jury in the disjunctive about premeditated and deliberate murder and felony murder and by informing the jury that it could convict defendant under either or both theories. Defendant contends the jury could have interpreted the instructions to allow a conviction on a theory of first-degree murder not found by all the jurors beyond a reasonable doubt, in violation of his right to a unanimous jury guaranteed by Article I, Section 24 of the North Carolina Constitution and in violation of his rights to a fair trial and due process guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Defendant contends that these disjunctive instructions were fatally ambiguous as it is impossible to determine whether the jury unanimously found that defendant actually committed either premeditated and deliberate murder or felony murder or if different jurors convicted on the basis of different theories. In light of the actual instructions given to the jury, the verdict sheet returned by the jury, and the jury poll, we are not persuaded that the jury was misled by the instructions.

The actual instructions given by the trial court made it clear to the jury that it had to be unanimous on both the verdict and the basis for that verdict. After informing the jury that it could "find the defendant guilty of first degree murder on either or both of two theories[,] [t]hat is, on the basis of malice, premeditation and deliberation, or under the felony—first-degree felony murder rule," the trial court charged the jury on first-degree murder by premeditation and deliberation and then instructed on the elements of felony murder. The court then charged as follows:

> So, members of the jury, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally killed the victim with a deadly weapon, and that this proximately caused the victim's death, and that the defendant intended to kill the victim, and that he acted with malice after premeditation and with deliberation, your duty would be to return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation. However, if you do not so find or if you have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation. Whether or not you find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, you will also consider whether he is guilty of first degree murder under the first degree felony murder rule.

The court then gave the final mandate on felony murder and finally instructed the jurors, "You and each of you, that is, all 12 of you, must unanimously agree upon any verdict which you return."

Further, the verdict sheet actually returned by the jury and the jury poll conducted after the verdict was returned indicate that the jurors did not construe the disjunctive instructions to allow the jury to convict defendant of first-degree murder on a basis that was not unanimously found beyond a reasonable doubt. The verdict sheet clearly indicates that the jury found defendant guilty of both premeditated and deliberate murder and felony murder. When polled, each juror reiterated that he or she found defendant guilty of first-degree murder based on both theories.

In *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), we stated:

> This Court has taken the position that: "Premeditation and deliberation is a theory by which one may be convicted of first degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes." *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 561 (1989) (citations omitted).

Id. at 221, 433 S.E.2d at 150-51. Hence, this case is distinguishable from *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), relied upon by defendant. In *Diaz* the Court held that a disjunctive instruction resulted in an ambiguous verdict since the Court could not determine

whether the jury unanimously convicted the defendant of a particular crime where each activity instructed on constituted a separate, discrete offense under the trafficking statute. *See also State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991) (discussing cases holding that a disjunctive instruction resulted in an ambiguous verdict and cases holding that the disjunctive instruction was not error since the acts in the instruction were merely different means of committing the same crime). Defendant's contentions are without merit, and this assignment of error is overruled.

[6] Finally, defendant contends that the trial court erred in admitting into evidence over defendant's objection photographs depicting the victim's body in the backseat of a wrecked automobile. Defendant argues that the photographs did nothing to illustrate the testimony of any witnesses or issues germane to the crime of first-degree murder based on a shooting and were aimed solely at inflaming the jury. We disagree.

"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). In a homicide case, photographs depicting the location and condition of the body at the time it was found are competent despite their portrayal of gruesome events which a witness testifies they accurately portray. *State v. Harris*, 323 N.C. 112, 127, 371 S.E.2d 689, 698 (1988). Whether photographic evidence is more probative than prejudicial lies within the sound discretion of the trial court, and the trial court's ruling should not be overturned unless it 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 526-27.

In the instant case, the challenged photographs were used for illustrative purposes by several witnesses. The challenged photographs were used by Deputy McPhatter, who observed the body where it was located in the backseat of Mrs. Addison's wrecked Oldsmobile, to illustrate his testimony about the location and condition of the body when first observed by law enforcement officers. The photographs also illustrated the testimony of Jeffrey Rowdy and Gregory Dixon that they put the victim in the backseat of Mrs.

Addison's Oldsmobile after the shooting and that he was in the backseat as they proceeded to the hospital.

Nothing suggested that the photographs were used to incense the jurors or incite their prejudices and passions against defendant. The fact that these photographs depicted the intervening car wreck was irrelevant since the evidence at trial showed that the victim's body sustained no further injuries as a result of this accident. The State made no attempt to draw undue attention to these photographs, which were not used in the closing arguments or viewed by the jury once deliberations had begun. In light of the foregoing principles, we cannot say that in the instant case the trial court's decision to admit the photographs was manifestly unsupported by reason, and we conclude that the trial court did not err in admitting the photographs.

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

NO ERROR.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

GARY EMERY HAZELWOOD v. JIMMY DALE BAILEY and WILLIAM CALVIN BAILEY

No. 544PA93

(Filed 10 February 1995)

1. Process and Service § 17 (NCI4th)— summons—wrong county designated—correctable

The designation of the incorrect county in a personal injury action arising from an automobile accident rendered a summons voidable rather than void where the summons gave defendants notice of the commencement of an action in the Superior Court of the General Court of Justice, alerted defendants that an answer to plaintiff's complaint must be filed in the superior court within thirty days of its service, the complaint correctly noted that the action was pending in Rockingham County even though the summons incorrectly instructed defendants to appear in Guilford County, the allegations of the complaint indicated that plaintiff and both defendants were residents of Rockingham County and

that the automobile accident occurred in Rockingham County, and defendants were not in fact confused as to the county in which to appear, as evidenced by the filing of their answer and offer of judgment in the appropriate county. The incorrect county designation amounted to an irregularity or error in form which can be corrected by amendment if the requirements of N.C.G.S. § 1A-1, Rule 4(i) are met.

Am Jur 2d, Process § 94 et seq.

2. Process and Service § 21 (NCI4th)— summons—designation of wrong county—motion to amend denied—remanded

A motion to amend a summons which had designated the wrong county was remanded where it was apparent that the court had refused to allow the amendment in the erroneous belief that the designation of the wrong county rendered the summons void rather than voidable. N.C.G.S. § 1A-1, Rule 4(i).

Am Jur 2d, Process §§ 96 et seq.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 112 N.C. App. 543, 436 S.E.2d 417 (1993), affirming an order dismissing plaintiff's complaint for insufficiency of process and insufficiency of service of process entered by McHugh, J., on 14 April 1993 in Superior Court, Rockingham County. Heard in the Supreme Court 15 September 1994.

Gabriel, Berry & Weston, by M. Douglas Berry; and Cranfill, Sumner & Hartzog, L.L.P., by Richard T. Boyette and Edward C. LeCarpentier III, for plaintiff-appellant.

Nichols, Caffrey, Hill & Evans, L.L.P., by Richard L. Pinto and Matthew L. Mason, for defendant-appellees.

FRYE, Justice.

Plaintiff presents two related issues on this appeal: (1) whether the trial court erred in granting defendants' motion to dismiss plaintiff's claim due to the incorrect designation of the county on the civil summons form, and (2) whether the trial court erred in denying plaintiff's motion to amend his summons under Rule 4(i) of the North Car-

olina Rules of Civil Procedure to substitute the correct county on the summons when there was no showing of any material prejudice to defendants. We answer the first question in the affirmative and therefore reverse the Court of Appeals. As to the second question, we conclude that the trial court failed to exercise its discretion in denying plaintiff's motion to amend the summons and therefore remand this case to the Court of Appeals with instructions that it further remand to the trial court for an exercise of the trial court's discretion on this question in accordance with this opinion.

The procedural history of this case is as follows: Plaintiff commenced this action by filing a complaint in Superior Court, Rockingham County, on 2 July 1992, seeking damages for personal injuries received in an automobile accident on 5 July 1989. Plaintiff's complaint correctly designated Rockingham County as the county in which the action was filed. However, the civil summons form, issued by a deputy clerk of Superior Court, Rockingham County, directed defendants to answer the complaint in Guilford County. On 7 July 1992, defendants were served with both the summons and the complaint. In order to facilitate settlement discussions, plaintiff granted defendants an extension of time to file an answer to the complaint.

On 25 November 1992, defendants filed an answer in Superior Court, Rockingham County. In their answer, defendants asserted a motion to dismiss the complaint for insufficiency of process and insufficiency of service of process pursuant to Rule 12(b)(4) and (5). On 8 December 1992, following a pretrial conference, the trial judge signed an order which indicated that there were no pending motions or other matters which would require a delay in calendaring the case and established a discovery completion date and trial date for the matter. On 16 December 1992, defendants filed an offer of judgment in Superior Court, Rockingham County.

On 10 February 1993, plaintiff filed a motion to amend the summons to correctly designate Rockingham County as the county where the action was pending, pursuant to Rule 4(i) of the Rules of Civil Procedure. A motions hearing was held before Judge Peter M. McHugh at the 22 February 1993 Civil Session of Superior Court, Rockingham County. In an order entered 14 April 1993, Judge McHugh, concluding that the civil summons was void because of the designation of the incorrect county, allowed defendants' motion to dismiss the complaint and denied plaintiff's motion to amend the summons. Plaintiff appealed to the Court of Appeals, which affirmed the trial court in an

unpublished opinion filed 2 November 1993. *Hazelwood v. Bailey*, 112 N.C. App. 543, 436 S.E.2d 417 (1993). This Court allowed plaintiff's petition for discretionary review on 3 March 1994.

[1] Plaintiff first contends that the trial court erred in granting defendants' motion to dismiss pursuant to Rules 12(b)(4) and (5) of the North Carolina Rules of Civil Procedure. Plaintiff argues that the designation of the incorrect county on the civil summons form is not a jurisdictional defect but rather an irregularity or error in form correctable by amending the summons in accordance with Rule 4(i). We agree.

"The purpose of a service of summons is to give notice to the party against whom a proceeding is commenced to appear at a certain place and time and to answer a complaint against him." *Harris v. Maready*, 311 N.C. 536, 541, 319 S.E.2d 912, 916 (1984). Rule 4 of the North Carolina Rules of Civil Procedure, which governs process and the service of process, is intended to provide notice of the commencement of an action and " 'to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit.' " *Id.* at 541-42, 319 S.E.2d at 916 (quoting *Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 84, 243 S.E.2d 756, 758 (1978)).

In regard to defects in a summons, this Court has stated:

> Where there is a defect in the process itself, the process is generally held to be either voidable or void. Where the process is voidable, the defect generally may be remedied by an amendment because the process is sufficient to give jurisdiction. Where the process is void, however, it generally cannot be amended because it confers no jurisdiction. 62 Am. Jur. 2d *Process* § 21 (1972).

Maready, 311 N.C. at 542, 319 S.E.2d at 916.

Rule 4(b) provides, in pertinent part, that a summons "shall contain the title of the cause and the name of the court and county wherein the action has been commenced." N.C.G.S. § 1A-1, Rule 4(b) (1990). The summons in this case contains the title of the cause and the name of the court wherein the action was commenced. The only defect in the summons is the designation of the incorrect county. Therefore, the critical question in this case is whether the designation of the incorrect county in the summons renders it void or voidable.

The trial court and Court of Appeals relied on previous Court of Appeals' decisions and language from decisions of this Court in con-

cluding that the summons in this case was void and that plaintiff's action must be dismissed. In *Brantley v. Sawyer*, 5 N.C. App. 557, 169 S.E.2d 55 (1969), the Court of Appeals held that the copy of the summons served on the defendant directing him to appear and answer in a county other than the one where the action was instituted was a fatal variance, incapable of conferring jurisdiction over defendant. The court in *Brantley* also reversed the trial court's grant of the plaintiff's motion to amend the summons to designate the correct county, stating that "[a]mendments may not be made to confer jurisdiction." *Id.* at 564, 169 S.E.2d at 59. The *Brantley* decision was followed by the Court of Appeals in *Grace v. Johnson*, 21 N.C. App. 432, 204 S.E.2d 723 (1974) (holding that the trial court erred in denying defendant's motion to quash a summons which commanded the defendant to appear and answer in a county other than the one in which the action was pending, even though plaintiff discovered the error and notified defendant only eight days after defendant was served), and in *Everhart v. Sowers*, 63 N.C. App. 747, 306 S.E.2d 472 (1983) (holding that summonses which incorrectly designated the county where the action was pending were fatally defective and did not confer jurisdiction of the court over defendants).

The *Brantley* court relied on language from this Court's decisions in *Harrell v. Welstead*, 206 N.C. 817, 175 S.E. 283 (1934), and *Washington County v. Blount*, 224 N.C. 438, 31 S.E.2d 374 (1944). In *Harrell v. Welstead*, the plaintiff instituted her action in Currituck County, but the summons served on the corporate defendant directed it to appear before the clerk of court in Pasquotank County. The corporate defendant's answer was received in Currituck County a day late, and a judgment by default and inquiry was entered. This Court set aside the default judgment, stating that "[a] default judgment rendered against a defendant in an action where he has never been served with process returnable to the proper county, nor appeared in person or by attorney, is not simply voidable, but void, and will be set aside on motion." *Harrell*, 206 N.C. at 819, 175 S.E. at 285.

In *Washington County v. Blount*, this Court affirmed the trial court's order which denied defendants' motion to set aside a tax foreclosure sale on the ground that the summons was defective and allowed the plaintiff to amend the summons by inserting the date of issue and having the clerk of court sign the summons. In distinguishing that case from its earlier decision in *Harrell*, the Court noted that while the omissions of the date and signature of the clerk were "harm-

less irregularities" which did not "mislead or prejudice" the defendants "nor affect the jurisdiction of the court," in *Harrell*, "there was a fatal variance between the place where defendant was commanded to appear and file its answer and the place where the suit was actually pending." *Washington County*, 224 N.C. at 440-41, 31 S.E.2d at 376.

Citing the cases discussed above, defendants contend that the doctrine of *stare decisis* requires this Court to hold that the summons in this case is void rather than voidable. However, in recent decisions, we have emphasized that while this Court attaches great importance to *stare decisis*, it will not be applied "when it results in perpetuation of error or grievous wrong, since the compulsion of the doctrine is, in reality, moral and intellectual, rather than arbitrary and inflexible." *Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 85, 243 S.E.2d 756, 758 (citations omitted). Our recent decisions interpreting the Rules of Civil Procedure have focused on substance rather than form. *Lemons v. Old Hickory Council*, 322 N.C. 271, 275, 367 S.E.2d 655, 657 (" 'The aim [of the Rules] is to achieve simplicity, speed and financial economy in litigation. Liberality is the canon of construction.' ") (quoting James E. Sizemore, *General Scope and Philosophy of the New Rules*, 5 Wake Forest Intra. L. Rev. 1, 6 (1968)), *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988).

In determining whether the summons in the present case is void or voidable, we find this Court's decisions in *Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 243 S.E.2d 756, and *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912, instructive. In *Wiles*, the corporate defendant moved for summary judgment on the grounds that it had not been subjected to valid *in personam* jurisdiction because the summons was directed to the corporate agent individually rather than to the defendant corporation. The trial court denied defendant's motion, but the Court of Appeals reversed.

In reviewing the summons in *Wiles*, this Court noted that "in all likelihood it would indeed be defective when judged by the standard previously exercised in determining questions of this sort." *Wiles*, 295 N.C. at 83-84, 243 S.E.2d at 757. However, after examining the rationale of Rule 4, we reversed the Court of Appeals, holding

> that the better rule in cases such as this is that when the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity

being sued, the summons, when properly served upon an officer, director or agent specified in N.C.R. Civ. P. 4(j)(6), is adequate to bring the corporate defendant within the trial court's jurisdiction.

Id. at 85, 243 S.E.2d at 758. We explained our departure from the standard applied in previous cases, stating:

> "A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else." *United States v. A. H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947).

Id. at 84-85, 243 S.E.2d at 758.

The *Wiles* decision was later relied on in this Court's decision in *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912. In *Maready*, the trial court allowed an individual defendant's motion to dismiss on grounds of insufficiency of process and insufficiency of service of process because the defendant was served with process addressed to another defendant in the action. In holding that the requirements for service of process prescribed in Rule 4 had been met and that the court had obtained jurisdiction over the defendant, this Court relied on *Wiles*, stating:

> This Court held in *Wiles* that any ambiguity in the directory paragraph of the summons was eliminated by the complaint and the caption of the summons and that "the possibility of any substantial misunderstanding concerning the identity of the party being sued in this situation is simply unrealistic." [*Wiles*, 295 N.C.] at 85, 243 S.E.2d at 758. Similarly, we are persuaded that there was no substantial possibility of confusion in this case about the identity of Maready as a party being sued. Maready was personally served with a summons, the caption of which listed his name first among the defendants being sued. In fact, his name appeared twice in the caption as he was named both individually and as a part of the law firm. Any person served in this manner would make further inquiry personally or through counsel if he had any doubt that he was being sued and would be required to answer the complaint when it was filed. Such further inquiry would have revealed the existence of a summons directed to him

and purporting on its face to have been served upon him and would have established his duty to appear and answer.

Maready, 311 N.C. at 544, 319 S.E.2d at 917.

In light of the purposes of Rule 4(b) and the rationale of this Court's decisions in *Wiles* and *Maready*, we are convinced that the designation of the incorrect county in the summons in this case did not render the summons void. The summons in this case gave defendants notice of the commencement of an action against them in the Superior Court of the General Court of Justice of this state. It also alerted defendants that an answer to plaintiff's complaint must be filed in the superior court within thirty days of its service upon them. While the summons incorrectly instructed defendants to appear in Guilford County, the complaint correctly noted that the action against them was pending in Rockingham County. In addition, the allegations of the complaint indicated that plaintiff and both defendants were residents of Rockingham County and that the automobile accident which was the subject of the lawsuit occurred in Rockingham County. Any person served in this manner would make further inquiry personally or through counsel if he had any doubt as to the proper county in which he was required to appear. Such inquiry would reveal the appropriate county in which the defendant was to appear and answer the complaint. Accordingly, there was no substantial possibility of confusion about the county in which defendants were expected to appear. Furthermore, defendants in this case were not in fact confused as to the county in which to appear, as evidenced by the filing of their answer and offer of judgment in the appropriate county—Rockingham County.

Accordingly, we hold that the designation of the incorrect county in the summons rendered the summons voidable rather than void. The incorrect county designation amounted to an irregularity or error in form which can be corrected by amendment if the requirements of Rule 4(i) are met. Therefore, the decision of the Court of Appeals, which affirmed the trial court's dismissal of plaintiff's action, must be reversed.

We note that our decision today is not in conflict with the results reached by this Court in *Harrell v. Welstead* and *Washington County v. Blount*. In *Harrell*, it was the default judgment, not the summons, that was "set aside on motion" because defendant had "never been served with process returnable to the proper county, nor appeared in person or by attorney." *Harrell*, 206 N.C. at 819, 175 S.E. at 285. In

Washington County, this Court affirmed the trial court's order which denied defendants' motion to set aside a tax foreclosure sale on the ground that the summons was defective and allowed the plaintiff to amend the summons by inserting the date of issue and having the clerk of court sign the summons. *Washington County*, 224 N.C. 438, 31 S.E.2d 374. Thus, we believe that this Court today would reach the same results as those reached by this Court in *Harrell* in 1934 and *Washington County* in 1944. Nevertheless, to the extent language from this Court's decisions in *Harrell v. Welstead* and *Washington County v. Blount* is inconsistent with our holding today, this language is expressly disavowed. In addition, to the extent they are inconsistent with this holding, the Court of Appeals' decisions in *Brantley v. Sawyer*, 5 N.C. App. 557, 169 S.E.2d 55; *Grace v. Johnson*, 21 N.C. App. 432, 204 S.E.2d 723; and *Everhart v. Sowers*, 63 N.C. App. 747, 306 S.E.2d 472, are expressly overruled.

We further note that our holding today is consistent not only with the result reached by this Court in *Wiles* and *Maready*, but also with the rationale of several recent decisions of the Court of Appeals. *See, e.g., Storey v. Hailey*, 114 N.C. App. 173, 441 S.E.2d 602 (1994) (noting that, in an action against an estate, the fact that the summons was directed to the defendant individually rather than in his capacity as executor of the estate was not a fatal defect); *Smith v. Schraffenberger*, 90 N.C. App. 589, 369 S.E.2d 90 (holding that a summons directed to the Commissioner of Motor Vehicles, as process agent for a nonresident motorist pursuant to N.C.G.S. § 1-105, was not fatally defective since the defendant's name was listed just below that of the Commissioner and appeared in the caption of the case and the complaint), *disc. rev. denied*, 323 N.C. 366, 373 S.E.2d 549 (1988); *Humphrey v. Sinnott*, 84 N.C. App. 263, 352 S.E.2d 443 (1987) (addressing in the same manner the issue addressed in *Schraffenberger* above); *Shelton v. Fairley*, 72 N.C. App. 1, 323 S.E.2d 410 (1984) (while upholding the trial court's dismissal of an action based on defective service of process, the court recognized that *Harris v. Maready* suggests a movement away from strict compliance with Rule 4(b) in cases involving defects in the form of the summons), *disc. rev. denied*, 313 N.C. 509, 329 S.E.2d 394 (1985).

[2] Plaintiff next contends that the trial court erred in denying his motion to amend the summons to substitute the correct county. Plaintiff argues that, pursuant to Rule 4(i) of the Rules of Civil Procedure, he should have been allowed to amend the summons since there has been no showing of any material prejudice to defendants.

Rule 4(i) provides:

> (i) *Summons—Amendment.*—At any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued.

N.C.G.S. § 1A-1, Rule 4(i) (1990).

It is apparent that the trial court in this case refused to allow amendment of the summons under the belief that the designation of the incorrect county rendered the summons void, rather than in an exercise of its discretion under Rule 4(i) of the North Carolina Rules of Civil Procedure. Therefore, we must remand this case for an exercise of the trial court's discretion on this question. *See Harris v. Maready*, 311 N.C. at 549, 319 S.E.2d at 920.

Accordingly, we hold that the trial court erred in concluding that the incorrect designation of the county on the civil summons form rendered the summons void and in granting defendants' motion to dismiss plaintiff's complaint. Therefore, the decision of the Court of Appeals, which affirmed the trial court's dismissal, is reversed. In addition, because the trial court failed to exercise its discretion in denying plaintiff's motion to amend the summons, we remand this case to the Court of Appeals with instructions that it further remand to the trial court for an exercise of the trial court's discretion on this question in accordance with this opinion. For the foregoing reasons, the decision of the Court of Appeals is

REVERSED AND REMANDED.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

RJR TECHNICAL COMPANY, AKA R.J.R. TECHNICAL COMPANY, A CORPORATION, PLAINTIFF, STATE OF NORTH CAROLINA, EX REL, WILLIAM W. COBEY, JR., SECRETARY OF THE DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, INTERVENOR-PLAINTIFF v. TERRY PRATT AND EUGENE LEE, DEFENDANTS

WILLIAM CULLEN CAPEHART, PLAINTIFF, STATE OF NORTH CAROLINA, EX REL, WILLIAM W. COBEY, JR., SECRETARY OF THE DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, INTERVENOR-PLAINTIFF v. RJR TECHNICAL COMPANY, AKA, R.J.R. TECHNICAL COMPANY, A CORPORATION, DEFENDANT

No. 104PA94

(Filed 10 February 1995)

Waters and Watercourses § 68 (NCI4th)— submerged land beneath navigable waters of Albemarle Sound—exclusive fishing rights—not conveyed

RJR did not own the exclusive fishing rights to two adjacent tracts of submerged land lying beneath the navigable waters of the Albemarle Sound where the lands were described in two grants from the State in 1892. The words "exclusive" and "several" are absent from the statute under which the grant was made, that statute contains no language whatsoever which expressly authorizes the conveyance of exclusive fishing rights, and the North Carolina Supreme Court has repeatedly held that exclusive or "several" fisheries could not be obtained in the navigable waters of the State. Although the Court of Appeals relied on *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, in holding that RJR held the exclusive right to fish these waters, that case dealt with erecting wharves; there is a legally substantive difference between an exclusive right of entry for the purpose of erecting wharves and an exclusive right of entry for the purpose of fishing.

Am Jur 2d, Waters §§ 378 et seq.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 113 N.C. App. 511, 439 S.E.2d 176 (1994), reversing in part and affirming in part a judgment entered by Duke, J., on 21 July 1992 in Superior Court, Bertie County. Heard in the Supreme Court on 11 January 1995.

Mary E. Ward and Pritchett, Cooke & Burche, by W.L. Cooke, for plaintiff-appellee.

Michael F. Easley, Attorney General, by Daniel F. McLawhorn and J. Allen Jernigan, Special Deputy Attorneys General, and Amy R. Gillespie and David W. Berry, Associate Attorneys General, for intervenor-plaintiff-appellant.

MITCHELL, Chief Justice.

This case involves conflicting claims between plaintiff, RJR Technical Company ("RJR"), and the State of North Carolina to two adjacent tracts of submerged land lying beneath the navigable waters of the Albemarle Sound. The parties agree that the lands in dispute are described in two grants from the State—the "Black Walnut Farm" water grant and the "Avoca Farm" water grant—to William R. Capehart issued on 12 December 1892, and that RJR has the record chain of title thereto. The property was granted "together with all Woods, Waters, Mines, Minerals, Hereditaments, and appurtenances to the said land belonging or appertaining: To Hold, to the said Wm. R. Capehart heirs and assigns, forever." The State's claim to the submerged lands in question is based on the "public trust doctrine."

The trial court held that RJR is the owner in fee simple of the submerged lands and that the grants from the State convey exclusive fishing rights. The Court of Appeals reversed the judgment of the trial court "to the extent [it] holds that RJR owns a fee simple interest in the submerged lands described in the grants." However, the Court of Appeals affirmed the judgment as to RJR's exclusive fishing rights. The questions presented on this appeal are: (1) whether Chapter 532 of the 1891 Session Laws, amending Section 2751 of the Code of North Carolina (1883) [hereinafter "the statute"], authorized the conveyance by the State of exclusive or "several" fishing rights in the navigable waters of the Albemarle Sound; (2) whether any exclusive fishing rights conveyed to RJR substantially impair the public trust; and (3) whether the grants at issue in this case violate Article I, Section 32 of the North Carolina Constitution prohibiting exclusive emoluments.

The State contends that the Court of Appeals erred when it held that Chapter 532 of the 1891 Session Laws authorized the conveyance of exclusive or "several" fishing rights in the navigable waters of the Albemarle Sound. Both parties agree that the properties in question are held in trust for the benefit of the public. In *State ex rel. Rohrer*

v. Credle, 322 N.C. 522, 369 S.E.2d 825 (1988), this Court determined that it has consistently been the law of this jurisdiction that lands and waters held by the sovereign in trust for the public cannot be conveyed by the State so as to deprive the public of its rights therein, except for legislatively authorized public purposes furthering the trust. *Id.* at 525-27, 369 S.E.2d at 827-28.

The statute provides:

> All vacant and unappropriated lands, belonging to the state, shall be subject to entry by any citizen thereof, in the manner hereinafter provided, except:
>
> (1) Lands covered by navigable waters: *Provided*, that persons owning lands on any navigable water for the purpose of erecting wharves or fish-houses or for fishing [in] said waters in front of their lands, may make entries of the land covered by said water, and obtain title as in other cases, but persons making such entries shall be confined to straight lines, including only the fronts of their own lands, and shall in no case extend a greater distance from the shore than one-fifth of the width of the stream, and shall in no respect obstruct or impair navigation . . . .

The Code of North Carolina § 2751(1), para. 1 (1883), *as amended by* 1891 N.C. Sess. Laws ch. 532, § 1. The statute was in effect on 7 June 1892 when William Capehart made the entries for the grants now asserted by RJR.[1]

The Court of Appeals concluded that by authorizing persons owning land on navigable waters to make entries of the lands covered by those waters "for fishing said waters," the General Assembly intended to authorize the grant of an exclusive appurtenant easement for fishing. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correl v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). Unless clear and specific words state otherwise, terms are to be construed so as to cause no interference with the public's dominant trust rights, for the presumption is that the sovereign did not intend to alienate such rights. *Atlantic and N.C. Railroad Co. v. Way*, 172 N.C. 774, 776-78, 90 S.E. 937, 938-40 (1916). We find it significant that the words "exclu-

1. In 1893, Chapter 532 was repealed by Chapter 4 of the Session Laws of 1893. Chapter 4 specifically provided, however, that it was to be in force "from and after its ratification" date of 2 January 1893.

sive" and "several" are absent from the statute. The statute contains no language whatsoever which expressly authorizes the conveyance of exclusive fishing rights.

This Court has repeatedly held that exclusive or "several" fisheries could not be obtained in the navigable waters of the State:

> A several fishery in the ocean or in a navigable stream is not, and never has been, the subject of private ownership in this State, because land covered by a navigable water course has always been expressly excluded from entry, and a grant of it by one individual to another would therefore exhibit on its face its own nullity.

Gilliam v. Bird, 30 N.C. 280, 284 (1848).

In *Bell v. Smith*, 171 N.C. 116, 87 S.E. 987 (1916), plaintiff argued that she held the exclusive right to a seine fishery adjacent to her beach in Bogue Sound by either grant of the bed or her habit of fishing the same area for many years. Chief Justice Walter Clark wrote: "The right to fish in navigable waters is open to all, and the proprietorship of the adjacent beach gives no exclusive right of fishing in the navigable waters in front thereof . . . ." *Id.* at 117, 87 S.E. at 988. Rejecting her claim of exclusive fishing rights by grant and prescription, the Court concluded:

> The right of fishing in the navigable waters of the State belongs to the people in common, to be exercised by them with due regard to the rights of each other, and cannot be reduced to exclusive or individual control either by grant or by long user by any one at a given point. Such right must be exercised, in the absence of express regulations by the State, with due regard to the rights of all under the general custom of fishing in the sound.

Id. at 118, 87 S.E. at 989.

The prohibition against granting exclusive fishing rights has not been modified in the years which followed. *See Capune v. Robbins*, 273 N.C. 581, 160 S.E.2d 881 (1968). In *Credle*, this Court recently reaffirmed that "no exclusive right to fish in navigable streams exists." 322 N.C. at 534, 369 S.E.2d at 832.

The Court of Appeals' decision does not comport with prior decisions of this Court to the effect that North Carolina law does not provide for private acquisition of exclusive or "several" fisheries in the State's navigable waters. Even though the Court of Appeals acknowledged this Court's prior holdings, it nonetheless concluded that RJR held the exclusive right to fish the waters in question. In so doing, the Court of Appeals relied on *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 44 S.E. 39 (1903).

In *Shepard's Point Land Co.*, this Court considered the nature of a grant issued by the State under the Session Laws of 1854-1855, Chapter 21, Section 2751. This statute provided that any person owning land on any navigable waters could make entries of the lands covered by such waters for the purpose of erecting wharves. The land in dispute was located beneath the navigable waters of Bogue Sound and adjacent to Morehead City. The plaintiffs argued that the grant conveyed the submerged land in fee simple. We concluded that "the grant . . . operated to give [plaintiffs] an exclusive right or easement therein as riparian owners and proprietors to erect wharves." *Id.* at 541, 44 S.E. at 47.

Shepard's Point Land Co. is distinguishable from and does not control the present case. There is a legally substantive difference between an exclusive right of entry for the purpose of erecting wharves and an exclusive right of entry for the purpose of fishing. In *Hampton v. Pulp Co.*, 223 N.C. 535, 541, 27 S.E.2d 538, 542 (1943), we concluded that "a riparian proprietor[] owns no part of the bed of the stream [the Roanoke River], and therefore has not a several and exclusive fishery, as that term is known to the law." *See also Capune v. Robbins*, 273 N.C. at 589, 160 S.E.2d at 886 (ocean pier owner does not control the right of fishing or navigation under or adjacent to the pier as a littoral right). Title to public trust waters is "held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, *and have liberty of fishing therein*, freed from the obstruction or interference of private parties." *Shepard's Point Land Co.*, 132 N.C. at 526, 44 S.E. at 42 (emphasis added). A wharf is adjacent to the shore and projects only to a sufficient depth to permit watercraft to moor to it. The intrusion upon public trust property is minimal, and the public still has the liberty of fishing the waters under and along such wharf. In contrast, an exclusive or "several" fishery completely impairs the rights of the public in those waters. Therefore, we conclude that the Court of Appeals erred

by finding that the statute at issue here conveyed exclusive fishing rights by the mere words "for fishing said waters."

For the reasons stated herein, the decision of the Court of Appeals is reversed to the extent it holds that RJR owns an exclusive or several fishery. Because we answer the first question in the negative, we find it unnecessary to address the remaining questions.

Reversed in part.

KENNETH J. FOREMAN, JR., AND WIFE, MARY FRANCES O. FOREMAN, TRUSTEES UNDER DECLARATION OF TRUST DATED AUGUST 6, 1981 v. S.H. SHOLL, M.D., EDWARD HENRY SHOLL, ELEANOR B. DEEX, GEORGE A. McELVEEN, JR., B.G. NORTH, B.G. WORTH, MRS. BERNARD GERMANN, B.O. TOWNSEND, MRS. IKE C. LOWE, MRS. PAUL MOONEY, W.T. DENMAN, III, MARGARET G. DENMAN, JANIE C. WILLIAMSON, EL DORA WILLIAMSON, OEHLESE WILLIAMSON, JAMES WILLIAMSON, JAMES L. WILLIAMSON, JR., JOHN GATLING, MRS. W.J. JOHNSON, MRS. ETHEL HIGHSMITH, MRS. ANNIE BROOKS, GARNETT T. BROOKS, MRS. A.H. McCORMICK, JAMES A. McCORMICK, DOROTHY HARLAN McMILLAN, EUGENE MAXTON HARLAN, WILLIAM WADE HARLAN, JOHN BURKE HARLAN, VIRGINIA AUTEN DIXON, F.I. STONE, ANNE STONE BARNETTE, T.R. SAMPSON, ISABEL H. SAMPSON, J.M. DAVIS, LEO W. HEARTT, JOSEPH BROWN, TICER BROWN, RICHARD B. BRIGGS, MRS. ELLA R. SAMPSON, JAMES A. BLUE, MRS. BONNIE BLUE COVELL, E.B. McNEIL, J.L. McNEILL TRUST, J.J. McNEILL, JR., GEO. S. CROMARTIN, ARTHU[R] S. HARRIS, ANN TURNER CROMARTIE, R.H. COHN, MARY N. HOWERTON, J.R. HOWERTON, PHILIP T. HOWERTON, M.D., J.A. McLAUGHLIN, WAYNE M. CLEGHERN, DONALD W. WILSON, CHAS. A. DIXON, C.H. MORROW (OR MARROW), R.B. SLAVIN, J. DAVID WINGER, MRS. ROSA H. GREER, MRS. EVA M. HUMPHREYS, J.F. ROBERTSON, BILLY SHAW HOWELL, JR., MRS. E.G. HUTCHINSON, DR. CHARLES E. WALKER, CLARA H. CARSWELL HEIRS, J.H. HOWELL, E.Y. WEBB, R.G. VAUGHN, CYNTHIA VAUGHN PRICE, JOHN TRIMBLE, MATTIE C. SPENCER, MRS. LYNWOOD G. CRAIG, C.C. SPRINKLE, REV. J.C. SIMS, H.J. WATRONS, JIM WATRONS, J.E. GROVES, F.J. GOWDEY (OR GOWDY), HODGES C. GOWDEY, SLOCUM G. KENDALL (OR FRANCES SLOCUM GOWDEY), G.D. CLIFFORD, MARY E. LAZENBY, THOS. H. SOMERVILLE, JAMES DENWIDDIE (OR DENEVIDDIE ESTATE,) MISS LINDA (OR SUIDA) H. CHANEY, A.S. DE VLANING, MRS. THOMAS C. JOHNSON, R.E. CABELL, T.L. TRAWICK, C. B. MAHAN, ELIZABETH CHAFFIN, MISS FANNIE R. WILLIAMS, WM. C. BUCHANAN, ADAIR H. SANDERS, KATHLEEN ADAIR BROWN, MONTREAT CONCRETE AND BUILDING COMPANY, INC., C.H. ROBINSON & COMPANY, MONTREAT-ANDERSON COLLEGE, INC., AND MOUNTAIN RETREAT ASSOCIATION, INC.: TO EACH OF THE ABOVE, IF LIVING; IF DECEASED, TO THEIR HEIRS, DEVISEES, SUCCESSORS, TRANSFEREES, LEGAL REPRESENTATIVES OR ASSIGNS; AND TO THE SPOUSE OF EACH, IF ANY; AND TO THE BENEFICIARIES OR TRUSTEES OF EACH, IF ANY; AND TO ALL OTHER PERSONS, FIRMS, CORPORATIONS, ESTATES OR TRUSTS WHO NOW HAVE OR CLAIM, OR MAY

HEREAFTER CLAIM, ANY RIGHT, TITLE OR INTEREST OR ESTATE IN AND TO THE PROPERTY DESCRIBED HEREIN, WHETHER SANE OR INSANE, ADULT OR MINOR, IN ESSE OR NOT IN ESSE OR EN VENTRE SA MERE, RESIDENT OR NONRESIDENT OF THE STATE OF NORTH CAROLINA, LIVE CORPORATION OR DISSOLVED CORPORATION

No. 86A94

(Filed 10 February 1995)

1. Appeal and Error § 203 (NCI4th)— denial of motion to supplement complaint—absence of notice of appeal

The trial court's denial of plaintiffs' motion to supplement their complaint so as to satisfy the seven-year requirement for color of title was not before the appellate courts where plaintiffs failed to properly give notice of their intent to appeal the denial of their motion.

Am Jur 2d, Appeal and Error §§ 290 et seq.

2. Appeal and Error § 451 (NCI4th)— dispositive issue decided by Court of Appeals—absence of dissent—appeal dismissed

Plaintiffs' appeal in an action to quiet title based upon adverse possession under color of title is dismissed where the Court of Appeals held that the seven-year period under N.C.G.S. § 1-38 had not run at the time this action was instituted; there was no dissent as to this issue in the Court of Appeals; and this issue is dispositive of plaintiffs' appeal.

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

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

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 113 N.C. App. 282, 439 S.E.2d 169 (1994), affirming an order granting defendants' motion for summary judgment entered by Lewis, J., on 28 May 1992, in Superior Court, Buncombe County. Discretionary review of an additional issue allowed by the Supreme Court 16 June 1994. Heard in the Supreme Court 10 January 1995.

Kelly & Rowe, P.A., by E. Glenn Kelly, for plaintiff-appellants.

McGuire, Wood & Bissette, P.A., by Grant B. Osborne, for defendant-appellees.

Todd, Hefferon and Hefferon, by Thomas J. Hefferon, on behalf of George W. McCormick, amicus curiae.

PER CURIAM.

On 25 May 1990, plaintiffs filed suit in Superior Court, Buncombe County, seeking to quiet title to fifty-nine tracts of land based upon their adverse possession of the land under color of title for more than seven years, pursuant to N.C.G.S. § 1-38 (1983). The trial court granted defendants' motion for summary judgment concluding, *inter alia*, that "in accordance with [section] 1-38," and "in view of the description in the deed upon which plaintiffs rely, there is no genuine issue of a material fact with respect to 'color of title.' " The trial court also denied plaintiffs' motion to supplement their complaint to allege that they had continued to hold adverse possession of the land since the institution of this action, thus satisfying the seven-year requirement for color of title.

The Court of Appeals affirmed the trial court's grant of summary judgment for defendants, concluding: 1) that the deed upon which plaintiffs relied for color of title did not contain an adequate description of the land; 2) that the seven-year statutory period under N.C.G.S. § 1-38 had not run at the time this action was instituted; and 3) that the appellate court was without jurisdiction to review the trial court's denial of plaintiffs' motion to supplement their complaint because plaintiffs failed to properly give notice of their intent to appeal on this ground. Judge Orr [now Justice Orr] dissented from the Court of Appeals' decision on two grounds: 1) that summary judgment for defendants was inappropriate because of the conflicting evidence presented by plaintiffs and defendants regarding the adequacy of the deed's description; and 2) that the trial court should have allowed plaintiffs' motion to supplement their complaint so as to satisfy the seven-year requirement for color of title.

Based on Judge Orr's dissent, plaintiffs appealed to this Court as a matter of right. On 16 June 1994, this Court granted plaintiffs' petition for discretionary review as to the second issue decided by the Court of Appeals: whether the seven-year statutory period under N.C.G.S. § 1-38 had run at the time this action was instituted. After

reviewing the record, briefs and oral arguments, we now conclude that plaintiffs' petition for discretionary review was improvidently allowed.

[1] With reference to their appeal based on the dissent in the Court of Appeals, plaintiffs contend that the trial court should have allowed their motion to supplement their complaint so as to satisfy the seven-year requirement for color of title. As noted by a majority of the Court of Appeals' panel, this question was not properly before that court, since plaintiffs failed to properly give notice of their intent to appeal the denial of their motion. Accordingly, this issue is also not properly before this Court. *See Falls Sales Co. v. Board of Transp.*, 292 N.C. 437, 443, 233 S.E.2d 569, 573 (1977).

[2] Plaintiffs also contend that the trial court erred in granting summary judgment for defendants because a genuine issue of material fact existed regarding the adequacy of the description in plaintiffs' deed. However, regardless of the adequacy of the description in plaintiffs' deed, summary judgment for defendants would still be proper if the seven-year statutory period had not run at the time this action was instituted. As noted earlier, the Court of Appeals held that the seven-year statutory period under N.C.G.S. § 1-38 had not run at the time this action was instituted. There was no dissent as to this issue, and this issue is dispositive of plaintiffs' appeal. Therefore, plaintiffs' appeal is dismissed.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED; APPEAL DISMISSED.

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

IN RE: INQUIRY CONCERNING A JUDGE, NO. 182, JERRY W. LEONARD, RESPONDENT

No. 454A94

(Filed 10 February 1995)

Judges, Justices, and Magistrates § 36 (NCI4th)— censure of district court judge—behavior resulting from alcohol use

A former district court judge is censured for conduct prejudicial to the administration of justice that brings the judicial office

into disrepute based upon the following conduct; (1) his behavior while publicly intoxicated in Key West, Florida which resulted in his arrest and a negotiated plea of *nolo contendere* to the criminal offense of trespass after warning; (2) his behavior while publicly intoxicated in Raleigh, North Carolina which resulted in his conviction of the criminal offense of indecent exposure; and (3) his continuing refusal, even after admitting psychological dependency, to abstain from the consumption of alcohol, the use of which caused the aforementioned incidents and conduct.

Am Jur 2d, Judges § 19.

Power of court to remove or suspend judge. 53 ALR3d 882.

This matter is before the Court upon a recommendation by the Judicial Standards Commission (Commission), filed with the Court 20 September 1994, that Judge Jerry W. Leonard, formerly a Judge of the General Court of Justice, District Court Division, Tenth Judicial District of the State of North Carolina, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Canons 1 and 2A of the North Carolina Code of Judicial Conduct.

William N. Farrell, Jr., Senior Deputy Attorney General, Special Counsel for the Judicial Standards Commission.

Merriman, Nicholls & Crampton, P.A., by Nicholas J. Dombalis, II, for respondent.

ORDER OF CENSURE.

The conduct upon which the Commission based its recommendation that the respondent be censured included: (1) the respondent's behavior while publicly intoxicated in Key West, Florida on 28 December 1992 which resulted in his arrest and in a negotiated plea of *nolo contendere* to the criminal offense of trespass after warning; (2) the respondent's behavior while publicly intoxicated in Raleigh, North Carolina in November of 1993 which resulted in his conviction of the criminal offense of indecent exposure; and (3) the respondent's continuing refusal, even after admitting psychological dependency, to abstain from the consumption of alcohol, the use of which caused the aforementioned incidents and conduct.

In his answer, the respondent "admitted that the conduct above constitutes conduct not in conformity with the Code of Judicial Con-

duct." Also, the respondent acknowledges that, "such conduct was a product of the voluntary consumption of intoxicating alcohol, a willful act." During the formal hearing before the Commission, the respondent offered evidence in the form of numerous affidavits in support of his capabilities as a jurist.

After reviewing the record in this case and the recommendation of the Commission, this Court concludes that the respondent's conduct constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of N.C.G.S. § 7A-376. The Court approves the recommendation of the Commission that the respondent be censured.

Now, therefore, it is, pursuant to N.C.G.S. §§ 7A-376, 377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, ordered that Judge Jerry W. Leonard be, and he is hereby, censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Done by the Court in Conference this the 9th day of February 1995.

Orr, J
For the Court

BENNY BENTON, PLAINTIFF v. HUGH CLIFTON THOMERSON, JR., DEFENDANT AND THIRD-PARTY PLAINTIFF v. CLAUDE E. McCLAIN, THIRD-PARTY DEFENDANT

No. 78A94

(Filed 10 February 1995)

Pleadings § 63 (NCI4th)— third-party complaint—reversal of sanctions against attorney

The Court of Appeals decision affirming the trial court's award of Rule 11 sanctions against defendant's attorney on the grounds that a claim for contribution alleged in a third-party complaint was not well-grounded in law or fact and was filed for

an improper purpose is reversed for the reasons stated in the dissenting opinion in the Court of Appeals.

Am Jur 2d, Pleading § 339.

Comment Note.—General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 95 ALR Fed. 107.

Appeal by defendant and third-party plaintiff Hugh Clifton Thomerson, Jr., pursuant to N.C.G.S. § 7A-30(2), from the decision of a divided panel of the Court of Appeals, 113 N.C. App. 293, 438 S.E.2d 434 (1994), reversing in part an order entered 22 April 1992 by Brewer, J., in the Superior Court, Cumberland County. Heard in the Supreme Court 13 January 1995.

Hedrick, Eatman, Gardner & Kincheloe, by Jack A. Gardner, III and Kimberly M. Quade, for defendant and third-party plaintiff.

Rose, Ray, Winfrey, O'Connor & Leslie, P.A., by Ronald E. Winfrey and Pamela S. Leslie, for third-party defendant.

PER CURIAM.

This action arises out of an automobile accident that occurred when a vehicle driven by Hugh Clifton Thomerson, Jr. collided with a vehicle driven by Claude E. McClain. Benny Benton, a passenger in Thomerson's vehicle, was injured as a result of the accident. On 6 April 1990, Benton filed an action against Thomerson alleging Thomerson was negligent in operating his vehicle. Prior to this action coming on for trial, Thomerson filed a third-party complaint against Claude E. McClain alleging that if Thomerson were liable, which Thomerson denied, then he was entitled to contribution from McClain because McClain was also negligent. McClain counterclaimed against Thomerson for the property damage to his vehicle.

Following a trial, the jury returned a verdict in favor of Benton for $15,000.00 and also in favor of third-party defendant McClain for $1,000. In addition, the trial court awarded attorney's fees against third-party plaintiff Thomerson pursuant to N.C.G.S. § 6-21.1 based on a finding of an unwarranted refusal to settle by Thomerson's insurance company, and ordered Thomerson to pay McClain attorney's fees in the amount of $8,810.00. Thomerson filed a motion for

relief from judgment pursuant to N.C.R. Civ. P. 60 alleging in part that his insurance company had in fact settled with McClain for property damage. Following a hearing on Thomerson's motion, the trial court reduced the amount of attorney's fees to $1,000.00.

In addition, McClain moved for Rule 11 sanctions against Thomerson's counsel, Philip R. Hedrick, on the bases that the claim for contribution alleged in the third-party complaint was not well-grounded in law or fact and was filed for an improper purpose. The trial court awarded sanctions against Hedrick in the amount of $8,810.00. Thomerson appealed the trial court's decision to the Court of Appeals assigning as error the trial court's award of sanctions and attorney's fees.

The Court of Appeals unanimously reversed the trial court's award of attorney's fees on the ground that Thomerson's insurance company did settle the property damages with McClain and that the trial court's finding of an unwarranted refusal to settle by the insurance company was an abuse of discretion. A majority of the Court of Appeals affirmed the Rule 11 sanctions against Hedrick based on its finding that Thomerson filed the third-party complaint for an improper purpose. Judge Martin dissented from the part of the decision affirming sanctions.

Based on Judge Martin's dissent, third-party defendant Thomerson appealed to this Court the issue of Rule 11 sanctions against his attorney Philip Hedrick. The only question before us is, therefore, whether the Court of Appeals properly affirmed the trial court's award of Rule 11 sanctions against Hedrick. For the reasons stated in the dissenting opinion for the Court of Appeals, we conclude that the decision of the Court of Appeals should be reversed on that issue.

REVERSED.

HURLEY v. MILLER

[339 N.C. 601 (1995)]

ROBERT L. HURLEY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BARBARA POOLE HURLEY, DECEASED v. KEVIN WAYNE MILLER, AND HARVEY LEE SMITH, JR., AND WIFE, KELLY BOGER SMITH, D/B/A HLS TRUCKING, AND HLS TRUCKING, INC.

No. 136A94

(Filed 10 February 1995)

Automobiles and Other Vehicles § 577 (NCI4th)— last clear chance—insufficient evidence

The decision of the Court of Appeals remanding for a new trial on the ground that the trial court erred by failing to submit an issue of last clear chance to the jury is reversed for the reasons stated in the dissenting opinion in the Court of Appeals.

Am Jur 2d, Automobiles and Highway Traffic §§ 438-441.

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

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 113 N.C. App. 658, 440 S.E.2d 286 (1994), affirming in part and reversing in part the judgment of Davis (James C.), J., at the 8 June 1992 session of Superior Court, Cabarrus County and remanding for a new trial on the issue of last clear chance. Submitted on 9 January 1995 without oral argument, by motion of the parties, pursuant to Rule 30(d) of the North Carolina Rules of Appellate Procedure.

Wallace and Whitley, by Michael Doran, for plaintiff-appellee.

Wishart, Norris, Henninger & Pittman, PA, by Kenneth R. Raynor, for defendant-appellants.

PER CURIAM.

For the reasons stated in the dissenting opinion of Judge Cozort, the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for further remand to the Superior Court, Cabarrus County for reinstatement of the trial court's judgment.

REVERSED AND REMANDED.

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

MARTIN MARIETTA CORP. v. WAKE STONE CORP.

[339 N.C. 602 (1995)]

MARTIN MARIETTA CORPORATION, MARTIN MARIETTA AGGREGATES, and JOHN F. LONG, JR. v. WAKE STONE CORPORATION, and THOMAS B. OXHOLM

No. 390A93

(Filed 10 February 1995)

Unfair Competition or Trade Practices § 39 (NCI4th)— false statements—intent to injure plaintiffs' business—unfair practices

The Court of Appeals correctly reversed the trial court's grant of defendants' motion for summary judgment on plaintiffs' unfair or deceptive practices claim where the record contains a forecast of evidence from which a jury could find that defendants knowingly, or in reckless disregard of the truth, made and distributed statements which were both false and designed to injure or destroy plaintiffs' business in Nash County, thereby eliminating competition in that area, since such statements are "unfair" within the meaning and intent of N.C.G.S. § 75-1.1 and unlawful under the prohibitions contained in N.C.G.S. § 75-5(3).

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

Practices forbidden by state deceptive trade practice and consumer protection acts. 89 ALR3d 449.

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

Appeal by defendants pursuant to N.C.G.S. § 7A-30(1) (substantial constitutional question) from a decision of the Court of Appeals, 111 N.C. App. 269, 432 S.E.2d 428 (1993), affirming in part and reversing in part a summary judgment in favor of defendants entered on 26 September 1991 by Stanback, J., in Superior Court, Wake County. Heard in the Supreme Court 12 January 1995.

Petree Stockton, L.L.P., by Ralph M. Stockton, Jr., Jeffrey C. Howard, and Rodrick J. Enns, for plaintiff-appellees.

McMillan, Kimzey & Smith, by James M. Kimzey and Katherine E. Jean, for defendant-appellants.

Martha A. Geer for the American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

PER CURIAM.

Having reviewed the record, briefs and oral arguments of the parties, the Court concludes that the record contains a forecast of evidence from which a jury could find that defendants knowingly, or in reckless disregard of the truth, made and distributed statements which were both false and designed to injure or destroy plaintiffs' business in Nash County, thereby eliminating competition in that area. Such statements do not enjoy constitutional protection. *McDonald v. Smith*, 472 U.S. 479, 86 L. Ed. 2d 384 (1985). They are "unfair" within the meaning and intent of N.C.G.S. § 75-1.1 and unlawful under the prohibitions contained in N.C.G.S. § 75-5(3). Accordingly, the Court of Appeals was correct in reversing the trial court's grant of defendants' motion for summary judgment on plaintiffs' unfair or deceptive trade practice claim. The decision of the Court of Appeals is therefore

AFFIRMED.

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

VALLEREE L. OWENS v. W.K. DEAL PRINTING, INC.

No. 65A94

(Filed 10 February 1995)

Workers' Compensation § 62 (NCI4th)— Woodson claim—summary judgment for employer improper

The decision of the Court of Appeals that the trial court properly entered summary judgment for defendant employer on plaintiff's *Woodson* claim is reversed for the reasons stated in the dissenting opinion except to the extent that it may be read as implying that actions authorized under *Woodson v. Rowland*, 329 N.C. 330 (1991) seek recovery for "intentional torts" in the true sense of that term. Plaintiffs in *Woodson* actions need only establish that the employer intentionally engaged in misconduct and that the employer knew that such misconduct was "substantially certain" to cause serious injury or death and, thus, the conduct was "so egregious as to be tantamount to an intentional tort."

Am Jur 2d, Workers' Compensation §§ 75-87.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 113 N.C. App. 324, 438 S.E.2d 440 (1994), affirming an order granting defendant's motion for summary judgment entered by Caviness, J., on 19 May 1992, in Superior Court, Gaston County. Heard in the Supreme Court 9 January 1995.

Frederick R. Stann and Wallace and Whitley, by Michael Doran, for the plaintiff-appellant.

Alala Mullen Holland & Cooper P.A., by H. Randolph Sumner and Jesse V. Bone, Jr., for the defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion of Judge Wynn in this case, *Owens v. W.K. Deal Printing, Inc.*, 113 N.C. App. 324, 328-32, 438 S.E.2d 440, 443-45 (1994), the decision of the Court of Appeals is reversed. To the extent that it may be read as implying that actions authorized under *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), seek recovery for "intentional torts" in the true sense of that term, we do not accept the reasoning of Judge Wynn's dissent. We reemphasize that plaintiffs in *Woodson* actions need only establish that the employer intentionally engaged in misconduct and that the employer knew that such misconduct was "substantially certain" to cause serious injury or death and, thus, the conduct was "so egregious as to be tantamount to an intentional tort." *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239, 424 S.E.2d 391, 395 (1993).

REVERSED.

KING v. SOUTHERN RAILWAY CO.

[339 N.C. 605 (1995)]

ALEXANDER KING, JR., AND WIFE, DEBRA ANN KING v. SOUTHERN RAILWAY COMPANY, A/K/A NORFOLK SOUTHERN CORPORATION, A/K/A NORFOLK SOUTHERN COMPANY

No. 135A94

(Filed 10 February 1995)

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) and Rule 14 of the North Carolina Rules of Appellate Procedure from the decision of a divided panel of the Court of Appeals, 113 N.C. App. 424, 440 S.E.2d 127 (1994), affirming the judgment entered by Ross, J., on 23 January 1992 in Superior Court, Guilford County, granting defendant's motion for summary judgment. On 5 May 1994, this Court allowed discretionary review of additional issues. Heard in the Supreme Court 12 January 1995.

Gabriel Berry & Weston, by J. Stewart Clontz, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by L.P. McLendon, Jr., and John W. Ormand III, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE v. BROWN

[339 N.C. 606 (1995)]

STATE OF NORTH CAROLINA v. LEON BROWN

No. 528A93

(Filed 10 Febrary 1995)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 112 N.C. App. 390, 436 S.E.2d 163 (1993), finding no error in defendant's trial resulting in a verdict of guilty of first-degree rape and a judgment of life imprisonment entered by Johnson (E. Lynn), J., on 10 June 1992 in Superior Court, Bladen County. Heard in the Supreme Court 14 September 1994.

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

Thomas K. Maher for defendant-appellant.

Tharrington, Smith & Hargrove, by Roger W. Smith, for North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

AFFIRMED.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

EDWARDS v. HARDIN

[339 N.C. 607 (1995)]

KEITH MARCELLETTE EDWARDS v. PAUL HARDIN, IN HIS PERSONAL AND OFFICIAL CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL (UNC-CH), BEN TUCHI, IN HIS PERSONAL AND OFFICIAL CAPACITY AS VICE CHANCELLOR OF THE UNC-CH, CHARLES ANTLE, IN HIS PERSONAL AND OFFICIAL CAPACITY AS ASSOCIATE VICE CHANCELLOR OF THE UNC-CH, DAN BURLESON, IN HIS PERSONAL AND OFFICIAL CAPACITY AS DIRECTOR OF EMPLOYEE RELATIONS, ROBERT SHERMAN, IN HIS PERSONAL AND OFFICIAL CAPACITY AS DIRECTOR OF PUBLIC SAFETY AT UNC-CH, CHARLES MAUER, IN HIS PERSONAL AND OFFICIAL CAPACITY AS CHIEF OF POLICE AT THE UNC-CH, AND JOHN DEVITTO, IN HIS PERSONAL AND OFFICIAL CAPACITY AS DIRECTOR OF PUBLIC SAFETY AT THE UNC-CH

No. 113PA94

(Filed 10 February 1995)

On discretionary review pursuant to N.C.G.S. § 7A-31 of an opinion of the Court of Appeals, 113 N.C. App. 613, 439 S.E.2d 805 (1994), granting defendants a new trial after judgment had been entered for plaintiff on 15 July 1992 in Superior Court, Orange County. Heard in the Supreme Court 13 January 1995.

Alan McSurely for plaintiff-appellant.

Michael F. Easley, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, and David M. Parker, Of Counsel to the Attorney General, for defendants-appellees.

PER CURIAM.

Discretionary Review Improvidently Allowed.

LIB WANDA WILLIAMS v. DONALD LEON WILLIAMS

No. 33A94

(Filed 10 February 1995)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 113 N.C. App. 226, 437 S.E.2d 884 (1994), affirming an order entered by Albright, J., on 2 July 1993, in Superior Court, Guilford County. Heard in the Supreme Court 13 January 1995.

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

No brief filed for defendant-appellee.

Johnston, Taylor, Allison & Hord, by Paul A. Kohut and Bret P. Holmes, for SSR, Inc., d/b/a Charlotte Honda, Yamaha, Kawasaki, amicus curiae.

PER CURIAM

AFFIRMED.

ALLEN v. FOOD LION, INC.

No. 616P94

Case below: 117 N.C.App. 289

Motion by both parties to withdraw petition for discretionary review allowed 9 February 1995.

BALDRIDGE v. EMERY AIR FREIGHT

No. 554P94

Case below: 116 N.C.App. 490

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995. Motion by plaintiff to convert petition for discretionary review to petition for writ of certiorari dismissed 9 February 1995.

BOOMER v. CARAWAY

No. 596PA94

Case below: 116 N.C.App. 723

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 9 February 1995.

BROMHAL v. STOTT

No. 520A94

Case below: 116 N.C.App. 250

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 9 February 1995.

BROOKWOOD UNIT OWNERSHIP ASSN. v. DELON

No. 51P95

Case below: 9315DC870 3 January 1995

Petition by defendant for temporary stay allowed 27 January 1995.

BROWN v. NATIONWIDE MUTUAL INS. CO.

No. 11P95

Case below: 117 N.C.App. 305

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

CAROLINA SURGICAL CENTER v. PRINCE HALL GRAND LODGE

No. 307P94

Case below: 114 N.C.App. 818

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995. Motion by defendants to dismiss petition for discretionary review denied 9 February 1995.

CAUDILL v. SMITH

No. 613P94

Case below: 117 N.C.App. 64

Petition by defendant for discretionary review pursuant to G.S.7A-31 denied 9 February 1995.

DAVIS v. SELLERS

No. 330P94

Case below: 115 N.C.App. 1

Petition by defendants for discretionary review pursuant to G.S.7A-31 denied 9 February 1995.

DUNES SOUTH HOMEOWNERS ASSN. v. FIRST FLIGHT BUILDERS

No. 3A95

Case below: 941SC116 20 December 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 allowed 9 February 1995.

EARLY v. BOWEN

No. 478P94

Case below: 116 N.C.App. 206

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

EDWARD VALVES, INC. v. WAKE COUNTY

No. 34P95

Case below: 9410SC290 3 January 1995

Petition by defendants for temporary stay allowed 9 February 1995.

EURY v. NATIONWIDE MUTUAL INS. CO.

No. 535PA94

Case below: 116 N.C.App. 490

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 9 February 1995.

FAIN v. STATE RESIDENCE COMMITTEE OF UNC

No. 71P95

Case below: 9310SC911 3 January 1995

Petition by defendant for temporary stay allowed 10 February 1995.

FRANKLIN v. WINN DIXIE RALEIGH, INC.

No. 610A94

Case below: 117 N.C.App. 28

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 9 February 1995. Motion by defendant to dismiss appeal denied 9 February 1995.

GUNTER v. ANDERS

No. 359P94

Case below: 114 N.C.App. 61

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

HARPER v. ALLSTATE INS. CO.

No. 614PA94

Case below: 117 N.C.App. 302

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 9 February 1995.

HARTMAN v. ODELL AND ASSOC., INC.

No. 1P95

Case below: 9422SC83 20 December 1994

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

IN RE APPEAL OF HOTEL L'EUROPE

No. 599P94

Case below: 116 N.C.App. 651

Petition by petitioner (Hotel L'Europe) for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

IN RE ESTATE OF WORSLEY

No. 14P95

Case below: 117 N.C.App. 305

Petition by respondent (Anne Birkhead Worsley) for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

IN RE LAMM

No. 539A94

Case below: 116 N.C.App. 382

Petition by respondent (Anne M. Lamm) 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 9 February 1995. Motion by North Carolina State Bar to dismiss appeal denied 9 February 1995.

IN RE MAYNARD

No. 564P94

Case below: 116 N.C.App. 616

Petition by petitioner (Iredell County Dept. of Social Services) for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

JONES v. KILLENS

No. 496P94

Case below: 115 N.C.App. 567

338 N.C. 311

Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 9 February 1995. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

JORDAN v. FOUST OIL COMPANY

No. 552P94

Case below: 116 N.C.App. 155

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

LAVENDER v. STATE FARM MUT. AUTO. INS. CO.

No. 606P94

Case below: 117 N.C.App. 135

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

LINER v. BROWN

No. 611PA94

Case below: 117 N.C.App. 44

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 9 February 1995. Petition by defendants for a writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 9 February 1995.

NAILING v. UNC-CH

No. 12P95

Case below: 9315SC1299 20 December 94

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

NATIONWIDE MUTUAL INS. CO. v. MABE

No. 312PA94

Case below: 115 N.C.App. 193

Petition by third-party defendant (NC Farm Bureau) for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed 9 February 1995.

NICHOLSON v. KILLENS

No. 497P94

Case below: 115 N.C.App. 552

338 N.C. 312

Petition by Attorney General for writ of supersedeas denied and stay dissolved 9 February 1995. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

PATTERSON v. AT & T TECHNOLOGIES

No. 595P94

Case below: 116 N.C.App. 737

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

PITTMAN v. BARKER

No. 65P95

Case below: 9312SC1278 17 January 95

Petition by defendant for temporary stay allowed 3 February 1995.

PURVIS v. BRYSON'S JEWELERS

No. 493P94

Case below: 115 N.C.App. 146

338 N.C. 520

Petition by plaintiff for reconsideration of petition for writ of certiorari dismissed 9 February 1995.

RICHARDSON v. GRUBER

No. 588P94

Case below: 117 N.C.App. 139

Petition by plaintiff (Pro Se) for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed 9 February 1995.

ROBINETTE v. BARRIGER

No. 527A94

Case below: 116 N.C.App. 197

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 9 February 1995.

ROUSE v. PITT COUNTY MEMORIAL HOSPITAL

No. 505PA94

Case below: 116 N.C.App. 241

Petition by defendant (Jarlath MacKenna) for discretionary review pursuant to G.S. 7A-31 allowed 9 February 1995. Petition by defendant (Lynn G. Borchert) for discretionary review pursuant to G.S. 7A-31 allowed 9 February 1995.

STANFIELD v. TILGHMAN

No. 16PA95

Case below: 117 N.C.App. 292

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 9 February 1995.

STATE v. ANTOINE

No. 32P95

Case below: 934SC1320 3 January 1995

Petition by Attorney General for temporary stay allowed 20 January 1995.

STATE v. BARNES

No. 543P94

Case below: 112 N.C.App. 853

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 February 1995.

STATE v. BROWN

No. 597A94

Case below: 9314SC1087 20 December 94

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 February 1995. Motion by defendant to dismiss appeal allowed 9 February 1995.

STATE v. CHAMBERS

No. 21P95

Case below: 9318SC747 20 December 94

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

STATE v. CLARK

No. 609P94

Case below: 117 N.C.App. 140

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 February 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

STATE v. CLINTON

No. 594P94

Case below: 116 N.C.App. 737

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 February 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

STATE v. DILLARD

No. 617P94

Case below: 117 N.C.App. 306

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

STATE v. FARRIOR

No. 2P95

Case below: 944SC21 20 December 1994

Petition by plaintiff for temporary stay allowed 10 January 1995.

STATE v. FIGURED

No. 464P94

Case below: 116 N.C.App. 1

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

STATE v. HATCHER

No. 608P94

Case below: 117 N.C.App. 78

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 February 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

STATE v. HOLLAND

No. 17P95

Case below: 117 N.C.App. 306

Notice of appeal by defendant (substantial constitutional question) dismissed 9 February 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

STATE v. JACOBS

No. 612P94

Case below: 117 N.C.App. 140

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 February 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

STATE v. JOHNSON

No. 578P94

Case below: 116 N.C.App. 736

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 February 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

STATE v. JONES

No. 435A90

Case below: 339 N.C. 114

Motion by defendant for reconsideration of opinion denied 17 January 1995. Motion by defendant for temporary stay of mandate denied 17 January 1995.

STATE v. JONES

No. 395A91-2

Case below: Superior Court Wake Co.

336 N.C. 229

Petition by defendant for writ of supersedeas denied 9 February 1995. Petition by defendant for writ of certiorari to review the order of the Superior Court, Wake County denied 9 February 1995.

STATE v. JOYCE

No. 622P94

Case below: 97 N.C.App. 464

Petition by defendant (Pro Se) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 February 1995.

STATE v. KALEY

No. 38A95

Case below: 948SC142 20 December 1994

Petition by Attorney General for writ of supersedeas denied 9 February 1995 on condition defendant's bond remains in effect.

STATE v. ROBINSON

No. 261A92-2

Case below: 339 N.C. 263

Motion by defendant for stay of execution denied 27 January 1995.

STATE v. ROUSE

No. 120A92

Case below: 339 N.C. 59

Motion by defendant for temporary stay of mandate denied 19 January 1995. Motion by defendant for reconsideration of opinion denied 19 January 1995.

STATE v. SMITH

No. 124A81-2

Case below: Superior Court Halifax Co.

305 N.C. 691

Petition by defendant for temporary stay of superior court order denied 19 January 1995. Petition by defendant for writ of supersedeas denied 19 January 1995. Petition by defendant for writ of certiorari to review the order of Superior Court, Halifax County denied 19 January 1995.

STATE v. STYLES

No. 518P94

Case below: 116 N.C.App 479

338 N.C. 313

Petition by Attorney General for writ of supersedeas denied and stay dissolved 9 February 1995. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

STATE v. WILLIAMS

No. 264A90-3

Case below: 339 N.C. 1

Motion by defendant for stay of execution denied 31 January 1995.

STATE v. WILSON

No. 282A93-2

Case below: 338 N.C. 244

Petition by defendant for writ of certiorari to review the decision of the Supreme Court denied 5 January 1995. Petition by defendant for stay of the Supreme Court decision denied 5 January 1995.

STATE v. YOUNG

No. 15P95

Case below: 117 N.C.App. 306

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

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

TRIPLE E ASSOCIATES v. TOWN OF MATTHEWS

No. 593P94

Case below: 116 N.C.App. 738

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

TRULL v. CENTRAL CAROLINA BANK

No. 19P95

Case below: 117 N.C.App. 220

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 February 1995.

PETITION TO REHEAR

STATE EX REL. UTILITIES COMM. v. N.C. POWER

No. 230A93

Case below: 338 N.C.412

Petition by defendant to rehear pursuant to Rule 31 denied 13 February 1995.

STATE OF NORTH CAROLINA v. DARRYL EUGENE HUNT[1]

No. 17A91

(Filed 30 December 1994

Mandate 2 March 1995)

1. Constitutional Law § 352 (NCI4th)— first-degree murder—retrial—use of defendant's testimony from first trial

The trial court did not err in a noncapital first-degree murder prosecution by allowing the admission of defendant's testimony from the first trial where defendant contended that he was induced to testify at the first trial by the improper use of another witness's prior statements. Defendant's first trial testimony was primarily given to establish an alibi at the time of the murder in contradiction to the evidence presented by the prosecution, which was later held inadmissible upon evidentiary rather than constitutional grounds, and defendant has failed to show that he was compelled to testify due to the admission of any unconstitutionally obtained evidence. As in *State v. Farrell*, 223 N.C. 804, the defendant offered himself as a witness at the former trial for the purpose of having the jury consider his testimony in determining his guilt or innocence and what he said then may be used at any subsequent stage of the prosecution.

Am Jur 2d, Criminal Law §§ 701 et seq., 936 et seq.

Use in subsequent prosecution of self-incriminating testimony given without invoking privilege. 5 ALR2d 1404.

2. Appeal and Error § 147 (NCI4th)— first-degree murder—retrial—use of defendant's prior testimony—mention of prior conviction—failure to object

A first-degree murder defendant being retried waived his right to assign error to his testimony from his first trial regarding a prior conviction where defendant objected to the introduction of the portion of his first trial testimony referring to a misdemeanor conviction for contributing to the delinquency of a minor, the trial court told defense counsel that the "best way to [object] . . . is to object as each question may be asked that you perceive

1. This opinion was originally filed on 30 December 1994. Upon motion by defendant for reconsideration, the mandate was temporarily stayed 19 January 1995 pending further orders of the Court. Defendant's motion for reconsideration was denied 2 March 1995.

is objectionable," and there were no specific objections to the questions concerning the plea, although defense counsel did object to the reading of certain other portions of the transcript.

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

3. Criminal Law § 425 (NCI4th)— first-degree murder—retrial—prosecutor's argument—alibi from first trial—defendant's failure to call witnesses at second trial—no error

The trial court did not err in a first-degree murder retrial by overruling defendant's objections to the prosecutor's arguments that defendant did not call alibi witnesses to prove his alibi from the first trial and did not introduce a photograph which he had testified was taken on the night of the murder. Although a prosecutor may not comment on the failure of a defendant to testify at trial, it is permissible for the prosecutor to point out to the jury that the defendant has produced no exculpatory evidence and has contradicted no evidence presented by the State. In this case, the prosecutor merely argued that the jury could consider the fact that defendant did not call any alibi witnesses or introduce a photograph exculpating himself.

Am Jur 2d, Trial §§ 577 et seq., 590 et seq.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify. 14 ALR3d 723.

4. Criminal Law § 427 (NCI4th)— first-degree murder—retrial—prosecutor's closing argument—defendant's decision not to testify

There was no plain error in a first-degree murder retrial where the court did not intervene *ex mero motu* to stop the prosecutor from commenting on defendant's decision not to testify where defendant himself argued that the State put on defendant's testimony from a prior trial and stated that the defense decided not to have defendant testify further and that defendant's silence was not to influence the trial.

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.

5. Criminal Law § 757 (NCI4th)— first-degree murder—retrial—instructions—reasonable doubt—no error

The trial court did not err during a first-degree murder retrial by not giving the Pattern Jury Instruction on reasonable doubt as requested by defendant. The instructions given by the court adequately reflected the substance of defendant's requested instructions, the reasonable doubt instruction given by the trial judge was not constitutionally deficient, and the trial judge did not err in refusing to give defendant's requested instructions verbatim.

Am Jur 2d, Trial § 1374.

6. Evidence and Witnesses § 982 (NCI4th)— first-degree murder—retrial—prior testimony of witness now taking Fifth—admissible

There was no error in a first-degree murder retrial where a witness who had testified at the first trial had subsequently been indicted and refused to answer questions based upon the Fifth Amendment and the witness's testimony at the first trial was admitted. Although defendant contends that the witness was an alibi witness at the first trial and that defendant did not have a similar motive for questioning the witness during the second trial, there was no reasonable showing that the motive would have been different. That motive was to seek the facts favorable to defendant regarding defendant's whereabouts at the time of the crime and defense counsel had ample opportunity to develop this testimony. N.C.G.S. § 8C-1, Rule 804(b)(1).

Am Jur 2d, Evidence §§ 890 et seq.; Homicide §§ 393, 394.

Witness' refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions. 43 ALR3d 1413.

7. Evidence and Witnesses § 472 (NCI4th)— first-degree murder—in-court identification of defendant—illegal lineup

The trial court did not err in a first-degree murder retrial by admitting identification testimony, notwithstanding alleged defects or irregularities in the lineup procedure, from a hotel auditor who stated during *voir dire* that he had observed defendant on the morning of 10 August (the morning on which the murder occurred) and that they had eye contact at least three times on that morning; that he had seen defendant on at least five or six

prior occasions in the hotel lobby and that he and defendant usually had brief conversations when defendant came into the hotel to use the rest room; the witness never identified anyone other than defendant; and the witness stated numerous times that the lobby was well lit and that nothing was obstructing his view of defendant when he came into the hotel. Considering the totality of the circumstances, the witness's ability to identify defendant as the person he saw in the hotel on the morning of 10 August was not the product of the illegal lineup but originated independently.

Am Jur 2d, Evidence § 628.

Admissibility of evidence of lineup identification as affected by allegedly suggestive lineup procedures. 39 ALR3d 487.

8. Criminal Law § 793 (NCI4th)— first-degree murder—instructions—acting in concert and aiding and abetting—actual presence at scene

There was no plain error in a first-degree murder retrial by failing to instruct the jury that defendant's active or constructive presence at the scene of the crime is an essential element of the theories of acting in concert and aiding and abetting. The instruction on acting in concert given by the trial judge was taken from the Pattern Jury Instructions; moreover, it is well settled that a charge on presence at the scene of the crime is unnecessary in a case in which the evidence shows that the defendant was actually present at the time the crime was committed.

Am Jur 2d, Trial §§ 1255 et seq.

9. Criminal Law §§ 446, 447 (NCI4th)— first-degree murder—prosecutor's argument—impact on victim and family—sending message—no plain error

There was no plain error in a first-degree murder retrial where the trial court did not intervene *ex mero motu* to stop what defendant contends was an overly emotional appeal to the jury during the prosecutor's closing argument. An argument concerning a murder victim's thoughts and the experience of the family of the loss were not grossly improper, it has been held that the prosecutor's remarks that the jury acts as the voice and conscience of the community are permissible, and the prosecutor's closing statements regarding the victim and the pain she experienced

were based upon the medical evidence presented at trial and thus were properly admitted.

Am Jur 2d, Trial §§ 648 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.

10. Evidence and Witnesses § 969 (NCI4th)— first-degree murder—municipal report on investigation—not admissible

The trial court did not err in a first-degree murder retrial by refusing to admit factual findings contained in a report by the city manager of a review of the investigation conducted after the first trial. Although defendant contends that the report was admissible pursuant to N.C.G.S. § 8C-1, Rule 803(8)(c), the report was not the result of "authority granted by law" to conduct an investigation into the murder, there was no assurance that the report contained factual findings that would be admissible, the report was not prepared for the purpose of being introduced against the State in a criminal case, and the prosecution did not have an opportunity to cross-examine the persons interviewed for the report.

Am Jur 2d, Evidence §§ 1363 et seq.

Admissibility, under Rule 803(8)(C) of Federal Rules of Evidence, of "factual findings resulting from investigation made pursuant to authority granted by law." 47 ALR Fed. 321.

11. Criminal Law § 107 (NCI4th)— first-degree murder—retrial—investigation following first trial—SBI report not admitted

The trial court did not err in a first-degree murder retrial by denying defendant's motion for an *in camera* inspection of an SBI investigative file prepared after the first trial. Because the prosecutor provided defense counsel with prior statements made by the prosecution's witnesses after they testified on direct examination, the trial court was not required to conduct its own *in camera* review. Moreover, defendant has failed to establish that any evidence not disclosed from the SBI report was "material" and what effect, if any, the nondisclosure would have had on the outcome of the trial.

Am Jur 2d, Depositions and Discovery § 443.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 ALR3d 181.

12. Evidence and Witnesses § 2973 (NCI4th)— first-degree murder—impeachment of witness—cross-examination concerning prior false testimony—not allowed—no prejudicial error

There was no prejudicial error in a first-degree murder retrial where the court prohibited defendant from impeaching the testimony of a prosecution witness regarding a lawsuit in which he had made false accusations. Assuming that there was error in the exclusion of the evidence, there is no reasonable possibility that the outcome of the trial would have been different if the evidence had been admitted.

Am Jur 2d, Witnesses §§ 563 et seq.

13. Evidence and Witnesses § 2974 (NCI4th)— first-degree murder—prosecution witness—reputation for truthfulness

The trial court did not err in a first-degree murder retrial by excluding testimony by a defense witness about the basis for his opinion about the untruthfulness of his brother, a prosecution witness. N.C.G.S. § 8C-1, Rule 404(a) is not applicable because the witness's responses do not relate to specific instances of conduct; moreover, N.C.G.S. § 8C-1, Rule 608(a) pertains solely to reputation or opinion testimony and this evidence was not in the form of reputation or opinion contemplated by Rule 608(a).

Am Jur 2d, Witnesses §§ 563 et seq.

Construction and application of Rule 608(b) of Federal Rules of Evidence dealing with use of specific instances of conduct to attack or support credibility. 36 ALR Fed. 564.

14. Criminal Law § 1013 (NCI4th)— first-degree murder—motion for appropriate relief—DNA evidence

Motions for appropriate relief in the trial and appellate divisions in a first-degree murder retrial were denied.

Am Jur 2d, New Trial §§ 164 et seq.

Justice FRYE dissenting.

Chief Justice EXUM joins in this dissenting opinion.

Justice WEBB joins in this dissenting opinion.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Ferrell, J., at the 17 September 1990 Criminal Session of Superior Court, Catawba County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 17 February 1993.

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.

On 10 December 1984, defendant was indicted for first-degree murder in the death of Deborah Brotherton Sykes. At defendant's first trial, the jury returned a verdict of guilty of first-degree felony murder, and defendant was sentenced to life imprisonment. On appeal, this Court found error in the guilt phase of defendant's trial, reversed the conviction, and ordered a new trial. *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989) (hereinafter *Hunt I*). On 27 July 1990, the trial judge entered an order changing the venue of the retrial to Catawba County because of extensive media coverage. At his new trial, defendant was retried noncapitally, and the jury returned a verdict of guilty of first-degree felony murder. The trial court subsequently imposed the mandatory sentence of life imprisonment. N.C.G.S. § 14-17 (Supp. 1992).

On appeal, defendant brings forth numerous assignments of error. After a thorough review of the transcript of the proceedings, record on appeal, briefs, and oral arguments, we conclude that defendant received a fair trial free of prejudicial error, and we therefore affirm his conviction and sentence.

Evidence presented at the trial tended to show the following: In 1984, Deborah Sykes was living in Mooresville, North Carolina, with her husband, John Sykes, at the home of his parents. In the summer of 1984, Mrs. Sykes was employed as a copy editor for the *Winston-*

Salem Sentinel. She would routinely leave home around 5:30 a.m. and arrive at work at approximately 6:30 a.m. Normally, Mrs. Sykes parked her car on a side street near the Crystal Towers apartments, approximately two blocks from the newspaper office.

On 10 August 1984, Mrs. Sykes left for work wearing a white sweater, a top under the sweater, and blue slacks. On this particular day, she was carrying two to three hundred dollars in a purse inside her pocketbook. At 7:00 or 7:30 a.m., Mrs. Sykes' supervisor telephoned Mr. Sykes to report that his wife had not arrived at work. Later that morning, when Mr. Sykes learned that Mrs. Sykes still had not arrived, he drove to Winston-Salem to look for her. Upon arriving in Winston-Salem around 10:00 a.m., Mr. Sykes immediately drove to the street where Mrs. Sykes usually parked. He found her car parked on West End Boulevard. Mr. Sykes then walked to the *Sentinel* office, and the police were called.

On 10 August 1984 at approximately 1:00 p.m., Brian Watts, an employee for Adele Knits, was walking through a field behind Crystal Towers. As he walked around the corner of some bushes, Watts observed a pocketbook. Beside the pocketbook, Watts noticed some change on the ground. Near the bushes was a fence made of posts sticking in the ground side by side. Next to the fence were a woman's sweater and a woman's pair of shoes. Watts picked up the pocketbook but found only change inside. After placing the pocketbook back on the ground, Watts walked around a corner of the fence, where he observed the body of a white female lying on a hill. The body was clothed only in "something like a tube top" and in panties that were torn. The woman appeared to be dead. Watts walked back to the street, where he saw two police officers and reported what he had seen. Watts then led the officers to the body.

At approximately 2:00 p.m. on Friday, 10 August 1984, Vickie Pearl, an identification technician with the Winston-Salem Police Department arrived at the crime scene behind Crystal Towers. Pearl observed Mrs. Sykes' body lying on a grassy slope in the field near West End Boulevard. Nearby she saw a pair of navy blue pants, a purse, a white sweater, a pair of multi-colored sandals, and a piece of beige elastic. The zipper on the pants was torn, and one pants leg was turned inside out and had dirt and debris on it. Pearl saw what appeared to be blood on the grass near the victim's body. The victim had on a beige knit short-sleeve top, a brassiere with a broken clasp, and beige underpants. There were bloodstains on her legs and

wounds on the front and back of her torso. Her body was found twenty to thirty feet from West End Boulevard on the side of the fence away from the street.

At approximately 2:15 p.m. on the same day, Dr. Lew Stringer, the medical examiner of Forsyth County, responded to a call on West End Boulevard. Upon arriving at the scene, Dr. Stringer also observed a pair of shoes, a pocketbook, and a sweater next to the fence posts. Just around the corner, he observed the pants with the leg turned inside out. In the area where the pants were located, there appeared to be a lot of bent grass, indicating that there had been a struggle in that location. From the area where the pants were found, down to the location of the body, the grass was bent over and blood was observed, especially near the body. Describing the body, Dr. Stringer stated that the victim was lying partly on her right side. Dr. Stringer saw multiple puncture or stab wounds on the victim, including in the neck, the side, the chest, and the back. The victim's underpants were pulled up to her chest, and the crotch had been either cut or torn away. The victim's blouse was pulled up, and one shoulder of the blouse was pulled down. There was blood on the victim's legs from the thighs to just below the knees. In Dr. Stringer's opinion, the wounds to the chest and neck were caused by a small pocket-size knife. From the nature of the wounds, Dr. Stringer opined that it appeared that at least some of the stab wounds were inflicted while the victim was either standing or kneeling. Dr. Stringer noted that the violent assault probably occurred over a period of time and that the victim probably endured much pain and suffering.

On 11 August 1984, Dr. Michael Shkrum, a pathologist with the North Carolina Medical Examiner's Office, performed an autopsy on the body of Deborah Sykes. The victim was a white female, age twenty-six. She was five-feet ten inches tall and weighed approximately 145 pounds. Mrs. Sykes was clothed in a white sleeveless blouse with five holes in the front, a brassiere with a broken clasp, and a pair of panties that were pulled up to her mid-abdomen area and that had been cut or torn. Dr. Shkrum observed four stab wounds to the chest as well as several wounds to the neck. There were two slash wounds under the victim's left chin, along with several superficial slash wounds. Dr. Shkrum found one rib fractured and a wound to the back of the head and upper back. On the left side of the upper back were three more large wounds and several superficial wounds. There was a slash wound to the left wrist consistent with a defensive wound. In Dr. Shkrum's opinion, the cause of death was a stab wound

to the victim's chest. Describing the fatal wound, Dr. Shkrum noted that the knife entered the sack around the heart. There was also an entry wound to the left side of the heart, and about a quart of blood had flowed into the chest cavity.

Furthermore, in Dr. Shkrum's opinion, the victim had been sexually assaulted. There was fluid found in the vagina and around the anus. Sperm was present in both samples. Based on Dr. Shkrum's examination, the time of death could have been between 6:00 a.m. and 7:00 a.m. on 10 August 1984.

Roger Stamey, a licensed bondsman, testified that around 2:00 a.m. on 10 August 1984, he and Billy Revis were looking for "bond skips" in the area of Ninth and Chestnut Streets in Winston-Salem, about a ten-minute walk from the crime scene. While in front of Service Distributors, Stamey saw the defendant, Sammy Mitchell, Marie Crawford, and a woman named Ann standing across the street. Mitchell walked across the street and talked to Stamey and Revis. After a brief conversation, Mitchell returned to where the others were standing, and the four continued walking up the street in the direction of downtown. At approximately 2:30 a.m., Stamey and Revis got into their car and proceeded towards downtown. They passed defendant, Mitchell, and the two women, who were standing on the corner of Seventh and Liberty Streets, approximately three blocks from the crime scene.

Roger S. Weaver, an auditor at the front desk for the Hyatt House Hotel in Winston-Salem, testified that he was working in the early morning hours of 10 August 1984. Between 4:30 a.m. and 5:00 a.m., Weaver went outside to move his car from the parking deck and observed two black men standing at a corner near the hotel. Weaver recognized one of the men from having seen him previously in the hotel. Weaver then noticed that the two men began walking in the direction of Crystal Towers. After Weaver parked his car, he reentered the hotel and went to the rest room in the lobby. Weaver did not notice anything unusual in the rest room at that time.

At approximately 6:45 or 7:00 a.m. on the same day, Weaver saw a black man enter the hotel. Once inside the hotel, the man made eye contact with Weaver. Weaver recognized the man as the same person who had come into the hotel five or six times during the summer. Weaver stated that the man had come in during the early morning hours and had asked to use the rest room. On these other occasions, Weaver had brief conversations with the man and had given him per-

mission to use the rest room. Weaver identified the man who came into the Hyatt House Hotel on 10 August 1984 as the defendant. On this particular morning, defendant did not ask to use the rest room, but instead headed directly towards the rest room. On his way to the rest room, defendant turned around and again looked directly at Weaver. While defendant was inside the rest room, no one else entered the rest room. Because defendant remained in the rest room longer than usual, Weaver instructed the security guard, Danny Holt, to go into the rest room and check on defendant. Once Holt entered the rest room, defendant left immediately. As defendant was leaving the hotel, Weaver noted that defendant was one of the two men that he had seen earlier that morning when moving his car. Weaver also identified Sammy Mitchell as the second black male.

At approximately 7:10 a.m., Weaver's replacement arrived at the front desk. Before leaving his shift, Weaver went to the rest room. Since defendant had left the hotel, no one else had entered the rest room. Once inside the rest room, Weaver noticed that the water in one of the sink basins was pink, colored by what appeared to be blood. After washing his hands, Weaver observed bloody paper towels in the wastepaper dispenser. Returning to the front desk, Weaver got his jacket and left the hotel.

Debra Davis testified that sometime between 6:30 a.m. and 7:30 a.m. on 10 August 1984, she was driving her car through downtown Winston-Salem with her husband. She was on her way to work when she passed by the Crystal Towers. While driving down Sixth Street, Davis testified that she saw defendant and Sammy Mitchell walking together about sixty feet from her. Davis had met defendant once before and had seen him with Mitchell several times.

Kevey Coleman was working the night shift at a Coca-Cola facility in Winston-Salem in 1984. Coleman testified that on 10 August 1984, he left work at 6:00 a.m. and got a ride home with a co-worker. Coleman was dropped off at Cherry and Sixth Streets and walked towards his home. At about 6:15 a.m., Coleman saw a woman, whom he later identified as Deborah Sykes, and two black men walking across an intersection. When Coleman first saw the three people, they were walking in his direction, but they then turned around and started walking in the other direction. One man, who was heavy-set and had a beard, had his arm around the woman's waist, and the other man, who appeared to have braids in his hair, was a step behind them. Coleman testified that the sight of the three people "just didn't look

right" because the woman's clothes were neat and the two men's clothes were dirty. Coleman was approximately forty feet away from them. When Coleman reached his front porch, he heard a loud scream. He looked in the direction of the scream but did not see anything. He then entered his house. Coleman testified that one of the two men with Sykes looked like defendant, although Coleman testified that he did not have his contact lenses in when he observed this incident.

On 10 August 1984, Bobby Upchurch was working at Herring Decorating with Ralph Nash. They usually walked down West End Boulevard to work around 6:30 a.m. Both men testified that they were traveling this route on 10 August at approximately 6:20 a.m. when they noticed a black male and a white female. The male had his arm around the female's waist. The male and female walked in front of Upchurch and Nash. Upchurch noticed that the woman was trying to pull away from the man. As Upchurch watched, he saw the black male take his leg and trip the white female. The woman fell down flat on her back. The man then put the woman's hands above her head, pinned her arms down, and straddled her. Upchurch and Nash walked on by. Upchurch and Nash testified that they often saw people in that area arguing about liquor, and Nash thought the two people were "winos."

Thomas Murphy lived in Winston-Salem in 1984 and worked for Hanes Dye and Finishing Company. Murphy testified that on 10 August 1984 at approximately 6:20 a.m., he was sitting at the intersection of Fifth Street and West End Boulevard near the Crystal Towers area, when he saw a black man and a white woman. He also saw another black man in the bushes nearby. The first man was holding the woman's right arm with one hand and had his other arm around the woman's neck in such a manner that her head was against his head. The woman was standing still, hands hanging down. Her eyes were closed. Murphy identified defendant as the man holding the woman and identified the man in the bushes as Johnny Gray. From a photograph of the victim, Murphy identified Deborah Sykes as the woman he had seen with defendant. After Murphy saw the three people, he assumed they were drunks and continued to drive to work. After seeing a television news bulletin around 4:00 p.m that same day, Murphy called the police department to report what he had seen.

Edward Reece testified that around 7:00 a.m. on the morning in question, he was driving on West End Boulevard to Herring Decorat-

ing, where he worked as a foreman. While passing near the Crystal Towers, Reece saw Sammy Mitchell coming out of a driveway, walking at a very fast pace. Reece had known Mitchell for approximately fifteen years. As Reece passed by, he called out to Mitchell and asked him what he was doing. Mitchell did not respond. At the time, Mitchell was alone.

Johnny Gray testified that on the morning of 10 August 1984 around 6:30 a.m., he got off the bus in downtown Winston-Salem between Fourth and Fifth Streets. He went to a coffee shop for about five minutes and then walked towards the house of a friend, Mark Brunson, to pick up some laundry. His route to Brunson's house took him near Crystal Towers and along West End Boulevard. As he walked by Crystal Towers, Gray heard a woman scream at least three times. He crossed the street toward the source of the scream. Forty to fifty feet away, on the other side of a post fence, Gray observed a black male on top of a white female. Gray saw the man straddling the woman and pinning her arms down while hitting her in the torso. Gray noticed that the woman had no clothes on from the waist down. Gray could not see whether the man had anything in his hands, but he could tell that the blows were being inflicted to the woman's chest. As Gray watched, the man turned, and Gray was able to see his face. Gray identified the man as the defendant. He noted that the defendant had "braided" hair. Defendant continued to beat the woman. At this point, Gray backed away and started walking down the sidewalk. As he left the scene, Gray heard the woman screaming. Gray looked back and saw the woman on her knees. Gray observed defendant tucking his shirt in his pants and running in the opposite direction. Looking back at the woman, Gray saw her drop her head and just roll over on her back. After the woman fell over, Gray did not hear any more screams.

At exactly 6:53 a.m., Gray stopped at a telephone booth near the Black Velvet Lounge on Thurman Street and telephoned the police. Gray untruthfully told the dispatcher that his name was Sammy Mitchell and that he wanted to report a man beating a woman in a field behind Crystal Towers, close to the fire station. After making the 911 call, Gray continued to Brunson's house, arriving between 7:00 a.m. and 7:30 a.m. Gray told Brunson that he had seen a man beating a woman. On 13 August 1984, three days after the murder, a police officer stopped Gray close to the scene of the crime and asked him his name and whether he had heard anything about the crime. Gray identified himself as Johnny Gray and told the officer that he did not

know anything about the murder; he did not tell the officer that he was the 911 caller.

On 22 August 1984, Gray telephoned the police and identified himself as the 911 caller. Gray told the police that he had seen the assailant that day and described the clothing that the man had on when he saw him. Gray later went down to the police station to identify the assailant. The police asked Gray to look at a person in the station room to see whether he was the assailant. Gray went by the room, looked through the open door, and looked the man in the face. Gray identified the man in the room "a couple of times" as Sykes' assailant. The man Gray identified as the assailant was Terry Thomas, who was later found to have been incarcerated on the morning of 10 August 1984.

A couple of weeks after the murder, Gray viewed a lineup at the Forsyth County jail. Officer J.I. Daulton told Gray that if he saw the assailant in the lineup, he should write the suspect's number on a piece of paper. Gray wrote down two numbers after viewing the lineup: one and four. Defendant wore number four in the lineup. Gray testified that he wrote the numbers "one" and "four" because the "number one suspect was number four."

Margaret Marie Crawford testified that in August of 1984, she was fourteen years old and living in Winston-Salem working as a prostitute. During the summer of 1984, Crawford met defendant. On the evening of 9 August 1984, Crawford, defendant, Sammy Mitchell, and Ann Wilson were standing on the corner of Ninth and Patterson Streets. Later that night, Crawford went back to her room at Motel 6 and went to sleep. She testified that defendant came to her room in the early morning hours of 10 August 1984, but she did not recall the time. When Crawford awoke at 8:00 or 8:30 a.m., she found that defendant was not in the room. A short time later, as she was getting ready to leave, defendant returned to the room. Crawford observed that defendant had dirt and grass stains on the knees of his pants. Defendant began washing what appeared to be blood off of his hands. Defendant seemed "nervous" and stated that he wanted to go see Mitchell. Defendant and Crawford rode in a cab to Mitchell's mother's house. After defendant changed clothes, he and Crawford went to the courthouse to meet Sammy Mitchell, who had to be in court on that day.

Crawford testified that several days later, she and defendant were watching television. While watching a show called "Crimestoppers,"

they heard about a reward for information on the Deborah Sykes murder. Crawford exclaimed that she wished she knew who killed Sykes. In response, defendant stated, "Sammy did it and he f——ed her, too." Defendant told Crawford that he and Mitchell were "just trying to rob her" and "[s]he got killed."

Crawford testified that during defendant's first trial, she denied signing certain statements for the police in 1984 because she was afraid. Crawford admitted that during the first trial, she said that she knew nothing about the murder of Deborah Sykes and that defendant would not have committed a crime like murder. Crawford said that she had always been afraid of Sammy Mitchell and that before the first trial, she received several letters that appeared to be from Mitchell threatening to kill her if she testified.

William C. Hooper testified that he worked for Hanes Dye and Finishing Company in Winston-Salem in 1984. Hooper testified that on 10 August 1984, just before 6:40 a.m., while he was driving down West End Boulevard near Crystal Towers, he observed two black men and a white woman on the sidewalk. He saw the shorter man shake his finger in the woman's face. Hooper then saw the taller man kiss the woman on the lips, and he assumed that they had just been out all night. Hooper later told police officers and the district attorney that defendant was not either of the two men that he had seen.

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

[1] Defendant assigns error to the admission, over his objection, of defendant's testimony from the first trial, read into evidence by the court reporter from the first trial. Defendant argues that *Harrison v. United States*, 392 U.S. 219, 20 L. Ed. 2d 1047 (1968), bars the State's introduction of defendant's first trial testimony because it was the improper use of Marie Crawford's prior statements that induced defendant to testify during the first trial, thus violating his privilege against self-incrimination. We disagree.

In order to analyze this issue, it is necessary to briefly examine this Court's decision in *Hunt I*. In *Hunt I*, the State introduced evidence of prior statements allegedly made by Marie Crawford that tended to incriminate defendant. Crawford first denied that she had made the statements, then stated that she could not recall having given the prosecutor or the police detective a statement. After *voir dire* of Crawford, the trial court ruled that because the witness may

have been hostile or unwilling, it was proper for the State to cross-examine Crawford regarding the alleged statements and that the relevance and probative value of Crawford's testimony would substantially outweigh any danger of unfair prejudice or confusion. Prior to the introduction of the statements into evidence during direct examination of Crawford, the trial court instructed the jurors that they were to consider Crawford's prior unsworn statements for the limited purpose of later determining Officer Daulton's credibility. These statements were reintroduced through the testimony of the police detective, Officer Daulton, to whom they had been made. The trial court allowed the introduction of both statements into evidence during direct examination of Daulton without a limiting instruction. In its final charge to the jury, the trial court instructed the jurors that Crawford's prior statements could be considered by them in determining the credibility of the witness. However, in recapitulating the testimony of Officer Daulton, the court reiterated the substance of both statements.

In *Hunt I*, this Court held that "the trial court erred in permitting Officer Daulton to testify as to the substance of the prior statements denied by [Crawford]." *Hunt I*, 324 N.C. at 348, 378 S.E.2d at 757. We found that it was improper to impeach Crawford concerning what she had or had not told Officer Daulton by offering Officer Daulton's testimony. *Id.* at 349, 378 S.E.2d at 757. This Court found that the proper use of the prior statements to corroborate Officer Daulton's testimony would have been only to demonstrate the fact that Crawford made statements to him on a particular date, not to prove the facts those statements purported to relate. *Id.* at 352, 378 S.E.2d at 759. The fact that the jury might confuse the substance of the statements with their use for the purpose of impeachment was compounded by the nature of the trial court's limiting instructions. *Id.* at 351, 378 S.E.2d at 759.

In *Harrison*, the Supreme Court reversed the defendant's conviction for murder where it was shown that at defendant's first trial, the prosecution introduced three confessions allegedly made by the defendant while he was in the custody of police. 392 U.S. at 220, 20 L. Ed. 2d at 1050. After these confessions had been admitted into evidence, the defendant testified in his own behalf to the events leading up to the victim's death. *Id.* At defendant's first trial, the jury found defendant guilty, and on appeal, the Court of Appeals reversed defendant's conviction, holding that the three confessions were obtained illegally and thus were inadmissible in evidence against defendant. *Harrison v. United States*, 359 F.2d 214, 222, *reh'g en*

banc, 359 F.2d 223 (D.C. Cir. 1965). Following the appeal, defendant was again tried for murder. At the second trial, the prosecution offered into evidence defendant's first trial testimony which placed him at the scene with the murder weapon. *Harrison*, 392 U.S. at 220, 20 L. Ed. 2d at 1050. The United States Supreme Court reasoned that, based on these facts, the prosecution could not introduce evidence of defendant's admissions at an earlier trial of the same case if defendant's taking the stand was clearly compelled by the State's introduction of illegally obtained confessions by him. *Id.* The Court held that because defendant was forced to testify in the earlier case to respond to the illegally obtained confessions, his compelled testimony in that case violated his Fifth Amendment right against self-incrimination. *Id.* However, the Court specifically noted:

> In this case we need not and do not question the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.

Id. at 222, 20 L. Ed. 2d at 1051.

In *State v. Wills*, 293 N.C. 546, 240 S.E.2d 328 (1977), this Court found that *Harrison* is limited to situations in which a defendant's testimony during a first trial is induced by constitutionally inadmissible evidence, not by the strength of the State's case. *Id.* at 550, 240 S.E.2d at 330-31. Even if defendant's testimony at his first trial was induced by evidence which was inadmissible under the rules of evidence, and not because it was unconstitutionally obtained, the *Harrison* exception to the general rule permitting the testimony to be offered at the second trial would not apply. *Id.*; *State v. Castonguay*, 218 Conn. 486, 491, 590 A.2d 901, 904 (1991); *United States v. Mortensen*, 860 F.2d 948, 951 (9th Cir. 1988), *cert. denied*, 490 U.S. 1036, 104 L. Ed. 2d 406 (1989); *People v. Armentero*, 148 Mich. App. 120, 384 N.W.2d 98 (1986), *denial of post-conviction relief reversed*, 194 Mich. App. 540, 487 N.W.2d 813 (1992), *appeal denied*, 441 Mich. 931, 498 N.W.2d 737, *reconsideration denied*, 502 N.W.2d 42 (1993). Therefore, we find that *Harrison* is inapplicable to the case at bar.

Although defendant did not testify in the second trial, the court reporter from the first trial read the transcript of his testimony from that trial. During the first trial, defendant testified that on the evening of 9 August 1984, he went to some liquor houses and then went to Cynthia McKeys' house at 1905 Dunleith Road in Winston-Salem. Sammy Mitchell was also at Cynthia McKeys' house. Defendant said that he was intoxicated when he went to sleep at 11:00 or 11:30 p.m. Defendant stated that he awoke at 7:30 a.m. on Friday, 10 August. Mitchell was on McKeys' couch when defendant woke up. Because Mitchell had to appear in court that morning, defendant and Mitchell took a bus from the McKeys' house at 8:30 a.m. to go to the courthouse.

We find that defendant's first trial testimony was primarily given to establish an alibi at the time of the murder in contradiction to the evidence presented by the prosecution. The admission of Crawford's prior inconsistent statements was found by this Court to be improper based upon evidentiary grounds, not ***constitutional*** grounds. Defendant has failed to show that he was compelled to testify due to the admission of any unconstitutionally obtained evidence; therefore, we reject defendant's argument that he was induced to refute Crawford's out-of-court statements concerning his whereabouts on the morning of the commission of the offense.

The State submits that this issue is controlled by *State v. Farrell*, 223 N.C. 804, 28 S.E.2d 560 (1944). We agree. In *Farrell*, the defendant was indicted for the rape of his stepdaughter. At defendant's first trial, he testified in his own behalf. Defendant was found guilty but on appeal was awarded a new trial. *Id.* at 805, 28 S.E.2d at 561. At the second trial, defendant offered evidence, but he did not testify. On rebuttal, the State was permitted to offer into evidence the defendant's testimony from his first trial. At the second trial, defendant was again found guilty. In rejecting the claim that the first trial testimony was improperly admitted, this Court reasoned that "the defendant offered himself as a witness on the former trial for the very purpose of having the jury consider his testimony in determining his guilt or innocence. What he said then may be used at any subsequent stage of the prosecution." *Id.* at 807, 28 S.E.2d at 563. This Court concluded that "[t]he statements or admissions made by [defendant] while so testifying are in nowise privileged, but may lawfully be offered in evidence on any subsequent trial for the consideration of the jury in passing upon his guilt or innocence." *Id.* at 808, 28 S.E.2d at 564. We find that defendant in the case *sub judice* testified in the first trial for

the very purpose of having the jury consider his testimony in determining his guilt or innocence. There was no compulsion resting on defendant to testify in the first trial, and therefore, we find that the trial court did not err by allowing the prosecutor to introduce defendant's testimony from the first trial.

[2] Defendant further contends that the trial court erred by admitting into evidence testimony by the defendant from the first trial regarding defendant's prior conviction for contributing to the delinquency of a minor, specifically Margaret Marie Crawford. Prior to the examination of Cathy Payton, the court reporter from the first trial, defense counsel objected to the introduction of the portion of defendant's first trial testimony referring to the misdemeanor conviction involving Crawford. Defense counsel objected on three grounds: (1) that the State had promised in a plea agreement not to use the 10 August 1984 date against defendant, (2) that the evidence of a prior conviction was not admissible against defendant in the second trial because he was not testifying in the second trial, and (3) that it would be unduly prejudicial to introduce evidence of a plea for a crime relating to Crawford. The trial court told defense counsel that the "best way to [object] . . . is to object as each question may be asked that you perceive is objectionable." Furthermore, the trial court told defense counsel, "I take it you will do so if you perceive something specifically objectionable about the testimony."

After the trial judge's ruling, the State called Payton to read defendant's testimony from the first trial. During direct examination of defendant during the first trial, defense counsel asked, "And on September 11th, 1984, did you plead guilty to contributing to the delinquency of a minor?" Defendant responded "[y]es," that he had pled guilty to the charge of contributing to the delinquency of Margaret Marie Crawford. During Payton's reading of the cross-examination of defendant during the first trial, defense counsel objected to the series of questions dealing with the prior conviction involving Crawford. The trial court overruled this objection, and Payton read into evidence defendant's testimony regarding his conviction of contributing to the delinquency of a minor. The record reflects that there were no specific objections to the questions concerning the plea of guilty of contributing to the delinquency of Crawford, although defense counsel did object to the reading of certain other portions of the transcript.

We conclude that defendant has waived his right to assign error to the introduction of this testimony. It is well established that " '[w]here evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence.' " *State v. Jolly*, 332 N.C. 351, 361, 420 S.E.2d 661, 667 (1992) (quoting *State v. Wilson*, 313 N.C. 516, 532, 330 S.E.2d 450, 461 (1985)); *see also* 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 30 (3d ed. 1988) (when evidence is admitted over objection but the same evidence has theretofore been or is thereafter admitted without objection, the objection is waived). Because defendant in the case at bar failed to object during the reading of the direct examination regarding his prior conviction, he has waived his right to assign error to the admission of this testimony.

[3] In his next assignment of error, defendant contends that the trial court erred by overruling his objections to the prosecutor's contentions during closing arguments that defendant had the burden of proving his first trial alibi. Specifically, defendant points out that the prosecutor argued that defendant did not call alibi witnesses to prove his alibi from the first trial, which was that he was at Cynthia McKeys' house during the time of the murder. In addition, the prosecutor noted that defendant did not introduce a photograph of himself, which defendant had testified during the first trial was taken on the night of 9-10 August. Defendant contends that the prosecutor's closing argument left the jury with the impression that he had the burden of proving his innocence. We disagree.

Although during closing arguments a prosecutor may not comment on the failure of a defendant to testify at trial, it is permissible for the prosecutor to point out to the jury that the defendant has produced no exculpatory evidence and has contradicted no evidence presented by the State. *State v. Howard,* 320 N.C. 718, 728, 360 S.E.2d 790, 796 (1987). This Court has held that during closing arguments, a prosecutor's comment noting a defendant's failure to produce any alibi witnesses does not constitute an impermissible comment on the defendant's failure to testify. *See State v. Young*, 317 N.C. 396, 346 S.E.2d 626 (1986); *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982).

In the case *sub judice*, the prosecutor, in his closing argument, merely argued to the jury that it could consider the fact that defendant did not call any alibi witnesses or introduce a photograph excul-

pating himself. After carefully reviewing the prosecutor's closing argument, we find no error in the trial judge's rulings on defendant's objections to the argument.

[4] In his next assignment of error, defendant contends that the trial court committed error by not intervening *ex mero motu* to stop the prosecutor from commenting on defendant's decision not to testify, on the ground that the trial court's failure to do so violated defendant's rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I of the North Carolina Constitution. We disagree.

The relevant portion of the prosecutor's argument is as follows:

> And here's another thing that made me real happy. I put three stars right by this one. [Defense counsel] said—and I quote. He talked about, quote, the State put in [defendant's] transcript and then he said and I put it in quotes, underline[d] it. After the State put in [defendant's] transcript, he said, thereafter—remember this word, thereafter, we decided not to have [defendant] testify. That's important. When did these two lawyers decide not to have [defendant] testify? It wasn't before; it wasn't during; it was thereafter.
>
> Now, ask yourselves that question. These two fine lawyers here, why would they wait to make that decision thereafter? I'll tell you why they waited to make it. Because after this came into evidence, his sworn testimony at the other trial, you see what happened then the reason it was thereafter, this man right here was boxed in. He was in a box. Right here's the box. Right here's what he said back in 1985 and thereafter. In case he wanted to change horses, that pretty much eliminated that, didn't it? If his alibi was a nag through this trial, maybe he had an idea of crawling on a thoroughbred up here in Hickory.

Defendant did not object to the prosecutor's comments, which he now asserts are error. The arguments of counsel are left largely to the control and discretion of the trial judge. *State v. Shank*, 327 N.C. 405, 407, 394 S.E.2d 811, 813 (1990). Counsel are granted wide latitude in the scope of their argument. *Id.* Counsel's argument is not improper where counsel argues the law, the facts in evidence, and all reasonable inferences to be drawn therefrom. *Id.* Only where counsel's argument affects the right of the defendant to a fair trial will the trial judge be required to intervene where no objection is made. *State v.*

Hill, 311 N.C. 465, 472, 319 S.E.2d 163, 168 (1984). This Court has held that where a defendant fails to object to the closing argument by the prosecutor, the trial court is required to intervene *ex mero motu* only if the remarks are grossly improper. *Id.* We cannot conclude that the trial judge erred in not intervening *ex mero motu* in this instance. We note that the defendant himself argued through one of his counsel that, "[o]f course, the State, as part of its case, put in [defendant's] testimony from the prior trial and thereafter we decided not to have [defendant] testify further in the case." We note further that defense counsel argued that "[defendant's] silence in this trial is not to influence your decision in any way, and I'm sure the judge will give you instructions substantially as I tell you." We do not find the closing argument of the prosecutor to be grossly improper, and therefore, the trial judge did not err in failing to intervene *ex mero motu*. This assignment of error is overruled.

[5] Defendant next assigns error to the charge on reasonable doubt. During the charge conference, defendant requested that the trial judge give the following instruction:

> A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

See N.C.P.I.—Crim. 101.10 (1974). Instead, the trial court charged:

> A reasonable doubt, members of the jury, is not a mere possible doubt[,] for most things that relate to human affairs are open to some possible or imaginary doubt. But rather a reasonable doubt is a fair doubt based on reason and common sense and growing out of some evidence or lack of evidence in the case.

After the charge to the jury, defense counsel renewed the request that the trial judge give the Pattern Jury Instruction, with particular emphasis on the last sentence, which states in part that "[p]roof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt." The failure of the trial judge to give the requested instruction is the basis for this assignment of error.

In the absence of a request, the trial court does not have to define reasonable doubt. *State v. Watson*, 294 N.C. 159, 167, 240 S.E.2d 440, 446 (1978). However, once the court undertakes to do so, the definition must be given in substantial accord with those that have been

approved by this Court, although no exact formula is required. *Id.* The trial court is not required to read the requested instruction verbatim. *State v. Greene*, 324 N.C. 1, 17, 376 S.E.2d 430, 440 (1989), *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). In *Greene*, this Court ruled that the trial court did not err by declining to instruct the jury that proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces the jury of the defendant's guilt. This Court said that "[w]hile the language defendant requested was appropriate, it was not essential to an accurate definition of reasonable doubt, and the refusal to give the requested instruction verbatim was not error." *Id.* In the case *sub judice*, we find that the instructions given adequately reflected the substance of defendant's requested instructions. We hold that the reasonable doubt instruction given by the trial judge was not constitutionally deficient and that the trial judge did not err in refusing to give defendant's requested instructions verbatim. We overrule this assignment of error.

[6] Defendant further contends that the trial court erred in allowing the State to introduce into evidence Sammy Mitchell's testimony from the first trial. At the time of the first trial, Mitchell was not a defendant in the case. On 16 January 1990, five years after the first trial, Mitchell was indicted as a codefendant. During the second trial, the State called Mitchell as a witness, whereupon defense counsel objected and the jury was excused. Outside the presence of the jury, Mitchell took the witness stand, and when asked his name by defense counsel, Mitchell responded, "I refuse to answer any questions based on my Fifth Amendment right and the advice of my counsel." Upon being asked several more questions, Mitchell responded in the same manner. The prosecution then asked that Mitchell be declared an unavailable witness and asked that the court reporter be allowed to read Mitchell's testimony from the first trial into the record. The trial judge found Mitchell to be an unavailable witness and under Rule 804(b)(1) permitted Mitchell's testimony from the first trial to be read into evidence. Defendant assigns error to the trial court's ruling.

Defendant contends that the State's introduction of Mitchell's first trial testimony was improper under Rule 804(b)(1) and deprived him of the right of confrontation guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution because defendant did not have the same motive in examining Mitchell at the first trial that he would have had during the second trial. At the first trial, Mitchell testified that both he and defendant spent the entire

night of 9-10 August at 1905 Dunleith, that he went to bed at 11:00 on 9 August, and that he awoke at 7:00 a.m. on 10 August.

Defendant's strategy in his first trial was to link himself to Mitchell on the night of 9-10 August because Mitchell supported his alibi and defendant had no reason to doubt Mitchell's credibility. In contrast, during the second trial, because of Mitchell's intervening indictment, defendant wanted to avoid linking himself to Mitchell on the night of 9-10 August. Therefore, defendant argues, his motive for developing Mitchell's testimony during the first trial differed from what his motive was during the second trial.

N.C.G.S. § 8C-1, Rule 804 provides in pertinent part:

> (a) Definition of unavailability.—"Unavailability as a witness" includes situations in which the declarant:
>
> (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement[.]
>
> . . . .
>
> (b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former Testimony.—Testimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

N.C.G.S. § 8C-1, Rule 804(a)(1), (b)(1) (1992).

In *State v. Grier*, this Court held that, as a general rule, the recorded testimony of a witness in a former trial will not be admitted as substantive evidence at a later criminal trial because the prior testimony is considered inadmissible hearsay under the Confrontation Clause of the Sixth and Fourteenth Amendments to the United States Constitution. 314 N.C. 59, 64, 331 S.E.2d 669, 673 (1985). The witness himself must be produced to testify *de novo* where possible. *Id.* However, even though there exists a preference for face-to-face confrontation at trial, Rule 804(b)(1) recognizes an exception to this requirement.

In the present case, we find that the trial court properly admitted Mitchell's first trial testimony into evidence over defendant's objections. As the trial court found, Mitchell was unavailable because he asserted his constitutional right against self-incrimination. Mitchell was called as a defense witness at the first trial in which defendant was also being tried for the same offense, the first-degree murder of the same victim, and defendant, being represented by counsel, had ample opportunity to question Mitchell on direct examination, as well as on redirect examination.

Defendant asserts that Mitchell was an alibi witness at the first trial and that he did not have a similar motive in questioning Mitchell during the second trial. We disagree. There was testimony at the first trial that defendant was seen with Mitchell several hours before the time of the victim's death. Mitchell's subsequent indictment did not change the fact that Mitchell was called as a defense witness and testified at defendant's first trial. Although the trial strategy by defense counsel may have been different at the second trial, there has been no reasonable showing that the motive would have been different. The motive was to seek the facts favorable to defendant regarding defendant's whereabouts at the time of the crime, and defense counsel had ample opportunity to develop this testimony. On the facts presented by the record, we find that the State has met the requirements of the exception in Rule 804(b)(1). Mitchell's first trial testimony was properly admitted into evidence in defendant's second trial.

[7] Defendant further contends that the trial court erred by denying his motion to exclude Roger Weaver's in-court identification of defendant. In *Hunt I*, this Court addressed, without deciding, defendant's contention that the State had violated his right to effective assistance of counsel under the Sixth Amendment by conducting a postindictment lineup after prohibiting defense counsel from being in the presence of the witness during the lineup. Although this Court declined to decide the merits of the issue due to defendant's failure to preserve the issue in the first trial, we did discuss the applicable legal principles to guide the trial court and the parties in the retrial. *Hunt I*, 324 N.C. at 354-55, 378 S.E.2d at 760-61. This Court stated that the Sixth Amendment guarantees defendant's right to have counsel present at a postindictment lineup where the accused is exhibited to an identifying witness to a crime. *Id.* In such circumstances, a defendant is entitled to the presence of counsel in order to prevent or remedy " 'dangers and variable factors which might seriously, even crucially, derogate from a fair trial.' " *Id.* at 355, 378 S.E.2d at 761 (quoting

United States v. Wade, 388 U.S. 218, 228, 18 L. Ed. 2d 1149, 1158 (1967)). The in-court identification of a witness who took part in an illegal pretrial confrontation must be excluded unless it is first determined by the trial judge on clear and convincing evidence that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. *Wade*, 388 U.S. at 239, 18 L. Ed. 2d at 1164. Defendant argues that the State did not prove by clear and convincing evidence that Weaver's in-court identification was based on his observations of defendant other than during the illegal lineup, and therefore, the trial court erred in denying defendant's motion to exclude Weaver's in-court identification. We disagree.

The trial court conducted a hearing on defendant's motion to exclude the identification testimony of Roger Weaver. On *voir dire*, Weaver testified that in 1984 he was employed as an auditor by the Hyatt House in Winston-Salem. Between 4:00 a.m. and 5:00 a.m. on 10 August, Weaver was moving his car from the parking deck to the street when he observed two black males standing on the corner. The area at the time was well lit by street lights. Weaver testified that the previous spring and summer, he had seen the slimmer of the two men in the Hyatt House five or six times when the man would ask permission to use the rest room. On each of these prior occasions, Weaver and the man had brief conversations. Usually, the man would come through the automatic doors entering into the lobby, which was well lit, and speak to Weaver. Weaver noted that the man's hairstyle was sometimes "bushy" and sometimes in "braids."

Weaver stated that later in the morning of 10 August, he saw this same man. The man came to the automatic doors of the hotel lobby and tried to enter through the exit door. When the exit door would not open, the man pulled the door open, stepped in on the activator, and the doors opened behind him. At this time, the man turned and made eye contact with Weaver. Weaver related that at this time, there was nothing obstructing his view of the man. Once the man entered the lobby, he went directly to the rest room. The man stayed in the rest room for an unusually long period of time. Weaver told the security guard that someone was in the rest room; defendant left immediately after the security guard entered the rest room. When the man was leaving, he looked straight at Weaver. Weaver testified that he and the man made eye contact at least three times on the morning of 10 August 1984. Weaver identified the man that he saw in the hotel on 10 August as the defendant. Specifically, the prosecutor asked Weaver, "independent of any photographs, lineups or anything else

that you may have been shown some date subsequent to that, I'll ask you whether or not you recognize the man in this courtroom that you saw come and go as you described on that morning of August 10?" Weaver responded, "Yes, I recognized him from being in the hotel."

On cross-examination during *voir dire* of Weaver, defense counsel brought out evidence from the first trial to impeach Weaver. The following colloquy took place between defense counsel and Weaver:

> Q. All right. Well, again—Now, when you were asked about this under oath back in 1985, you testified that you based your identification in court on the lineup in addition to what you say you saw on the 10th in the hotel; isn't that right?
>
> A. I didn't base it but I confirmed. I would use the word confirm.
>
> Q. Well, let's look at the word you used back in June of 1985, Mr. Weaver. On page 1219 at line 4 you were asked, "Are you basing your identification of [defendant] here in court today based on what you saw on August 10 or something you saw afterwards?" And your answer was, "And the lineup is what I'm basing it on." Isn't that what you said then?
>
> A. The lineup was basing it on that it was the same person I had seen in the hotel.
>
> . . . .
>
> Q. All right. So you based it on the lineup and what you say you saw; isn't that right?
>
> A. On the lineup and the picture in the paper.

Weaver further testified on cross-examination that he did not make the connection that defendant was the same man he had seen at the hotel on 10 August until he recognized defendant's picture in the newspaper in September. Weaver also stated, "I didn't depend on a lineup. I had already recognized him through the picture in the paper." In addition, Weaver explained that he had misled the police by not reporting that he had seen defendant on the night in question because he was fearful for his safety since he was so easily accessible to the public while on duty at the hotel. Weaver did not view the lineup until 15 May 1985, three weeks before the first trial and nine months after the murder. Following the *voir dire* hearing, the trial court denied defendant's motion to suppress the in-court identifica-

tion of defendant by Weaver but ruled that the prosecution could not offer evidence relating to the lineup.

In *Wade*, the Supreme Court set forth several criteria with which to determine whether an in-court identification is tainted by, or independent of, an illegal lineup:

> the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

Wade, 388 U.S. at 241, 18 L. Ed. 2d at 1165; *see State v. McCraw*, 300 N.C. 610, 615, 268 S.E.2d 173, 176 (1980).

In the case *sub judice*, Weaver stated during *voir dire* that he had observed defendant on the morning of 10 August and that they had eye contact at least three times on that morning. Weaver also stated that he had seen defendant on at least five or six prior occasions in the hotel lobby and that he and defendant usually had brief conversations when defendant came into the hotel to use the rest room. Weaver never identified anyone other than defendant. Furthermore, Weaver stated numerous times that the lobby was well lit and that nothing was obstructing his view of defendant when he came into the hotel. Considering the totality of the circumstances, we conclude, as a matter of law, that Weaver's ability to identify defendant as the person he saw in the hotel on the morning of 10 August was not the product of the illegal lineup but originated independently of the illegal lineup. Therefore, the trial court did not err in admitting Weaver's identification testimony, notwithstanding alleged defects or irregularities in the lineup procedure.

[8] In his next assignment of error, defendant asserts that the trial court erred by failing to instruct the jury that defendant's active or constructive presence at the scene of the crime is an essential element of the theories of acting in concert and aiding and abetting. Because a trial court must instruct the jury on every essential element of an offense, defendant argues that the trial court's failure to instruct that presence is an element of acting in concert constitutes error because the witnesses at trial differed greatly on the question of whether defendant was the actual perpetrator of the crime. Defend-

ant further submits that the same reasoning applies to the failure to instruct that presence is an essential element of aiding and abetting. Defendant concedes that there was no objection to the trial court's instructions or a request for such an instruction, and therefore, this assignment is determined under the plain error standard of review. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983); N.C. R. App. P. 10(b)(2).

In the present case, we find no plain error in the instructions given that would mandate a new trial in defendant's case.

In the charge, the trial court instructed the jury that the burden was on the prosecution to prove beyond a reasonable doubt that "defendant was the perpetrator, or aided and abetted the perpetrator, or acted together with another in perpetrating the crime charged." Thereafter, the jury was again instructed on acting in concert and on aiding and abetting as follows:

> Now, members of the jury, for a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit first degree murder on the basis of robbery, rape, sexual offense, or kidnapping, each of them is held responsible for the acts of the others done in the commission of such. This is known as the legal doctrine acting in concert.
>
> Now, members of the jury, a person may be guilty of first degree murder although he personally does not do any of the acts necessary to constitute that crime. A person who aids and abets another to commit a crime is guilty of that crime. You must clearly understand that if he does aid and abet, he is guilty of the crime just as if he had personally done all the acts necessary to constitute that crime.

The trial court specifically charged the jury that in regard to finding defendant guilty of first-degree murder on the basis of aiding and abetting, "a person is not guilty of a crime merely because he is present at the scene even though he may silently approve of the crime or secretly intend to assist in its commission." The jury was then instructed on acting in concert and on aiding and abetting as they apply to the felony murder rule.

The instruction on acting in concert given by the trial judge was taken from our Pattern Jury Instructions for criminal cases. *See* N.C.P.I.—Crim. 202.10 (1971). In addition, this Court has approved

charges on acting in concert very similar to the charge in this case in *State v. Gilmore*, 330 N.C. 167, 171, 409 S.E.2d 888, 890 (1991), and in *State v. Williams*, 299 N.C. 652, 658, 263 S.E.2d 774, 778 (1980). It is well settled that a charge on presence at the scene of the crime is unnecessary in a case in which the evidence shows that the defendant was actually present at the time the crime was committed. *Id.* We find that the evidence in the record before us in this case overwhelmingly establishes defendant's presence and participation. The evidence of defendant's actual or constructive presence at the scene of the murder was sufficiently substantial that a charge on this feature of the case was not necessary. Defendant has failed to show plain error in the trial judge's failure to give the requested instruction. This assignment of error is overruled.

[9] Defendant next contends that the trial court committed error by not intervening *ex mero motu* to stop what defendant contends was the prosecutor's grossly improper emotional appeal to the jury during closing argument. Defendant acknowledges that no objections were made to the portions of the prosecutor's argument to which exceptions have been entered.

Defendant sets forth several portions of the prosecutor's closing argument that he claims were grossly improper. First, defendant refers to the references made by the prosecutor to the loss suffered by the victim's family. For example, the prosecutor stated, "And Deborah Sykes' life was not just her life. Those were her clothes. Those were her shoes. But her life was not just her life. She had a husband. She had a mother. Deborah Sykes' life belonged to all those people that cared about her." Next, defendant refers to the prosecutor's argument about the victim's physical and emotional pain and suffering as being grossly improper. The prosecutor said, "And lastly, what—ask yourselves. What was Deborah Sykes thinking when she knelt on all fours, bleeding, gasping no doubt for breath. No doubt dying as she watched that man right there run across the field. Her assassin, her assassin." As to the third portion of the closing argument asserted to be grossly improper, defendant refers to the inference by the prosecutor to the fact that a young woman's life ended long before its time: "Maybe she thought about buying that house . . . ; having a family. Maybe she was thinking about having a baby." Lastly, defendant maintains that the prosecutor's argument concerning deterring violence was grossly improper. The prosecutor argued that "[i]t's time people like you stood up and you say that's enough, that's enough. We're not going to stand for it any more. Let the message ring

out and let it ring out loud and clear. That's enough. Enough." Defendant contends that the prosecutor's argument was calculated to replace reason with raw emotion as a basis for the jury's verdict and thus was grossly improper.

The arguments of trial counsel are left largely to the control and discretion of the trial judge, and counsel will be granted wide latitude in the argument of hotly contested cases. *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). Counsel is permitted to argue the facts that have been presented, as well as reasonable inferences that can be drawn therefrom. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). If a party fails to object to a closing argument, this Court must decide whether the argument was so improper as to warrant the trial judge's intervention *ex mero motu*. *State v. Craig*, 308 N.C. 446, 457, 302 S.E.2d 740, 747, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). The standard of review is one of "gross impropriety." *Id.*

In *State v. King*, 299 N.C. 707, 264 S.E.2d 40 (1980), this Court found that the prosecutor's remarks during closing, concerning what the victim must have been thinking as he was dying and what the family of the victim experienced following the loss, were not grossly improper. In addition, this Court has held that the prosecutor's remarks reminding the jury that for purposes of the defendant's trial, it was acting as the voice and conscience of the community are permissible. *State v. Soyars*, 332 N.C. at 61, 418 S.E.2d at 488; *State v. Brown*, 320 N.C. 179, 203, 358 S.E.2d 1, 18 ("[W]hen you hear of such acts, you say, 'Gee, somebody ought to do something about that.' You know something, Ladies and Gentlemen of the Jury, today you are the somebody that everybody talks about . . . ."), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). Furthermore, the prosecutor's closing statements regarding the victim and the pain she experienced were based upon the medical evidence presented at trial and thus were properly permitted. We find that the trial court did not err by failing to intervene *ex mero motu* during the prosecutor's closing argument. This assignment of error is overruled.

[10] Defendant next argues that the trial court committed prejudicial error in refusing to admit factual findings contained in a report by the city manager and an exhibit to that report which is a photo composite of defendant. At trial, Al Beaty, the assistant city manager for Winston-Salem, testified that after the first trial in this matter, he was asked by the city manager to do a review of the Winston-Salem Police

Department's investigation of the Deborah Sykes murder. After conducting the review, Beaty testified that he prepared a report entitled, *Review of the Winston-Salem Police Department's Investigation of the Deborah B. Sykes Murder* (hereinafter the City Manager's Report). The report was released by the city manager's office on 20 November 1985. At the conclusion of Beaty's testimony, the report and an exhibit from the report were offered as evidence by the defendant. The State's objection to defendant's request to have the report introduced into evidence was sustained. At the conclusion of the evidence for the defense, the report and exhibit were again offered into evidence, and the State's objection was again sustained. Defendant contends that the report was admissible as substantive evidence as an exception to the hearsay rule pursuant to Rule 803(8)(C) of the North Carolina Rules of Evidence and that the judge's failure to allow the actual report into evidence constituted prejudicial error. We disagree.

Rule 803 states in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (8) Public Records and Reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth . . . (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

N.C.G.S. § 8C-1, Rule 803(8)(C) (1992). In *State v. Acklin*, 317 N.C. 677, 346 S.E.2d 481 (1986), this Court addressed the issue of whether the trial court erred by not allowing into evidence under Rule 803(8)(C) the laboratory reports prepared by two SBI agents employed as forensic chemists. The first agent testified that a hair found on the victim's pubic region did not come from the defendant. The second agent testified that, in his opinion, the semen found on the victim's underwear did not come from the defendant. Although the agents were permitted to testify, the trial court sustained the prosecutor's objections to the introduction of their laboratory reports. In granting the defendant a new trial, this Court concluded that the reports were admissible pursuant to Rule 803(8)(C), stating:

> The laboratory reports defendant sought to introduce meet the standards of admissibility under Rule 803(8)(C): (a) both reports were prepared by the State Bureau of Investigation, a public office or agency pursuant to authority granted by law, (b) containing factual findings, (c) to be introduced against the State in a criminal case, and (d) containing, given the impartiality of the SBI chemists and the right to examine and cross-examine witnesses, adequate assurances of trustworthiness.

Id. at 682, 346 S.E.2d at 484.

In the case *sub judice*, Beaty specifically testified that in conducting his review for the City Manager's Report, he "first analyzed and gave some study to the concerns that had been raised and the information that [he] received from Reverend Lassiter and, as a result of hearing and understanding what those concerns were, [he] sought out then to interview individuals who would have information . . . that would answer some questions with regard to the concerns." Beaty further stated that he read the testimony from the first trial and interviewed various people within the police department and others "to try to come to some conclusions with respect to the questions that had been raised." In addition, the report itself states that "[o]n August 13, 1985, Alderman Vivian H. Burke presented a report to the City Manager that had been compiled by Reverend Leonard V. Lassiter, Jr. The report contained various allegations and concerns regarding the Police Department's investigation that had been shared with Reverend Lassiter by concerned citizens." The report later states that "[t]he Lassiter report . . . was used as the basis for our review of the Police Department's activities in the investigation of this case." In conducting the review, interviews were conducted with "persons employed by the Police Department, the District Attorney's Office, the Darryl Hunt Defense Attorneys, the Forsyth County Jail staff, and private citizens."

Because the City Manager's Report does not fall within the Rule 803(8)(C) exception as interpreted in *Acklin*, we find that the trial court did not err by sustaining the State's objection to the introduction of the City Manager's Report and the exhibit from the report. The City Manager's Report was not the result of "authority granted by law" to conduct an investigation into the Sykes' murder, there was no assurance that the report contained factual findings that would be admissible, and the report was not prepared for the purpose of being introduced against the State in a criminal case. Furthermore, the

prosecution did not have an opportunity to cross-examine the persons interviewed for the report. Because the City Manager's Report did not fit into the exception, it was hearsay and therefore properly excluded by the trial court.

[11] Defendant's next assignment of error concerns the trial court's denial of his motion to conduct an *in camera* inspection of an SBI investigative file. After the first trial, the SBI and the Winston-Salem Police Department reinvestigated the case and prepared a three thousand page report on the investigation. Defendant filed a written motion for disclosure of the SBI report under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). The trial court denied defendant's motion for disclosure of the report. After the commencement of the trial, the record shows that during the prosecutor's direct examination of Kevey Coleman, defense counsel requested a copy of any statement made by the witness to the SBI. The prosecutor responded that he did not have a copy in his file at the time but that he would get it and make a copy of the statement. Thereupon, defense counsel made a motion for a mistrial alleging that the prosecution had violated *Brady* by withholding material from the defense. However, in his argument, defense counsel acknowledged that he had previously been provided with four statements from Coleman. Defense counsel further asserted that these statements were part of an SBI report that had been requested by the defense prior to trial, but that his request had been denied. At this point, defense counsel asked the trial court to review the SBI report to determine if there was any exculpatory material.

In response, the prosecutor informed the trial court that at this point in the trial, the defense had been provided with the statements of all of the prosecution witnesses at the conclusion of their testimony. Following further testimony and arguments, the trial court declined to review the SBI report but ordered the State to deliver the SBI report to the trial court and to place the report under seal. During the trial, the trial court denied defendant's subsequent motion to unseal the SBI report for the limited purpose of determining whether any portion of the report constituted findings admissible under N.C.G.S. § 8C-1, Rule 803(8)(C). As the trial continued, the prosecution provided defense counsel with copies of each witness' statement following his or her direct examination. At the conclusion of the trial, defense counsel renewed the motion to have the SBI report unsealed. The motion was denied. In an order dated 20 July 1992, this Court granted defendant's motion to order certification of the SBI report to

this Court but denied defendant's motion to order that the report be unsealed.

We conclude that the trial court did not err in denying defendant's motion for access to the SBI report or for an *in camera* inspection. N.C.G.S. § 15A-903(d) requires the disclosure to the defendant of all documents and tangible objects "which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belonged to the defendant." However, the next section of the statute, N.C.G.S. § 15A-904, limits the application of N.C.G.S. § 15A-903 and is dispositive of the issue of prosecution witnesses' statements. N.C.G.S. § 15A-904(a) provides as follows:

> Except as provided in G.S. 15A-903(a), (b), (c) and (e), this Article does not require the production . . . of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State.

N.C.G.S. § 15A-904(a) (1988); *see State v. Hardy*, 293 N.C. 105, 124, 235 S.E.2d 828, 839 (1977). Therefore, the investigative files of the district attorney, law enforcement agencies, and others helping to prepare the case are not open to discovery. *State v. Alston*, 307 N.C. 321, 336, 298 S.E.2d 631, 642 (1983). The trial court did not err in refusing to order the State to disclose the SBI report to defendant. In addition, notably lacking from the list of subsections that are excluded from the scope of N.C.G.S. § 15A-904(a) is subsection (f) of N.C.G.S. § 15A-903. In *State v. Soyars*, this Court held that:

> [A] [d]efendant is also statutorily entitled to any statement of a witness other than the defendant, in the possession of the State and relating to the subject matter of the witness' testimony, once the witness has testified. N.C.G.S. § 15A-903(f) (1988). If the State wishes to withhold a statement, the court must conduct an in camera review of the statement to determine whether the statement relates to the subject matter of the testimony. However, as defendant's request came prior to the testimony of any of the witnesses, he was not yet entitled to such statements and an in camera review would have been premature. Thus, defendant's right to access to evidence, prior to trial, was not violated.

332 N.C. at 63, 418 S.E.2d at 489-90.

Because the prosecutor in the case *sub judice* provided defense counsel with prior statements made by the prosecution's witnesses

after they testified on direct examination, the trial court was not required to conduct its own *in camera* review of the SBI report under these circumstances.

Defendant claims that the information sought was discoverable under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215. The United States Supreme Court has held that due process does not require the State to make complete disclosure to defendant of all of the investigative work on a case. *Moore v. Illinois*, 408 U.S. 786, 33 L. Ed. 2d 706, *reh'g denied*, 409 U.S. 897, 34 L. Ed. 2d 155 (1972). "[N]o statutory provision or constitutional principle requires the trial court to order the State to make available to a defendant all of its investigative files relating to his case . . . ." *State v. McLaughlin*, 323 N.C. 68, 85, 372 S.E.2d 49, 61 (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). *Brady* only requires the disclosure, upon request, of evidence favorable to the accused and not a disclosure of all evidence. Moreover, in *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976), the Supreme Court clarified *Brady* and held that the prosecutor is constitutionally required to disclose only any evidence that is favorable and material to the defense. In determining whether the suppression of certain information was violative of a defendant's right to due process, the focus should be on the effect of the nondisclosure on the outcome of the trial, not on the impact of the undisclosed evidence on the defendant's ability to prepare for trial. *Id.* at 109, 49 L. Ed. 2d at 353. Because the evidence withheld must be material, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.* Defendant in the case at bar has failed to establish that any evidence not disclosed from the SBI report was "material" and what effect, if any, the nondisclosure would have had on the outcome of the trial. This Court finds no constitutional principle under *Brady* that would require the trial court to order the State to make available to defendant the SBI report or to conduct an *in camera* inspection of the SBI report.

[12] Defendant next argues that the trial court committed reversible error by prohibiting defendant from impeaching the testimony of prosecution witness Johnny Gray under N.C.G.S. § 8C-1, Rule 608(b) through cross-examination regarding a lawsuit brought by Gray. During cross-examination by defense counsel, Gray was asked:

Q. In 1988, you made some allegations in a lawsuit that you had been beaten up in jail, didn't you?

MR. BOWMAN: OBJECTION.

THE COURT: SUSTAINED.

After the trial court sustained the prosecutor's objection, defendant made an offer of proof. During *voir dire*, Gray testified that in 1988, he had filed a complaint in the United States District Court for the Middle District of North Carolina alleging brutality by an officer with the Winston-Salem Police Department. In the complaint, Gray claimed that Reginald Craven and Darryl Ford had witnessed his injuries. Gray verified that he had written a letter to Ford asking him to be a witness for him. At the bottom of the letter to Ford, Gray admitted that he wrote, "If you need any money, write and let me know, all right." However, Gray stated that he never offered Craven any money in exchange for his testimony. Gray stated that he knew that Craven submitted an affidavit in the lawsuit stating that he had not witnessed any of the matters that defendant alleged in the lawsuit. In addition, Ford sent a comparable affidavit denying any knowledge of the alleged brutality against Gray. Gray further conceded that the federal magistrate dismissed his lawsuit. After the offer of proof, the trial court again sustained the prosecution's objection to the evidence regarding the content of Gray's complaint in the lawsuit, without stating a basis for its ruling.

Defendant asserts that the trial court committed reversible error by prohibiting defendant from cross-examining Gray, under Rule 608(b), regarding the lawsuit that he had brought against law enforcement officers in which he made false allegations.

N.C.G.S. § 8C-1, Rule 608(b) provides that specific instances of conduct of a witness may, "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning his character for truthfulness or untruthfulness." As the rule provides, it is within the trial court's discretion to allow or disallow cross-examination of a witness about his specific acts if the acts are relevant to his character for truthfulness or untruthfulness. Therefore, "the only character trait relevant to the issue of credibility is veracity or the lack of it." *State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 90 (1986). In *Morgan*, this Court found that "the types of conduct most widely accepted as falling into this category are 'use of false identity, making false state-

ments on affidavits, applications or government forms (including tax returns), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others.' " *Id.* at 635, 340 S.E.2d at 90 (quoting 3 David Louisell & Christopher B. Mueller, *Federal Evidence* § 305 (1979)). A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986).

Assuming *arguendo* that there was error in the exclusion of the evidence regarding the complaint as probative of Gray's character for truthfulness, we conclude that there is no reasonable possibility that the outcome of the trial would have been different if the excluded evidence had been admitted. N.C.G.S. § 15A-1443 (1988). This assignment of error is overruled.

[13] In defendant's final assignment of error, he contends that the trial court erred in excluding testimony by defense witness Lee Haigy regarding the basis for Lee's opinion about the untruthfulness of prosecution witness Donald (Don) Haigy, Lee's brother. During direct examination of Lee Haigy, defense counsel asked, "What is your opinion as to [Don's] character for truthfulness or untruthfulness? Does [Don] tell the truth or does he not tell the truth?" Lee responded that he did not believe Don. When asked what Don's reputation was for telling the truth, Lee responded "[h]e's a very dishonest person." Thereupon, Lee was asked upon what he based his opinion, and the prosecutor's objection was sustained. Defense counsel was permitted to proffer Lee's basis for his opinion into the record. During *voir dire*, Lee stated that Don would do "whatever it takes to come out ahead. If he needs to plea bargain or whatever he needs to do, he'll do it." Lee further stated that Don had been in trouble with the law from the time that he was twelve years old. Defendant asserts that the basis for Lee's opinion regarding Don's character is admissible under both Rule 405(a) and Rule 608(a) of the North Carolina Rules of Evidence. We disagree.

We find that Rule 405(a) is not applicable because Lee's responses to the questions do not relate to specific instances of conduct.

Rule 608(a) provides in pertinent part that "[t]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a)." Rule 608(a) pertains solely to reputation or opinion testimony. In the case at bar, defense

counsel sought to have Lee testify that he based his opinion on the fact that Don would do "whatever it takes to come out ahead. If he needs to plea bargain or whatever he needs to do, he'll do it." Lee further testified during *voir dire* that Don had been in trouble with the law since he was twelve. This is not evidence in the form of reputation or opinion contemplated by Rule 608(a). We overrule this assignment of error.

We have conducted a thorough review of the transcript of the trial and sentencing proceeding, the record on appeal, and the briefs of defendant and the State. We find no error in defendant's trial warranting reversal of defendant's conviction.

[14] On 22 October 1990, subsequent to the entry of judgment in the Trial Division but prior to the docketing of the appeal with this Court, defendant filed in the Superior Court, Forsyth County, a Motion for Appropriate Relief. On 1 February 1993, subsequent to the docketing of the appeal with this Court but prior to oral argument, defendant filed with this Court a Supplemental Motion for Appropriate Relief. On 18 February 1993, this Court entered an order remanding defendant's Supplemental Motion to the Superior Court, Forsyth County, consolidating the same with defendant's previously filed Motion of 22 October 1990 and ordering that court to conduct an evidentiary hearing on defendant's motions filed 22 October 1990 and 1 February 1993. From 20 June 1993 through 30 June 1993, the Superior Court, Forsyth County, Melzer A. Morgan, Jr., judge presiding, held an evidentiary hearing as directed by this Court. On 1 July 1993, pursuant to a motion filed 29 June 1993 to amend our 18 February 1993 order, this Court entered an additional order directing an *in camera* review of the SBI report.

Defendant subsequently filed with the trial court an Amendment to Supplemental Motion for Appropriate Relief dated 15 October 1993 and thereafter, on 17 November 1993, filed with the trial court a Second Amendment to Supplemental Motion for Appropriate Relief. On 22 through 24 and 29 November 1993, Judge Morgan held additional hearings. On 12 August 1994, he entered a 210-page order making appropriate findings of fact and conclusions of law and denying each of defendant's motions.

On 8 September 1994, this Court granted in part defendant's Motion for Supplemental Briefing and Oral Argument, set a briefing schedule, and denied defendant's request for oral argument on the motion. Defendant subsequently filed additional motions in the Supe-

rior Court, Forsyth County, and filed with this Court a Motion to Toll Appeal, attaching his recently filed Superior Court motions. On 26 October 1994, this Court allowed defendant's Motion to Toll Appeal, treated defendant's attached motions as an amendment to defendant's original 22 October 1990 Motion for Appropriate Relief, and remanded the same for an evidentiary hearing before Judge Morgan. Following an evidentiary hearing on 7 November 1994, Judge Morgan denied defendant's subsequently filed motions by order dated 10 November 1994.

We have carefully reviewed the findings of fact and conclusions of law of the extensive order entered by Judge Morgan dated 12 August 1994, and the findings of fact and conclusions of law of his subsequent order dated 10 November 1994, and we hereby adopt the same as our own. Defendant's Motion for Appropriate Relief as supplemented and amended as heretofore described is denied. Judge Morgan's orders of 12 August 1994 and 10 November 1994 are hereby affirmed in all respects.

NO ERROR.

Justice FRYE dissenting.

I dissent from that portion of the Court's opinion which adopts the findings and conclusions of law contained in Judge Morgan's orders of 12 August and 10 November 1994 and denies defendant's motion for appropriate relief. I agree with Judge Morgan's conclusion that defendant's motion to dismiss should be denied. However, I disagree with his conclusion that defendant is not entitled to a new trial based on newly discovered evidence related to PCR/DNA analysis.

A defendant seeking a new trial on the basis of newly discovered evidence has a heavy burden to meet. As we said in *State v. Britt*:

> Our usual standard for evaluating motions for a new trial on the grounds of newly discovered evidence requires a defendant to establish seven prerequisites:
>
> 1. That the witness or witnesses will give newly discovered evidence.
>
> 2. That such newly discovered evidence is probably true.
>
> 3. That it is competent, material and relevant.
>
> 4. That due diligence was used and proper means were employed to procure the testimony at the trial.

5. That the newly discovered evidence is not merely cumulative.

6. That it does not tend only to contradict a former witness or to impeach or discredit him.

7. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

State v. Britt, 320 N.C. 705, 712-13, 360 S.E.2d 660, 664 (1987).

I believe defendant has established each of the seven prerequisites in this case. Judge Morgan, after conducting appropriate hearings and listening to the arguments of counsel, found that defendant had met the first six of these prerequisites, but not the seventh. The seventh prerequisite to obtaining a new trial on the basis of newly discovered evidence is that the newly discovered evidence "is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail." *Britt*, 320 N.C. at 713, 360 S.E.2d at 664.

Judge Morgan found that "the newly discovered evidence is not of such a nature as to show that a different result, i.e. a finding of not guilty *on all submitted bases of guilty*, would probably be reached." (Emphasis added.) Defendant was convicted of first-degree murder under the felony murder rule, on the bases that the murder occurred in the perpetration of four felonies: robbery with a dangerous weapon, rape, sexual offense, and kidnapping. The hearing judge found that while "the State's theory on rape and sexual offense is somewhat weakened by the DNA evidence, its case overall is not fatally flawed." Earlier, the judge found that the newly discovered evidence "would most directly contradict the State's summation when (a) [the assistant special prosecutor] said[,] 'They deposited their semen in her' . . . and (b) [the special prosecutor] referred to a yellow thick aspirated fluid . . . and said[,] '. . . [W]hat was [the victim] thinking when [this man right over here] spread those legs right there apart and he crawled down inside her and he raped and ravaged her and deposited some sickening yellow fluids in her body.' "

Among the newly discovered evidence in this case is a PCR/DNA report that states: "Darryl Hunt is eliminated as a possible source of the genetic material detected in this sample." Given the State's theory that the murder occurred during the perpetration of four felonies, including rape, and the fact that defendant's defense was alibi, the

PCR/DNA report eliminating defendant as the source of the sperm taken from the victim is powerful evidence tending to weaken the State's entire case and strengthen defendant's defense. Thus, I would hold that defendant has established the seventh prerequisite to a new trial: that the newly discovered evidence is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

I vote to allow the motion for appropriate relief by granting defendant a new trial.

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

STATE OF NORTH CAROLINA v. GENERAL SAM MILLER

No. 67A93

(Filed 3 March 1995)

1. Grand Jury § 43 (NCI4th)— foreperson—racial discrimination in selection—motion to quash indictment—timeliness

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion to quash the indictment based upon racial discrimination in the selection of the grand jury foreperson where the motion was filed on the first day of the trial. The motion to quash defendant's indictment should have been filed on or before his arraignment date because he was arraigned before the session of court for which his trial was calendared unless he could show good reason to grant relief from the statutory time limitation. Although defendant argued that his current counsel should not be bound by the waivers of past counsel and that he had no notice of the requirement until the N.C. Supreme Court decided *State v. Robinson*, 327 N.C. 346, defendant's current counsel did not file the motion until the first day of trial, almost four years after defendant's arraignment and two years after *Robinson*. The trial court could reasonably have determined that counsel's belief that no action was necessary until the day of trial did not warrant relief from the time limitation. N.C.G.S. § 15A-955, N.C.G.S. § 15A-952.

Am Jur 2d, Grand Jury §§ 21-25.

2. Jury § 141 (NCI4th)— capital murder—jury selection—questions concerning parole

The trial court did not err in a first-degree murder sentencing hearing by denying defendant's motion to permit questioning of potential jurors regarding their beliefs about parole eligibility.

Am Jur 2d, Jury §§ 205 et seq.

3. Jury § 70 (NCI4th)— capital murder—jury selection—statement informing potential jurors about case—defendant's planned testimony regarding mental disease—omitted

The trial court did not err during jury selection in a first-degree murder prosecution by not informing the venire that defendant planned to offer expert testimony relating to a mental disease or defect. Although defendant argues that this violates N.C.G.S. § 15A-1213, which requires the trial court to inform the potential jurors about the case prior to jury selection, that statute does not require the trial court to divulge a defendant's theory of the case to the venire. Evidence regarding defendant's mental state at the time of the crime is not an affirmative defense for which defendant bears the burden of proof and the trial court had no statutory duty to inform the jury about the anticipated expert testimony.

Am Jur 2d, Jury §§ 121 et seq.

4. Jury § 92 (NCI4th)— capital murder—jury selection—potential jurors urged to state views clearly—no error

The trial court did not abuse its discretion during jury selection for a first-degree murder trial by allowing the prosecutor to encourage potential jurors to state their views clearly and without ambiguity. Although defendant argued that this encouragement prevented potential jurors who held ambivalent views from speaking truthfully, the record does not reveal that the prosecutor's request for clarity impaired potential jurors' ability to answer *voir dire* questions truthfully.

Am Jur 2d, Jury §§ 189 et seq.

5. Jury § 226 (NCI4th)— capital murder—jury selection—rehabilitation for equivocal answers—disparity in rehabilitation allowed prosecution and defense

The trial court did not abuse its discretion during jury selection in a first-degree murder prosecution where the court stated

that it would allow rehabilitation if a potential juror's answers were equivocal or if it determined that a juror did not understand the question posed and the defendant contended that the court allowed the prosecution to rehabilitate potential jurors but did not grant defendant the same privilege. The record reveals the court's perception that potential jurors did not understand questions posed by the defense; any disparity in the amount of rehabilitation stemmed from a disparity in the complexity of the questions asked. Moreover, even assuming an abuse of discretion, defendant expressed satisfaction with each juror impanelled and did not exhaust his peremptory challenges.

Am Jur 2d, Jury § 279.

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

6. Jury § 227 (NCI4th)— capital murder—jury selection—excusal for cause—opposition to death penalty—rehabilitation

The trial court did not err during jury selection for a first-degree murder prosecution by excusing two jurors for cause who had first unequivocally stated that they could not vote for the death penalty under any circumstances, stated during rehabilitation that they could set aside their personal beliefs and follow the court's instructions or that they could think of circumstances where they would vote for the death penalty, and then said when asked by the prosecutor or the court that they could not vote for the death penalty. Both potential jurors clearly expressed several times that they could not vote for the death penalty under any circumstances and the court properly could have concluded that subsequent equivocation arose out of their desire to perform their duties as jurors.

Am Jur 2d, Jury § 279.

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

7. Jury § 123 (NCI4th)— capital murder—jury selection—questions concerning particular mitigating circumstances—not allowed

The trial court did not abuse its discretion during jury selection in a first-degree murder prosecution by denying defendant's motion to ask two potential jurors if they could consider impaired capacity arising from drug use as a mitigating circumstance and to ask potential jurors whether they thought people could change their lives for the better. The questions defendant sought to ask here constituted improper attempts to stake out jurors, not means of determining whether they could follow the law.

Am Jur 2d, Jury §§ 208 et seq.

8. Jury § 154 (NCI4th)— capital murder—jury selection—questions to reveal bias for death penalty—excluded

The trial court did not err during jury selection in a first-degree murder prosecution by sustaining the State's objections to questions intended to reveal potential jurors' latent biases in favor of the death penalty. Overly broad questions or those calling for policy decisions are impermissible under *State v. Conner*, 335 N.C. 618. The first of defendant's questions here is substantially similar to the *Conner* question, the second has no reasonable expectation of revealing information bearing upon the potential juror's qualifications to serve as an impartial juror, and the third asked for a policy decision.

Am Jur 2d, Jury §§ 208 et seq.

9. Jury § 154 (NCI4th)— capital murder—jury selection—whether convicted defendant should automatically suffer death—question excluded—no prejudicial error

There was no prejudicial error in a first-degree murder prosecution where the trial court sustained the State's objection to defendant's question as to whether a person convicted in a case such as this should automatically be put to death. Assuming error, it was harmless beyond a reasonable doubt because defendant was allowed to ask both of these jurors whether they could under any circumstances vote for a life sentence, defendant exercised peremptory challenges to excuse both of these potential jurors, and defendant did not exhaust his peremptory challenges.

Am Jur 2d, Jury §§ 208 et seq.

10. Homicide § 244 (NCI4th)— first-degree murder—premeditation and deliberation—sufficiency of evidence

The trial court did not err by submitting first-degree murder to the jury where defendant contended that the evidence of premeditation and deliberation was insufficient but the record revealed substantial evidence that defendant was not provoked by the victim in that defendant admitted that he shot the victim for refusing to hand over the money from the cash register and, although he now argues that he was provoked by a racial remark, presented no evidence beyond pure speculation that the victim's racial statement provoked him; defendant's conduct before the murder supports an inference that he had anticipated and decided how to resolve a possible confrontation with his robbery targets; and defendant's calm and deliberate conduct as he robbed the victim after the murder also supports an inference of premeditation and deliberation. Finally, the facts of this case are similar to those of *State v. Williams*, 319 N.C. 73.

Am Jur 2d, Homicide §§ 437 et seq.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.

11. Criminal Law § 1315 (NCI4th)— capital murder—sentencing hearing—mitigating evidence—defendant's character

Any error was harmless beyond a reasonable doubt in a first-degree murder sentencing hearing where the trial court sustained the State's objection to defendant's question to defendant's psychotherapist concerning the witness's opinion of defendant as a friend and defense counsel concluded his questioning of the witness without an offer of proof. Even assuming that the issue was properly preserved for review, the jury heard testimony from numerous witnesses, including defendant's sister and his minister, about his good character, his quest for self-improvement while incarcerated, and his leadership role within his family. The excluded testimony would have been merely cumulative.

Am Jur 2d, Criminal Law §§ 598, 599.

12. Criminal Law § 447 (NCI4th)—capital murder—sentencing—prosecutor's argument—jury visualizing itself as victim

The trial court did not err in a first-degree murder sentencing hearing by overruling defendant's objection to the prosecutor's

argument that the jurors should visualize themselves as the murder victim. The argument related to the nature of the crime and neither misstated nor manipulated the evidence.

Am Jur 2d, Criminal Law §§ 648 et seq.

13. Criminal Law § 1357 (NCI4th)— capital murder—sentencing—mitigating circumstances—cocaine withdrawal—mental or emotional disturbance not submitted

The trial court did not err in a first-degree murder sentencing hearing by not submitting the statutory mitigating circumstance that defendant was under the influence of a mental or emotional disturbance when he committed the crime. Although defendant argued that he suffered from cocaine and opiate withdrawal, which is a defined psychiatric disorder, drug withdrawal stemming from voluntary intoxication does not qualify as a mental or emotional disturbance for purposes of N.C.G.S. § 15A-2000(f)(2).

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.

14. Criminal Law § 1357 (NCI4th)— capital murder—sentencing—mitigating circumstances—mental or emotional disturbance—racial slur

The trial court did not err during a first-degree murder sentencing hearing by not submitting the statutory mitigating circumstance of mental or emotional disturbance where defendant contended that a racial slur provoked him to shoot, but he told police in his statement that he shot the victim because the man tried to stop him from getting money for drugs. This evidence reveals that defendant committed the murder for money, not as a result of provocation to which he was abnormally susceptible. N.C.G.S. § 15A-2000(f)(2).

Am Jur 2d, Criminal Law §§ 598, 599.

Comment Note.—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

15. Criminal Law § 1360 (NCI4th)— capital murder—sentencing—mitigating circumstances—impaired capacity—drug withdrawal

The trial court did not err in a first-degree murder sentencing hearing by refusing to submit the impaired capacity mitigating circumstance where defendant relied on evidence of drug withdrawal to show impairment. The record contains no evidence that defendant was impaired by drugs or withdrawal therefrom at the time of the murder or that any symptoms of withdrawal he may have experienced at that time impaired his capacity. N.C.G.S. § 15A-2000(f)(6).

Am Jur 2d, Criminal Law §§ 598, 599.

Effect of voluntary drug intoxication upon criminal responsibility. 73 ALR3d 98.

16. Criminal Law § 1363 (NCI4th)— capital murder—sentencing—mitigating circumstances—no harm to witnesses

The trial court did not err in a first-degree murder sentencing hearing by not submitting the nonstatutory mitigating circumstance that defendant neither threatened nor harmed eyewitnesses to the crime. Mitigating circumstances focus on positive aspects of a defendant's character or behavior; the absence of an aggravating circumstance or bad conduct cannot constitute a mitigating circumstance. The categories of positive behavior recognized as mitigating do not include a defendant's failure to harm eyewitnesses.

Am Jur 2d, Criminal Law §§ 598, 599.

17. Criminal Law § 1322 (NCI4th)— capital murder—sentencing—instructions—parole eligibility

The trial court did not err during a first-degree murder sentencing hearing by refusing to instruct the jury regarding defendant's potential to be paroled if given a life sentence. Parole eligibility is not relevant during jury selection, closing argument, or jury deliberation in a capital sentencing proceeding; *Simmons v. South Carolina*, 129 L. Ed. 2d 133, does not require that N.C. precedents on the issue be overruled where defendant remains eligible for parole if given a life sentence, and N.C.G.S. § 15A-2002, effective 1 October 1994, which requires that a sentence of life imprisonment shall be life without parole and that the jury be so instructed, does not entitle defendant to a new sen-

tencing hearing. Under the law applicable at the time of defendant's trial, the court was neither required nor allowed to give an instruction on the issue of parole eligibility.

Am Jur 2d, Trial § 1441.

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

18. Criminal Law § 680 (NCI4th)— capital murder—sentencing—peremptory instructions

The trial court did not err during a first-degree murder sentencing hearing by refusing to give peremptory instructions on allegedly uncontroverted statutory and nonstatutory mitigating circumstances where it was held elsewhere that the court did not err in refusing to submit these circumstances to the jury.

Am Jur 2d, Trial §§ 1441, 1444.

19. Criminal Law § 1348 (NCI4th)— capital murder—sentencing instructions—mitigating circumstances

The trial court did not err in a first-degree murder sentencing hearing by refusing to give defendant's requested peremptory instruction on the ground that it required the jury to accord weight to nonstatutory circumstances. The instruction failed to inform jurors that they could accord no weight to proven nonstatutory circumstances.

Am Jur 2d, Trial §§ 1441, 1444.

20. Criminal Law § 1323 (NCI4th)— capital murder—sentencing—instructions—consideration of mitigating circumstances found by other jurors

The trial court did not err in a first-degree murder sentencing hearing by failing to instruct the jury that it must consider any mitigating circumstance found by a juror. 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.

Am Jur 2d, Trial §§ 1441, 1444.

21. Criminal Law § 1363 (NCI4th)— capital murder—sentencing—instructions—nonstatutory mitigating circumstances

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury that it could consider nonstatutory mitigating circumstances it found to exist and to have mitigating value when weighing aggravating and mitigating circumstances. Although defendant contended that this instruction improperly allowed jurors to decide that a circumstance existed but had no mitigating value, nonstatutory mitigating circumstances, unlike their statutory counterparts, do not have mitigating value as a matter of law.

Am Jur 2d, Trial §§ 1441, 1444.

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

A sentence of death for a first-degree murder was not disproportionate where the evidence supported the three aggravating factors found, the record does not suggest that the sentence was imposed under passion, prejudice, or any arbitrary factor, and, comparing this case to similar cases in which the death penalty was imposed and considering both the crime and the defendant, the death penalty was not disproportionate or excessive. This case is more egregious than others involving a robbery-murder in which the death penalty was held proportionate.

Am Jur 2d, Criminal Law § 628.

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Barnette, J., at the 11 January 1993 Criminal Session of Superior Court, Robeson County, on a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 11 January 1995.

Michael F. Easley, Attorney General, by William N. Farrell, Jr., and William P. Hart, Special Deputy Attorneys General, for the State.

Henderson Hill, Director, North Carolina Resource Center, by Marshall L. Dayan, Senior Staff Attorney, and Bruce T. Cunningham, Jr., for defendant-appellant.

WHICHARD, Justice.

In 1986 defendant was convicted of the first-degree murder of Earl Allen, the owner and operator of City Jewelers in Robeson County, and sentenced to death. On defendant's first appeal, we ordered a new trial. *See State v. Hucks & Miller*, 323 N.C. 574, 374 S.E.2d 240 (1988). At his second trial in 1993, defendant again was convicted of the first-degree murder of Earl Allen and sentenced to death. He appeals from this second conviction and sentence. We find no prejudicial error in the guilt/innocence and sentencing phases, and we conclude that the sentence of death is not disproportionate.

The State's evidence tended to show that defendant arrived in Fayetteville, North Carolina, on 29 September 1985 in a stolen car. He ran out of money and on 4 October began looking for a place to rob, armed with a .32-caliber pistol and accompanied by Kenneth Hucks, his codefendant at the first trial. On 5 October defendant spotted Allen's jewelry store in St. Pauls and stated, "there is our easy money." At approximately 3:45 p.m. defendant and Hucks parked the car and entered the store. Defendant demanded the money from Allen's cash register. When Allen refused, defendant raised his pistol and fired one shot into Allen's forehead. Defendant later told an investigator that he shot Allen for trying "to stop him from getting the money." After Allen fell to the floor, defendant removed money, a wallet, and a set of keys from Allen's pockets. Hucks stole some watches as defendant took money from the cash register. On their way out, defendant pointed a gun at, but did not shoot, a person entering the store. Allen died six days later, without regaining consciousness, as a result of the gunshot wound to his head.

Defendant and Hucks divided the proceeds of the robbery on their way back to Fayetteville. Defendant used his share—$800.00—to buy drugs. Police officers apprehended defendant, after a high-speed chase which ended in a multiple-car accident, early in the morning on 6 October. They recovered a gun and some watches from the stolen car driven by defendant. A ballistics expert from the State Bureau of Investigation testified that the bullet removed from Allen's brain matched the gun found in the car.

Defendant was transported by ambulance from the scene of the accident to Southeastern General Hospital, accompanied by then-Assistant Chief of Police Tommy Hagens. Chief of Police James Sanderson, SBI Agent Lee Sampson, and Hagans interrogated defendant in the hospital and continued the questioning in the Robeson

County Sheriff's Office after defendant was released from the hospital. At the Sheriff's Office, defendant waived his *Miranda* rights and then confessed that he shot Allen; Agent Sampson recounted defendant's confession at trial. After giving his statement, defendant helped the police locate Hucks and provided information used to obtain a search warrant. Police recovered much of the property stolen from City Jewelers as a result of defendant's assistance.

Defendant introduced no evidence during the guilt/innocence phase. The jury returned a verdict of guilty under the theory of premeditation and deliberation as well as the felony murder rule.

During the sentencing phase, the State introduced evidence that defendant, armed with a pistol, had robbed the Quality Inn in Fayetteville on 3 October 1985 and Martin's Quick Service in Fayetteville on 5 October 1985. The State also introduced evidence that defendant had been convicted of third-degree robbery in Connecticut in July 1982.

Defendant offered evidence at sentencing tending to show that while in the emergency room at Southeastern General he admitted to drug abuse and that a hospital nurse observed needle tracks on both of defendant's arms. Additionally, defendant's hospital record shows that on the afternoon of 6 October he requested medicine to treat what he called drug withdrawal.

Defendant's social worker, Beth McAllister, testified about her work with defendant. She stated that defendant remained close to his family in Connecticut despite his incarceration and that he nurtured and supported his siblings. Defendant began smoking marijuana at age twelve or thirteen and began to use harder drugs at age fourteen after his father died. Defendant had developed a routine in jail which included reading the newspaper and the Bible, educating himself, and praying.

Defendant's sister, June Lewis, testified that defendant was devastated by their father's death and that he did whatever he could to help her. For example, he talked to her sons about their behavior, drove her to work when necessary, and took care of her family when she was in the hospital for back surgery. Defendant's nephew, Walter Miller, Jr., testified that he talked to defendant about many things, including getting good grades and staying in school.

Elder Thomas Dockery, defendant's minister since 1986, testified that defendant had embraced Christianity and made an effort to turn

his life around. He testified about defendant's good relationship with officers at Central Prison and about improvements in his speech and personal grooming.

Finally, Dr. George Cliette, a psychologist, testified that he performed several tests on defendant. The results revealed that defendant's intelligence is below average. He reads at a twelfth grade level but has deficient math and spelling skills. Personality tests showed that defendant acts impulsively, has difficulty processing information, and has a moderately high addictive personality.

The jury found all three aggravating circumstances submitted: (1) that defendant had previously been convicted of a felony involving the use or threat of violence; (2) that the murder was committed for pecuniary gain; and (3) that the murder was part of a course of conduct including the commission of other crimes of violence against other persons. The trial court submitted one statutory and thirteen nonstatutory mitigating circumstances. The jury found the statutory circumstance that defendant aided in the apprehension of another capital felon and ten of the nonstatutory circumstances. The jury then recommended a sentence of death, and the court sentenced defendant accordingly.

PRETRIAL PHASE

[1] Defendant first assigns as error the trial court's denial of his motion to quash his murder indictment on the basis of racial discrimination in the selection of the grand jury foreman. Such discrimination denies a black defendant the protections of Article I, Sections 19 and 26 of the North Carolina Constitution. *State v. Pigott*, 331 N.C. 199, 415 S.E.2d 555 (1992); *State v. Robinson*, 327 N.C. 346, 361, 395 S.E.2d 402, 411 (1990); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). The trial court denied the motion, which was filed on the first day of trial, on the grounds that it was time-barred and that defendant presented no valid reason to waive the time bar.

In *Robinson*, we implicitly assumed that motions like defendant's, known as *Cofield* motions, are motions to dismiss an indictment based on a challenge to the array under N.C.G.S. § 15A-955(1) because they in effect challenge the grand jury which indicted the defendant. *Robinson*, 327 N.C. at 361, 395 S.E.2d at 411. We now expressly adopt that position. N.C.G.S. § 15A-952 provides in pertinent part that motions to dismiss under N.C.G.S. § 15A-955 "must be made within the time limitations stated in subsection (c) unless the

court permits filing at a later time." N.C.G.S. § 15A-952(b)(4) (Supp. 1994). Subsection (c) of that statute provides:

> Unless otherwise provided, the motions listed in subsection (b) must be made at or before the time of arraignment if arraignment is held prior to the session of court for which the trial is calendared. If arraignment is to be held at the session for which trial is calendared, the motions must be filed on [sic] or before five o'clock P.M. on the Wednesday prior to the session when trial of the case begins.

Defendant was arraigned for the second time on 17 January 1989, well before the session of court for which his trial was calendared. Thus a motion to quash his indictment should have been filed on or before 17 January 1989. Unless defendant presented the trial court good reason to grant relief from the statutory time limitation, he waived his *Cofield* rights. N.C.G.S. § 15A-952(e). Defendant contends his motion should not have been time-barred because his current counsel did not represent him at the time of his arraignment and should not be bound by waivers by prior counsel. He also argues he had no notice that *Cofield* motions constituted challenges to an array under N.C.G.S. § 15A-955 until this Court decided *Robinson*. Therefore, he contends, his inaction should not constitute a waiver. We disagree.

The trial court did not bind new defense counsel by previous counsel's waiver. The court's ruling was based on counsel's failure to file the motion until the first day of trial. Defendant's new counsel began to represent him on 3 July 1989, seven months after his second arraignment. Counsel could have filed a *Cofield* motion at that time and argued then for relief from the time bar on the grounds that he should not be bound by an error of prior counsel. Defense counsel also could have filed the motion on 8 October 1992 when he argued a motion for change of venue. Finally, he could have filed the motion as soon as *Robinson* was published, as that case provided clear notice that N.C.G.S. § 15A-952(c) applied to *Cofield* motions. Instead, he waited until the first day of trial—almost four years after defendant's arraignment and more than two years after publication of the opinion in *Robinson*. Defendant presented no grounds for relief from the time bar other than his counsel's belief that no action was necessary until the day of trial. The trial court could reasonably have determined that this belief did not warrant relief from the time limitation. We cannot

conclude that the court's ruling constitutes an abuse of discretion. This assignment of error is overruled.

[2] Defendant also assigns as error the trial court's denial of his motion to permit questioning of potential jurors regarding their beliefs about parole eligibility. We have consistently "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." *State v. Payne*, 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994); *see also State v. Green*, 336 N.C. 142, 157-58, 443 S.E.2d 14, 23 (1994). As we explained in *Payne*, the recent decision in *Simmons v. South Carolina*, —- U.S. —-, 129 L. Ed. 2d 133 (1994), does not affect our position on this issue when, as here, the defendant remains eligible for parole if given a life sentence. *Payne*, 337 N.C. at 516-17, 448 S.E.2d at 99-100. This assignment of error is overruled.

JURY SELECTION

[3] Defendant presents numerous assignments of error regarding jury selection. First, he contends that the trial court erred by failing to inform the venire that defendant planned to present expert testimony relating to a mental disease or defect affecting his mental state at the time of the crime. He argues this omission violated the statute that requires a trial court to make a statement informing potential jurors about the case prior to jury selection. N.C.G.S. § 15A-1213 (1988). In this statement the court must identify the parties and counsel for each side and briefly state the charge against defendant, the date of the alleged offense, the victim's name, the defendant's plea, "and any affirmative defense of which the defendant has given pretrial notice." *Id.* The trial court here made the required statement but did not mention defendant's intent to introduce expert testimony about his mental status. Defendant concedes that such evidence did not constitute an affirmative defense but contends we should recognize it as such for purposes of section 15A-1213.

N.C.G.S. § 15A-1213 does not require a trial court to divulge a defendant's theory of the case to the venire. Evidence regarding defendant's mental state at the time of the crime might be found to rebut the State's proof of premeditation and deliberation, but it is not an affirmative defense for which defendant bears the burden of proof. Thus the trial court had no statutory duty to inform the jury about the anticipated expert testimony. The court properly fulfilled its duty

under section 1213 to orient the venire to the case. This assignment of error is overruled.

[4] Next defendant contends the trial court improperly allowed the prosecutor to encourage potential jurors to state their views clearly and without ambiguity. He argues such encouragement prevented potential jurors who actually held ambivalent views from speaking truthfully during *voir dire*. This contention has no merit. Lawyers face a difficult task when attempting to ascertain whether potential jurors hold biases for or against the death penalty that would impair the performance of their duties. *See Wainwright v. Witt*, 469 U.S. 412, 424-25, 83 L. Ed. 2d 841, 852 (1985). Clear answers to their questions ease this difficulty. The record does not reveal that the prosecutor's request for clarity impaired potential jurors' ability to answer *voir dire* questions truthfully. It simply urged them to enunciate their views in an understandable manner. The trial court, which is charged with supervising the examination of potential jurors, has "broad discretion in controlling the extent and manner of" *voir dire*. *State v. Brown*, 315 N.C. 40, 55, 337 S.E.2d 808, 820 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Based on the record, we cannot say the court here abused its discretion when it overruled defendant's objections to the State's requests for clarity from potential jurors.

[5] Defendant next argues the trial court improperly treated the prosecution and defendant differently in ruling on challenges for cause based on prospective jurors' beliefs regarding the death penalty. He contends the trial court allowed the prosecution to rehabilitate potential jurors—despite a decision early in *voir dire* not to allow rehabilitation—but did not grant defendant the same privilege. This created, according to defendant, a jury with a large number of death-qualified jurors and few life-qualified jurors.

The trial court stated that it would allow rehabilitation if a juror's answers were equivocal or if it determined that a juror did not understand the question posed. The trial court can best determine a juror's confusion or lack of understanding. The record reveals the court's perception that potential jurors did not understand questions posed by the defense: "If I'm convinced that a juror fully understands what you're talking about . . . then that's one thing. But I'm . . . sitting there . . . watching. Not only listening, but watching the particular juror, and the confusion on their face when the questions are being asked of

them [by the defense]—they do not understand." We conclude that any disparity in the amount of rehabilitation the court allowed stemmed from a disparity in the complexity of the questions asked by each side. We cannot conclude based on this record that the court abused its discretion when it permitted or precluded rehabilitation. Even assuming an abuse of discretion, "to establish reversible error [relating to *voir dire*], a defendant must show prejudice in addition to a clear abuse of discretion on the part of the trial court." *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). Defendant expressed satisfaction with each juror impanelled and did not exhaust his peremptory challenges. He thus cannot show prejudice from the court's rulings on rehabilitation. This assignment of error is overruled.

[6] In his next assignment of error, defendant contends the trial court erred by excusing two qualified potential jurors for cause during *voir dire*. He argues that the potential jurors unequivocally stated they could set aside their personal beliefs concerning the death penalty and follow the court's instructions. Defendant argues that they were therefore qualified to sit on the jury and that he is entitled to a new trial because the trial court erred by excluding them.

Prospective juror Hailey stated twice on *voir dire* that she could not vote for the death penalty under any circumstances. During defendant's attempted rehabilitation, however, Hailey indicated she could set aside her personal views and make a sentencing decision based on the law. The trial court then asked, "Ms. Hailey, under any circumstances could you render a verdict that meant the death penalty?" Hailey answered, "No." The court allowed the prosecution's challenge for cause.

Similarly, prospective juror Murray told the prosecutor during *voir dire* that he could not vote for the death penalty under any circumstances because of his personal beliefs. The prosecution challenged Murray for cause. Defense counsel then asked, "is there any situation that you can think of in which the death penalty would be the appropriate punishment—and in which you could serve on a jury and vote for it?" Murray answered, "Yes." The prosecutor then asked Murray a few more questions, including, "You just couldn't vote for [the death penalty] for any . . . case; is that right?" Murray nodded affirmatively, and the court excused him for cause.

A trial court may excuse for cause a prospective juror whose views regarding the death penalty would prevent or substantially

impair the performance of his duty as a juror. *State v. Yelverton*, 334 N.C. 532, 543, 434 S.E.2d 183, 189 (1993). We "must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially" because a prospective juror's bias for or against the death penalty cannot always be proven with unmistakable clarity. *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). In *State v. Oliver*, 302 N.C. 28, 39, 274 S.E.2d 183, 191 (1981), we recognized that excusal for cause is proper when a juror expresses a "specific inability to impose the death penalty under any circumstances." We noted in *Yelverton* that a potential juror's equivocation on the subject of the death penalty may stem from a "conscientious desire to do his duty as a juror and to follow the court's instructions in the face of recognizing his personal inability to impose the death penalty." *Yelverton*, 334 N.C. at 544, 434 S.E.2d at 190. Here both Hailey and Murray clearly expressed several times that they could not vote for the death penalty under any circumstances. The trial court properly could have concluded that subsequent equivocation arose out of their desire to perform their duties as jurors according to the dictates of the law. This assignment of error is overruled.

[7] In his next assignment of error, defendant argues that the trial court improperly precluded him from determining whether potential jurors could follow the law. Defendant filed a motion seeking to ask two questions of potential jurors:

> If the defendant is convicted of first-degree murder and we proceed to the sentencing phase of the trial and sufficient evidence is presented to convince you that, because of drug abuse, at the time of the offense the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, could you, following the instructions of the Court, consider this as a mitigating factor? By contrast, do you consider drug use such an evil that you could not, under any circumstances, consider the defendant's impaired capacity on the basis of drug use as a mitigating circumstance?

The trial court denied the motion. Defendant also sought permission to ask potential jurors whether they thought people could change their lives for the better. The court refused to allow this question, and sustained objections when it was asked. Defendant contends these rulings improperly prevented him from ascertaining potential jurors' ability to follow the law.

We have consistently held that a defendant may not use *voir dire* to stake out potential jurors by asking whether they could consider specific mitigating circumstances during the sentencing phase. *See, e.g., State v. Skipper*, 337 N.C. 1, 19-24, 446 S.E.2d 252, 261-64 (1994), *cert. denied*, — U.S. —, — L. Ed. 2d —, 63 U.S.L.W. 3563 (1995); *State v. Hill*, 331 N.C. 387, 404, 417 S.E.2d 765, 772 (1992), *cert. denied*, — U.S. —, 122 L. Ed. 2d 684 (1993), *reh'g denied*, — U.S. —, 123 L. Ed. 2d 503 (1993); *Davis*, 325 N.C. at 621, 386 S.E.2d at 425. General questions, such as whether a potential juror could follow instructions regarding the consideration of mitigating circumstances, are permissible. *See Skipper*, 337 N.C. at 20, 446 S.E.2d at 261-62. The questions defendant sought to ask here, however, constituted improper attempts to stake out jurors, not means of determining whether they could follow the law. We thus conclude that the trial court did not abuse its discretion by denying defendant's motion or by refusing to allow defendant to ask potential jurors whether they could consider particular mitigating circumstances.

[8] Defendant also argues in this assignment of error that the trial court improperly prevented him from asking questions intended to unveil potential jurors' latent biases in favor of the death penalty. For example, the court sustained the prosecution's objections to the following questions: "Do you believe that if a person takes a life unlawfully that he should pay for it with his own life?" "Do you think the defendant should have to prove to you why he should receive a life sentence or do you think the State should have to prove to you as to why he should receive the death sentence?" "Do you believe that some murders are worse than others and more deserving of the death penalty?" Defendant contends these questions properly attempted to determine whether potential jurors could follow the law.

In *State v. Conner*, 335 N.C. 618, 644-45, 440 S.E.2d 826, 840-41 (1994), we held that overly broad questions or those calling for policy decisions are impermissible. We agreed with the trial court there that the question "[d]o you feel that the death penalty is the appropriate penalty for someone convicted of first-degree murder?" was impermissible. The first of defendant's questions listed above is substantially similar to the *Conner* question and thus was properly disallowed. Defendant's query as to whether the burden of proof was fair "has no reasonable expectation of revealing pertinent information bearing upon the potential juror's qualifications to serve as an impartial juror." *Id.* at 632, 440 S.E.2d at 834. Finally, the third question was also improper under *Conner* because it asked for a policy decision.

We therefore conclude that the trial court properly sustained the State's objections to all three questions.

[9] In his final argument under this assignment of error, defendant contends the trial court erred by sustaining the State's objection to the question, "would you automatically believe or feel that the person who is convicted of first degree murder in the course of a robbery as in this . . . case should automatically be put to death?" He argues that precluding two potential jurors from answering this question violated his rights under *Morgan v. Illinois*, —- U.S. —-, —-, 119 L. Ed. 2d 492, 503-06 (1992), where the United States Supreme Court held that a defendant must be allowed to ask a potential juror whether he would automatically or always vote for the death penalty following a defendant's conviction of a capital offense.

Assuming *arguendo* that a *Morgan* error occurred, we conclude it was harmless beyond a reasonable doubt. First, defendant was allowed to ask both potential jurors whether they could, under any circumstances, vote for a life sentence where a person had been convicted of first-degree murder during a robbery. Defendant thus acquired the information that *Morgan* questions are designed to elicit. Second, defendant exercised peremptory challenges to excuse both potential jurors; he did not exhaust his peremptory challenges and thus was not forced to accept an undesirable juror as a result of excluding these two potential jurors. This assignment of error is overruled.

GUILT/INNOCENCE PHASE

[10] In defendant's next assignment of error, he argues that the trial court erred by submitting to the jury the charge of first-degree murder on the theory of premeditation and deliberation. Defendant contends the evidence of premeditation and deliberation was insufficient to support its submission.

To determine whether a defendant committed his crime with premeditation and deliberation, evidence must exist that he "thought about the act for some length of time, however short, before the actual killing; no particular amount of time is necessary to illustrate that there was premeditation." *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994). In making this determination, we must view the evidence in a light most favorable to the State. *Id.* at 757, 440 S.E.2d at 794.

The State usually proves premeditation and deliberation by circumstantial evidence. *Id.* at 758, 440 S.E.2d at 794; *State v. Ginyard*, 334 N.C. 155, 158, 431 S.E.2d 11, 13 (1993). This Court has often "enumerated some of the circumstances which tend to support a proper inference of premeditation and deliberation." *Ginyard*, 334 N.C. at 158, 431 S.E.2d at 13; *see, e.g., Sierra*, 335 N.C. at 758, 440 S.E.2d at 794; *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992). Defendant contends that application of such factors to this case reveals that the State failed to present evidence sufficient to support an inference of premeditation and deliberation. We disagree.

Two of the frequently enumerated circumstances apply in this case:

First, a lack of provocation by the victim supports an inference of premeditation and deliberation. *Olson*, 330 N.C. at 565, 411 S.E.2d at 596. The record reveals substantial evidence that defendant here was not provoked by the victim. In defendant's statement to the police, he admitted that he shot the victim for refusing to hand over the money from the cash register. Defendant gave no other reason for the murder, though he now argues that he was provoked into shooting when the victim called him a "black son-of-a-bitch." He presented no evidence beyond pure speculation to show that the victim's statement provoked him or to contradict his earlier statement.

Second, a defendant's conduct before and after the killing supports an inference of premeditation and deliberation. *Id.* Evidence tending to show that a defendant carried a deadly weapon prior to committing a murder with it supports an inference that "he had anticipated a possible confrontation and given some forethought to how he would deal with a confrontation." *Ginyard*, 334 N.C. at 159, 431 S.E.2d at 13; *see also State v. Fields*, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985). Defendant here carried a loaded .32-caliber pistol for several days prior to the robbery and murder. He threatened two persons with this weapon during two armed robberies just days before he killed Allen with it. These facts support an inference that he had anticipated and decided how to resolve a possible confrontation with his robbery targets.

Defendant's conduct after he shot the victim also supports an inference of premeditation and deliberation. While Allen lay bleeding on the floor, defendant removed money, a wallet, and a set of keys from Allen's pockets. He then removed the money from the cash reg-

ister. This calm and deliberate conduct indicates defendant committed the murder with premeditation and deliberation.

Finally, the facts of this case are similar to those of *State v. Williams*, 319 N.C. 73, 80-81, 352 S.E.2d 428, 433 (1987). There we concluded the trial court properly submitted the issue of premeditation and deliberation to the jury based on the following evidence: a convenience store was robbed; during the robbery an employee of the store was killed by a blast from a twelve-gauge shotgun; a cash register and cash were removed from the premises; parts of the register and a stolen car were found seven and one-half miles from the store; the car contained two twelve-gauge shotgun shells, one fired and one unfired; police found a sawed-off, twelve-gauge shotgun in the defendant's home; and the defendant confessed he shot the employee to avoid being identified. We held that these facts "constituted substantial evidence of . . . first-degree murder committed with premeditation and deliberation." *Id.* The only material difference here is the defendant's motive for shooting the employee—defendant shot Allen for refusing to hand over the money as requested, not to eliminate a witness. This variation does not require a different result. We conclude that, as in *Williams*, sufficient evidence of premeditation and deliberation existed for the trial court to submit the charge of first-degree murder to the jury on that theory.

SENTENCING PHASE

[11] Defendant next argues that the trial court erred by excluding relevant mitigating evidence during the sentencing proceeding. Beth McAllister, a psychotherapist in Raleigh, testified on defendant's behalf. She had worked with defendant for about a year beginning in October 1991, meeting or speaking with him at least once a week. McAllister testified primarily about defendant's family life and his conduct in prison. Defense counsel asked McAllister, "Tell the jury what you think of [defendant] as a . . . friend"; the trial court sustained the prosecutor's objection before McAllister could answer. Counsel asked no further questions of McAllister. Defendant now contends the trial court erred when it sustained the objection because it barred important character evidence from the sentencing proceeding in violation of *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and its progeny.

Defense counsel concluded his direct examination of McAllister upon the court's ruling. He made no offer of proof indicating how McAllister would have responded to the question; defendant there-

fore failed to preserve this issue for review. "[T]o preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). Further, "the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred." *Id.*

Even assuming *arguendo* that defendant properly preserved this issue for review, we conclude that any error was harmless beyond a reasonable doubt. The jury heard testimony from numerous witnesses, including defendant's sister and his minister, about defendant's good character, his quest for self-improvement while incarcerated, and his leadership role within his family. The excluded testimony thus would have been merely cumulative. This assignment of error is therefore overruled.

[12] In another assignment of error, defendant contends he was denied a fair sentencing proceeding because the trial court overruled his objections to the prosecutor's inflammatory and prejudicial closing argument. Defendant argues that the prosecutor improperly asked the jurors to visualize themselves as the murder victim. He is entitled to a new sentencing proceeding, he argues, because the improper argument appealed to the jury's passions and influenced it to reject a sentence of life imprisonment. Defendant focuses on the following statements:

> You [jurors] haven't done your job if you weren't right with [the victim] in the store on October 5, 1985 when he waited on customers [objection overruled] and he took the calls several times that day with his wife. . . . And you haven't done your job, ladies and gentlemen, if you're not right there with Mr. Earl Allen on October 5, 1985 [objection overruled] when the defendant, Sam Miller, seated right over at that table came in toting that pistol [or] when General Sam Miller raises up that pistol and points it—point blank range at Mr. Allen's head, pulls the trigger and you feel that hot ball of lead burn into his brain, ladies and gentlemen [objection overruled]. . . . And you haven't done it if you're . . . not laying there with him on the floor as the defendant [objection overruled] . . . is going through his pockets, ladies and gentlemen. . . . [Defendant is] going through [the victim's] pockets and as his very life blood is flowing out of his body . . . [defendant] is going

through his pockets and probably rolling him over so he can get to the rest of his pockets.

In *State v. Artis*, 325 N.C. 278, 324, 384 S.E.2d 470, 496 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991), the murder victim died by manual strangulation. During closing argument at sentencing, the prosecutor asked the jurors to hold their breath for as long as they could during a four-minute stretch of time so they could " 'understand . . . the dynamics of manual strangulation.' " *Id.* The defendant objected, but the trial court allowed the argument. On appeal, we found no error, concluding that an argument "[u]rging the jurors to appreciate the 'circumstances of the crime' " is not improper during the penalty phase of a trial. *Id.* at 325, 384 S.E.2d at 497. Likewise, the prosecutor's argument here related to the nature of the crime, which is "the touchstone for propriety in sentencing arguments." *State v. Brown*, 320 N.C. 179, 202-03, 358 S.E.2d 1, 17, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). It neither misstated nor manipulated the evidence. We therefore conclude that the argument was not improper and that the trial court did not err by overruling defendant's objections.

[13] Defendant also assigns as error the trial court's refusal to submit the statutory mitigating circumstance that defendant was under the influence of a mental or emotional disturbance when he committed the crime. *See* N.C.G.S. § 15A-2000(f)(2) (Supp. 1994). He contends the evidence showed that he suffered from cocaine and opiate withdrawal—a psychiatric disorder defined in the *Diagnostic and Statistical Manual of Mental Disorders, Third Edition—Revised* (1987)—at the time of the murder. He also contends this disorder made him more vulnerable to the provocation that led him to shoot the victim. Thus, he argues, the trial court should have submitted the circumstance, and its failure to do so entitles him to a new sentencing proceeding. We disagree.

A trial court must submit to the jury any statutory mitigating circumstance supported by the evidence. N.C.G.S. § 15A-2000(b); *Artis*, 325 N.C. at 311, 384 S.E.2d at 489; *State v. Lloyd*, 321 N.C. 301, 311-12, 364 S.E.2d 316, 323 (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). Here the evidence does not support defendant's contention that he was under a mental or emotional disturbance at the time of the murder. Defendant states that he suffered from drug

withdrawal, which he contends qualifies as a mental or emotional disturbance, at the time of the offense. We conclude that drug withdrawal stemming from voluntary intoxication does not qualify as a mental or emotional disturbance for purposes of N.C.G.S. § 15A-2000(f)(2).

In *State v. Irwin*, 304 N.C. 93, 105-06, 282 S.E.2d 439, 447-48 (1981), we held that voluntary intoxication by alcohol or drugs at the time of the commission of a murder does not qualify as a mental or emotional disturbance under the statute. *See also State v. Greene*, 329 N.C. 771, 775, 408 S.E.2d 185, 186 (1991). Defendant's alleged withdrawal from cocaine and other opiates is simply a stage of voluntary intoxication and therefore cannot support the submission of the mitigating circumstance that defendant was influenced by a mental or emotional disturbance when he committed his offense. We therefore need not reach the question of whether defendant proved he was suffering from withdrawal when he shot the victim.

[14] Defendant also contends that a racial slur spoken by the victim provoked him to shoot, indicating that he suffered from a mental disturbance that made him peculiarly susceptible to provocation. Although abnormal susceptibility to provocation can show a mental or emotional disturbance, *id.* at 777, 408 S.E.2d at 188, defendant's evidence did not show that such abnormal provocation occurred. Defendant told police in his statement that the victim called him a "black son-of-a-bitch." He did not say he shot the victim because of this alleged epithet, however; rather, he stated that he shot the victim because "the man tried to stop him from getting the money" he needed for drugs. This evidence reveals that defendant committed the murder for money, not as a result of provocation to which he was abnormally susceptible; it therefore does not support submission of the (f)(2) circumstance. This assignment of error is overruled.

[15] Defendant also assigns as error the trial court's refusal to submit the statutory mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. *See* N.C.G.S. § 15A-2000(f)(6). Defendant relies on evidence of his drug withdrawal to show impairment. He also notes that Dr. George Cliette testified that defendant is prone to addiction, lacks appropriate judgment, and has low-average intelligence. Defendant states that his withdrawal, combined with these personality traits, made him less likely to behave lawfully than a normal person. *See State v. Taylor*, 304 N.C. 249, 290, 283 S.E.2d

761, 786 (1981) (one definition of diminished capacity is whether a defendant "was for any reason less able than a normal person to do what the law requires or to refrain from what the law forbids"), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983).

The evidence showed that defendant ingested drugs on 30 September and immediately after the murder on 5 October. It also showed that defendant asked for medicine for withdrawal symptoms while in the hospital on 6 October. The record contains no evidence that he was impaired by drugs or withdrawal therefrom at the time of the murder, or that any symptoms of withdrawal he may have experienced at that time impaired his capacity. None of defendant's witnesses, including Dr. Cliette, testified that defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was impaired. Thus the trial court properly refused to submit the mitigating circumstance. *See State v. Williams*, 305 N.C. 656, 687, 292 S.E.2d 243, 262 (1982) (trial court did not err when it refused to submit the (f)(6) circumstance where "[t]here was no expert psychiatric or other evidence introduced to show that [the defendant's] capacity to appreciate the criminality of his conduct was impaired").

[16] In another assignment of error, defendant contends the trial court erred by failing to submit to the jury the nonstatutory mitigating circumstance that defendant neither threatened nor harmed eyewitnesses to his crimes. Four persons saw him during this robbery and murder; one person was present during each robbery on 3 and 5 October. Defendant argues that he could have hurt these persons in an effort to eliminate potential witnesses but refrained from such conduct. This indicates, according to defendant, that he did not contemplate or desire the wanton destruction of human life; thus, his behavior toward the eyewitnesses should have been submitted in mitigation. The trial court indicated that the evidence supported the circumstances but refused to submit them because it determined that as a matter of law they lacked mitigating value. Defendant argues that this ruling violated *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973, which requires that a sentencer be allowed to consider any "circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 57 L. Ed. 2d at 990; *see also Woodson v. North Carolina*, 428 U.S. 280, 304, 49 L. Ed. 2d 944, 961 (1976).

We have defined a mitigating circumstance as

> a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of

> first-degree murder, but which may be considered as extenuating, or reducing the moral culpability of the killing, or making it less deserving of the extreme punishment than other first-degree murders.

Irwin, 304 N.C. at 104, 282 S.E.2d at 446-47. The absence of an aggravating circumstance is not mitigating. *State v. Hunt*, 330 N.C. 501, 513, 411 S.E.2d 806, 812, *cert. denied*, —- U.S. —-, 120 L. Ed. 2d 913 (1992); *State v. Brown*, 306 N.C. 151, 179, 293 S.E.2d 569, 587, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982). Likewise, the absence of bad conduct that could have occurred during the commission of a crime cannot constitute a mitigating circumstance. Mitigating circumstances, statutory and nonstatutory alike, focus on positive aspects of a defendant's character or behavior. *See, e.g.*, N.C.G.S. § 15A-2000(f); *State v. Moseley*, 338 N.C. 1, 62, 449 S.E.2d 412, 448-49 (1994) (positive mitigating circumstances listed), *cert. denied*, —- U.S. —-, — L. Ed. 2d —-, 63 U.S.L.W. 3539 (1995); *State v. Bacon*, 337 N.C. 66, 82-83, 446 S.E.2d 542, 549 (1994) (same). The categories of positive behavior recognized as mitigating do not include a defendant's failure to harm eyewitnesses. Had defendant here threatened, assaulted, or killed any bystanders, the State could have charged him with additional criminal offenses and submitted additional aggravating circumstances at his trial, such as creating the risk of death to more than one person, N.C.G.S. § 15A-2000(e)(10), or attempting to avoid lawful arrest, N.C.G.S. § 15A-2000(e)(4). We conclude that the trial court properly declined to submit the four requested nonstatutory circumstances because they did not mitigate the robbery and murder or make defendant less culpable for the crimes.

[17] Defendant next assigns as error the trial court's refusal to instruct the jury regarding his potential to be paroled if given a life sentence. Defendant requested an instruction explaining that if sentenced to life imprisonment, he would not be eligible for parole for twenty years, that parole is never an inmate's right, that the Parole Commission would determine whether release of defendant would be appropriate, and that the jury should assume the Commission would perform its duties in a correct and responsible manner. He argues the court's failure to so instruct warrants a new sentencing proceeding.

Parole eligibility is not relevant "during jury selection, closing argument, or jury deliberation in a capital sentencing proceeding." *Bacon*, 337 N.C. at 98, 446 S.E.2d at 558. A trial court should not instruct the jury regarding the meaning of "life imprisonment" absent

inquiry by the jury. *State v. Robinson*, 336 N.C. 78, 124, 443 S.E.2d 306, 329 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 650 (1995). Further, upon such an inquiry a trial court should instruct the jury not to consider the issue of parole eligibility, but to deliberate as though life imprisonment means imprisonment for life in the State's prison. *Id.* at 123-24, 443 S.E.2d at 329; *State v. Conner*, 241 N.C. 468, 471-72, 85 S.E.2d 584, 587 (1955). *Simmons v. South Carolina*, — U.S. —, 129 L. Ed. 2d 133 (1994), does not require us to overrule our precedents on this issue when, as here, the defendant remains eligible for parole if given a life sentence. *State v. Payne*, 337 N.C. 505, 516-17, 448 S.E.2d 93, 99-100.

As of 1 October 1994, a sentence of life imprisonment shall be "a sentence of imprisonment for life in the State's prison, without parole." N.C.G.S. § 15A-2002 (Supp. 1994). A trial court must now instruct a sentencing jury, in accord with that statute, "that a sentence of life imprisonment means a sentence of life without parole." *Id.* Contrary to defendant's contention, however, this new statute does not entitle him to a new sentencing proceeding. Under the law applicable at the time of defendant's trial, he is eligible for parole, and the trial court was neither required nor allowed to give an instruction on the issue of parole eligibility. This assignment of error is overruled.

[18] In another assignment of error, defendant argues that the trial court erred when it refused to give peremptory instructions on allegedly uncontroverted statutory and nonstatutory mitigating circumstances. He contends first that the court should have instructed peremptorily on the statutory mitigating circumstances that he was influenced by a mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct was impaired. We held above that the court did not err by refusing to submit these circumstances to the jury; it follows that the court did not err by failing to give peremptory instructions on them.

[19] Defendant also contends the court should have given peremptory instructions for all twenty-six of his requested nonstatutory mitigating circumstances. Defendant proposed the following peremptory instruction: "If you find that [describe mitigating circumstance] exists, and I instruct you that all of the evidence shows that this is true, you would so indicate by having your foreman write, 'Yes' in the space after this mitigating circumstance on the form." The trial court refused to give this instruction, deciding it did not accurately reflect North Carolina law to the extent that it required the jury to accord

weight to nonstatutory circumstances. "[N]onstatutory mitigating circumstances do not necessarily have mitigating value." *State v. Daniels*, 337 N.C. 243, 274, 446 S.E.2d 298, 317 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 895, 63 U.S.L.W. 3653 (1995). Jurors who determine that a nonstatutory circumstance exists must therefore decide whether it also has mitigating value. *State v. Huff*, 325 N.C. 1, 58-61, 381 S.E.2d 635, 668-70 (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). A juror properly may give a nonstatutory circumstance no weight even if the juror finds the circumstance to exist. The instruction defendant proposed failed to inform jurors that they could accord no weight to proven nonstatutory circumstances. It thus was contrary to North Carolina law, and the trial court properly refused to give it.

Our decision in *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, rendered subsequent to defendant's trial, provides further support for the trial court's decision. There we held that the pattern jury instruction for statutory mitigating circumstances should not be given for nonstatutory circumstances. This assignment of error is overruled.

[20] Defendant also assigns as error the trial court's failure to instruct the jury that in weighing the mitigating circumstances against the aggravating circumstances, it must consider any mitigating circumstance found by a juror. Defendant requested the following instruction: "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 . . . must consider any mitigating circumstance or circumstances that . . . any juror determined to exist by a preponderance of the evidence." The court refused, instructing instead that a juror must consider only those mitigating circumstances that juror determined to exist. Defendant argues that the court's instruction violated *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

We recently rejected defendant's position in *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252. There we concluded, after reviewing *McKoy*, 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." *Id.* at 50-51, 446 S.E.2d at 280. Here, as in *Skipper*, the trial court's instruction "gave each juror this individu-

alized opportunity. Thus, the instructions . . . are valid." *Id.* at 51, 446 S.E.2d at 280.

[21] Defendant argues in his next assignment of error that the trial court erred by instructing the jury that it could consider nonstatutory mitigating circumstances it found to exist and to have mitigating value when weighing aggravating and mitigating circumstances. He contends this instruction improperly allowed jurors to decide that a circumstance existed but had no mitigating value. Defendant notes that a sentencing jury must give weight to statutory mitigating circumstances it finds to exist; he then argues no constitutionally valid reason exists to treat nonstatutory mitigating circumstances differently.

We have decided this issue against defendant's position. *Payne*, 337 N.C. at 533, 448 S.E.2d at 109-10. Nonstatutory mitigating circumstances, unlike their statutory counterparts, do not have mitigating value as a matter of law. *Id.*; *State v. Lee*, 335 N.C. 244, 292, 439 S.E.2d 547, 572, *cert. denied*, —- U.S. —-, 130 L. Ed. 2d 162, *reh'g denied*, —- U.S. —-, 130 L. Ed. 2d 532 (1994). The trial court's instruction did not violate *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973, and its progeny, by precluding jurors from considering evidence offered by defendant in mitigation. We upheld a virtually identical jury instruction in *Payne*; defendant's arguments here do not warrant reversal of our precedent on this issue. This assignment of error is overruled.

PROPORTIONALITY REVIEW

[22] Having found no error in the guilt/innocence or sentencing phases, we must

> review the record to determine (1) whether the record supports the jury's finding of the aggravating circumstance[s] 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."

Payne, 337 N.C. at 536, 448 S.E.2d at 111 (quoting N.C.G.S. § 15A-2000(d)(2)). Having thoroughly examined the record, transcripts, and briefs in this case, we conclude that the evidence supports all three aggravating circumstances found by the jury, namely, that the capital felony was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); that the felony was part of a course of conduct

involving violent crimes against other persons, N.C.G.S. § 15A-2000(e)(11); and that defendant had a prior conviction of a violent felony, N.C.G.S. § 15A-2000(e)(3). The record does not suggest that the sentence of death was imposed under passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review "to compare the case at bar with other cases in the pool [as defined in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), and *Bacon*, 337 N.C. at 106-07, 446 S.E.2d at 563-64] which are roughly similar with regard to the crime and the defendant." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

Proportionality review is designed 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). It also guards against " 'the capricious or random imposition of the death penalty.' " *Bacon*, 337 N.C. at 104, 446 S.E.2d at 562 (quoting *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 (1980), *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1981)). We cannot conclude based on the record that the imposition of the death penalty in this case is aberrant or capricious.

This case is distinguishable from those in which we have held the death sentence disproportionate. In three of those cases—*State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983)—the jury convicted the defendant, or the defendant pled guilty, solely under the felony murder rule. Here, defendant was convicted on the basis of malice, premeditation, and deliberation as well as the felony murder rule. "The 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. 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 trying to shoot a different person with whom he had argued. The jury there found only one aggravating circumstance, and the defendant was only nineteen years old. Here defendant shot the victim from point-blank range during an armed robbery. The jury found three aggravating circumstances, and defendant was thirty-five years old at the time of the crime.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), we noted that the case was unlike robbery-murder cases in which the death penalty had been imposed because the jury did not find the aggravating circumstance that the defendant was engaged in a course of conduct involving another violent crime. The jury in this case found that circumstance. It also found that defendant had been convicted of previous violent crimes, an aggravating circumstance not present in *Young*.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the evidence did not clearly show how the murder occurred or how defendant acted when he encountered the victim. Here, no question exists about the circumstances of the murder, and the evidence clearly shows defendant's involvement in the crime.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the defendant attempted to obtain medical help for his victim and had no apparent motive for the killing. Here, defendant robbed the victim, who lay bleeding on the floor, and defendant had a clear motive of pecuniary gain.

We recognize that juries have imposed sentences of life imprisonment in several robbery-murder cases. However, "the fact that one, two, or several juries have returned recommendations of life imprisonment in [similar] cases . . . does not automatically establish that juries have 'consistently' returned life sentences in factually similar cases." *State v. Green*, 336 N.C. at 198, 443 S.E.2d at 47. Our review of such cases reveals that they are distinguishable and do not render the sentence of death in this case disproportionate. The jury in several of them—for example, *State v. Hill*, 308 N.C. 382, 302 S.E.2d 202 (1983); *State v. Barnette*, 307 N.C. 608, 300 S.E.2d 340 (1983); and *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78 (1982)—found that the defendant's capacity to appreciate the criminality of his conduct was impaired, or that he suffered from a mental or emotional disturbance, or both.[1] Here, by contrast, the evidence did not justify the submission of either mitigating circumstance. Defendant was fully aware of his actions on the night of the crimes; he committed a coldly calculated murder because the victim refused to hand over money from his cash register.

Further, many factually similar cases do not involve the aggravating circumstances found by the jury here. For example, in *State v.*

1. The mitigating circumstances are not listed in the opinions but are in the records of the cases maintained by this Court.

Howard, 334 N.C. 602, 433 S.E.2d 742 (1993), the jury found that the defendant committed the robbery-murder for pecuniary gain and had committed prior violent felonies, but not that the murder was part of a course of conduct involving other violent crimes. Additionally, the jury convicted the defendant solely under the felony murder rule, whereas here the jury convicted defendant under that rule as well as on the theory of premeditation and deliberation. In *State v. Marlow*, 334 N.C. 273, 432 S.E.2d 275 (1993), the jury found the murder had been committed during a burglary and for pecuniary gain, but not that the defendant had a prior history of violent felonies or that the murder was part of a violent course of conduct. The course of conduct circumstance is often present in cases where the jury imposes death instead of life imprisonment. *See State v. Lawson*, 310 N.C. at 648-49, 314 S.E.2d at 503-04. The defendants in *State v. Reeb*, 331 N.C. 159, 415 S.E.2d 362 (1992), were convicted of first-degree murder and armed robbery; as in this case, the jury found premeditation and deliberation and also applied the felony murder rule. The jury found only two aggravating circumstances: that the murder was part of a course of conduct and that it was committed while the defendant was engaged in a robbery. Unlike defendant here, neither defendant in *Reeb* had been convicted of previous violent felonies, and both had impaired capacity. The cases similar to this one in which life sentences were imposed thus are distinguishable from this one. Our review of the cases does not reveal that juries have consistently imposed sentences of life imprisonment in cases similar to this one.

Further, this case is similar to cases in which we have found the death penalty proportionate. We have upheld a sentence of death where, as in this case, the jury found the aggravating circumstances that the defendant committed the crime for pecuniary gain and during a course of conduct involving other violent crimes. *See, e.g.*, *Daniels*, 337 N.C. 243, 446 S.E.2d 298; *State v. Jones*, 336 N.C. 229, 443 S.E.2d 48, *cert. denied*, — U.S. —, 130 L. Ed. 2d 423 (1994), *reh'g denied*, — U.S. —, 130 L. Ed. 2d 676 (1995); *Green*, 336 N.C. 142, 443 S.E.2d 14; *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 found a third aggravating circumstance here: that defendant had been convicted of prior violent crimes. Additionally, the convictions in both *Green* and *Gardner* were based solely on the felony murder rule; here, the jury convicted both under that rule and on the theory of premeditation and deliberation. This case thus is more egregious

than others involving a robbery-murder in which we have held the death penalty proportionate.

We hold that defendant received a fair trial and sentencing proceeding, free of prejudicial error. Comparing this case to similar cases in which the death penalty was imposed, and considering both the crime and the defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive.

NO ERROR.

STATE OF NORTH CAROLINA v. WILLIAM DAVID LOVIN

No. 192A92

(Filed 3 March 1995)

1. Searches and Seizures § 80 (NCI4th)— detention at airport—articulable suspicion of criminal activity—legality of subsequent arrest and inculpatory statement

Officers had a reasonable and articulable suspicion that defendant had been involved in a homicide and properly detained defendant at an airport to investigate the matters about which they were suspicious where an airline employee directed the officers' attention to the defendant, and at that time the officers knew that the victim had been murdered; the victim's Porsche automobile had been taken; a person with a "lot of hair," a gold watch and large frame glasses had been seen driving the Porsche toward the airport; the Porsche was in the airport parking lot with the hood still warm; and the employee who directed the officers to defendant told them he had long brown hair, was wearing a gold watch and was acting suspiciously. Furthermore, officers could ask defendant about the keys in his possession without exceeding the circumstances of his stop, their arrest of defendant after they determined that a key in defendant's possession fit the victim's Porsche was legal, and defendant's subsequent inculpatory statement made at the sheriff's office was not the result of an illegal detention and arrest.

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. Evidence and Witnesses § 693 (NCI4th)— suppression hearing—court's refusal to place excluded answers in record—absence of prejudice

When the trial court sustained objections to questions defendant asked a witness at a hearing on his motion to suppress, the trial court should have allowed defendant to have the answers placed in the record for appeal, but defendant was not prejudiced by the court's failure to do so where the substance of the evidence defendant wanted to present was apparent from the context of the questions, and several questions of the same import were answered by the witness.

Am Jur 2d, Trial §§ 436 et seq.

Construction of provision of Rule 43(c) of the Federal Rules of Civil Procedure, and similar state provisions, providing for entry into record of evidence excluded by trial court. 9 ALR3d 508.

3. Evidence and Witnesses § 651 (NCI4th)— motion to suppress—evidence not conflicting—failure to make findings and conclusions

The trial court did not err by failing to make findings of fact or conclusions of law before denying defendant's motion to suppress after a *voir dire* hearing where there was no material conflict in the evidence, and the propriety of the trial court's ruling on the motion can be determined on the undisputed facts shown by the evidence.

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

Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters. 63 ALR3d 311.

4. Evidence and Witnesses § 188 (NCI4th)— homosexual videos in victim's condominium—inadmissibility to show aggression by victim

Two videotapes depicting violent homosexual acts which were found in a murder victim's condominium were not admissible to support defendant's contention that the victim was the aggressor with the intent to sodomize defendant and that defendant killed him in self-defense. If the tapes were admitted to prove the victim's homosexuality, they would have added little proof of this fact to testimony about defendant's homosexuality, which the State conceded, and could have been very inflammatory and unfairly prejudicial. N.C.G.S. § 8C-1, Rule 803.

Am Jur 2d, Homicide § 302.

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.

5. Evidence and Witnesses § 3201 (NCI4th)— affidavit—admissibility for corroboration—exclusion not prejudicial

An affidavit given by a defense witness to defendant's attorney which contained a prior statement consistent with his trial testimony should have been admitted to corroborate the witness's testimony. However, defendant was not prejudiced by the exclusion of this affidavit where it was prepared only a few days before trial and thus would have added little to the trial testimony, and there is no reasonable possibility that the verdict would have been different if the affidavit had been read to the jury. N.C.G.S. § 15A-1443(a).

Am Jur 2d, Witnesses §§ 641 et seq.

6. Evidence and Witnesses § 2750.1 (NCI4th)— evidence of telephone conversation—door not opened to evidence of second conversation

When the State elicited testimony from a witness as to a telephone conversation with defendant on the day of a murder, it did not open the door to cross-examination of the witness by defendant in regard to a second telephone conversation with defendant later that same day. The specific issue or particular transaction to which the State opened the door was only the first telephone conversation between defendant and the witness.

Am Jur 2d, Witnesses § 417.

7. Evidence and Witnesses § 860 (NCI4th)— impeachment of defendant's exculpatory statements—exclusion of corroborating statement—harmless error

Assuming that the State introduced a statement made by defendant to his girlfriend for the purpose of impeaching statements other witnesses testified he had made to the effect that he had killed the victim in self-defense and that the trial court erred under N.C.G.S. § 8C-1, Rule 806 by refusing to permit defendant to elicit testimony by the girlfriend on cross-examination concerning a later statement made to her by defendant to corroborate defendant's exculpatory statements, this error was not prejudicial since this testimony was not substantive evidence, and it is unlikely that the jury would have felt that an exculpatory statement by defendant to his girlfriend added much to the evidence.

Am Jur 2d, Evidence §§ 664 et seq.; Witnesses §§ 641 et seq.

8. Evidence and Witnesses § 860 (NCI4th)— defendant's letters to girlfriend—details corroborating self-defense claim—exclusion as harmless error

Assuming that two letters defendant wrote to his girlfriend in which he set forth details concerning his contention that he had killed the victim while defending himself from a homosexual assault were admissible for corroboration under Rule 806, the trial court's exclusion of these letters was not prejudicial error since defendant was able to get into evidence that he stated in the letters that he killed in self-defense, and there is no reasonable possibility that a different verdict would have been returned if defendant had put before the jury more details of the killing as corroborative evidence.

Am Jur 2d, Evidence §§ 664 et seq.; Witnesses §§ 641 et seq.

9. Evidence and Witnesses § 2908 (NCI4th)— cross-examination—opening door to redirect testimony

Testimony by defendant's girlfriend on cross-examination by defendant that defendant had "told me a different story" as to why she should leave with him opened the door for the State to have her explain this "story" on redirect examination.

Am Jur 2d, Witnesses § 425.

10. Evidence and Witnesses § 3179 (NCI4th)— prior consistent statement—corroboration—exclusion as harmless error

Where a witness testified that she first thought sounds she heard at the time the victim was killed were from a hedge clipper or gravel in a lawn mower but after learning of the victim's death she decided they could have been gunshots, testimony by a second witness that the first witness had told her that she heard shots at the approximate time the victim was killed should have been admitted for corroboration, but the exclusion of this testimony was harmless error since it would have been cumulative.

Am Jur 2d, Witnesses §§ 641 et seq.

11. Evidence and Witnesses § 2873 (NCI4th)— cross-examination—matters not already in evidence

Questions asked by the State on cross-examination of defendant's expert witness were not improper because they referred to matters not in evidence, and the trial court did not err by allowing the questions where they were designed to elicit testimony relevant to the issues in the case and were not asked in bad faith. N.C.G.S. § 8C-1, Rule 611(b).

Am Jur 2d, Witnesses §§ 471 et seq.

12. Evidence and Witnesses § 1939 (NCI4th)— expert witness—improper impeachment with article—harmless error

The trial court erred by allowing the State to impeach defendant's expert witness (a clinical psychologist) by reading to her a statement from an article that denigrated clinical psychologists when the witness had not read the article and there was no showing of its validity. However, this error was not prejudicial where the evidence of defendant's guilt was strong, the questions about the article were a small part of the cross-examination of the witness, and the questions did not impeach the methods used by the witness in her diagnosis and did not directly impeach the diagnosis.

Am Jur 2d, Expert and Opinion Evidence §§ 125 et seq.

Use of medical or other scientific treatise in cross-examination of expert witnesses. 60 ALR2d 77.

13. Jury § 270 (NCI4th)— inattentive juror—court's refusal to remove—no abuse of discretion

Although there was a showing by defendant that a juror in a murder trial might have been inattentive to parts of the case, the trial court did not abuse its discretion by refusing to remove the juror and substitute an alternate juror for him where the testimony of the chief bailiff and the observations of the court support the court's conclusion that the juror could perform his duties.

Am Jur 2d, Trial § 1705.

Constitutionality and construction of statute or court rule relating to alternate or additional jurors or substitution of jurors during trial. 84 ALR2d 1288.

14. Evidence and Witnesses § 731 (NCI4th)— question and argument about Satanism—harmless error

It was error in a murder prosecution for the court to permit the State to elicit testimony from a witness (defendant's girlfriend) that defendant had discussed Satanism with her and for the prosecutor to refer to Satanism in his final argument. However, defendant was not prejudiced by this error since there was no real contention that defendant practiced Satanism, and there was other evidence concerning bizarre behavior and conversations by defendant.

Am Jur 2d, Appeal and Error §§ 797 et seq.

Admissibility and prejudicial effect of evidence, in criminal prosecution, of defendant's involvement with witchcraft, satanism, or the like. 18 ALR5th 804.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Hyatt, J., at the 11 November 1991 Criminal Session of Superior Court, Buncombe County, upon a jury verdict of guilty of first-degree murder in a case in which the defendant was tried capitally. The defendant's motion to bypass the Court of Appeals as to additional judgments was allowed. Heard in the Supreme Court 31 January 1994.

The defendant was tried for first-degree murder. He was also tried for the larceny of an automobile, two charges of credit card theft, and two charges of credit card fraud.

The evidence showed the defendant, who was eighteen years old, killed the victim in the victim's condominium by shooting and stabbing him on 23 May 1991. The defendant contended he was defending himself from a homosexual assault. After killing the victim, the defendant took from the victim two credit cards and his Porsche automobile. The defendant made purchases using each of the credit cards and then drove the automobile to the Asheville Airport. He was arrested by law enforcement officers in the terminal of the airport.

The defendant was convicted of all charges. After a sentencing hearing, the jury recommended life in prison on the murder charge and this sentence was imposed. The defendant was sentenced to seven years in prison on the other charges to be served consecutively with the life sentence.

The defendant appealed.

Michael F. Easley, Attorney General, by Jane R. Garvey, Assistant Attorney General, for the State.

David G. Belser and Sean P. Devereux, for defendant-appellant.

WEBB, Justice.

The defendant's first assignment of error deals with a motion by the defendant to suppress all evidence and items obtained by a search of the defendant at the Asheville Airport, all evidence obtained from the defendant as a result of his arrest, and all oral and written statements of the defendant made after he was taken into custody. The court held a hearing on this motion prior to the commencement of the trial.

The evidence at the suppression hearing showed that after the defendant had killed the victim, he took the victim's watch and his wallet. He also took the victim's Porsche automobile. The defendant went to a shopping mall and had a hair weave procedure performed, which thickened and lengthened his hair. This procedure cost $340.72, and the defendant put this charge on the victim's credit card. The defendant then called the airport and made a reservation in the name of the victim to fly to Kansas. The defendant put the cost of the ticket on the credit card.

The evidence showed further that in the afternoon the victim's supervisor went to the victim's condominium and entered it with the help of a locksmith. The supervisor discovered the victim's body and called the Sheriff's Department. A bulletin was broadcast on the radio of the Sheriff's Department notifying listeners to be on the lookout for the victim's Porsche automobile. An administrative assistant for the Blue Ridge Parkway heard the broadcast. While driving home some time after 4:00 p.m., she saw a Porsche automobile which matched the description of the victim's car. She followed the automobile until it stopped at a stoplight. She stopped behind the Porsche and observed that it was being operated by a male with a "lot of hair," a gold watch, and large frame glasses. She followed the Porsche until it turned onto Airport Road. She then went to her home, called the Sheriff's Department, and reported what she had seen.

Several law enforcement officers went to the airport and found the Porsche in the long term parking lot. The hood was still warm. The officers went into the airport terminal and checked the ticket counters. They found that a reservation had been made for a flight to Kansas in the name of the victim. A ticket agent pointed the defendant out to the officers as a man who had been acting nervously at her counter. She told the officers that the defendant was acting suspiciously at "our ticket counter." She described the "suspicious guy" as having "long hair, brown hair, wearing a gold watch."

The officers approached the defendant at approximately 5:30 p.m. The officers asked the defendant for some identification and he produced his own driver's license. The defendant told the officers he had come to the airport in a Yellow Bird Cab. The officers knew that the airport was served by the Yellow Cab Company and the Red Bird Cab Company, but there was not a company named Yellow Bird Cab Company. The officers then asked the defendant to go to a stairwell for more privacy, which the defendant agreed to do.

When they reached the stairwell, one of the officers asked the defendant for permission to search his bag, to which the defendant agreed. The bag contained a Rolex watch, defendant's birth certificate, and receipts from LensCrafters in the name of the victim. One of the officers asked the defendant if he had any car keys and the defendant produced a set of keys, among which was a Porsche key. An officer took the key to the Porsche in the parking lot and determined that the key fit the Porsche. The defendant was then placed

under arrest. The defendant was patted down and the victim's wallet was found in his pocket.

When the defendant was being placed in the patrol car to be taken to the Sheriff's office, he asked, "[w]hat's going on?" He was advised that the victim was dead and he said, "when I left there this morning, he was okay."

When the defendant arrived at the Sheriff's office, he was placed in a room with Mike Bustle, a detective with the Sheriff's Department. Det. Bustle was not to interrogate the defendant but was to stay with him until Hank Whitmire, the detective in charge of the investigation, arrived. Det. Bustle explained to the defendant that he knew nothing of the case and did not want to talk to him about it. The defendant told Det. Bustle that he had done something wrong and was trying to decide what to do, and asked Det. Bustle's advice. Det. Bustle told the defendant that when he was very young he had been taught in Sunday School that the first thing was to confess and ask for forgiveness. He nevertheless asked the defendant not to talk to him anymore and told the defendant that only he could make the decision as to what to do.

Det. Whitmire arrived at approximately 7:15 p.m. He advised the defendant of his rights, and the defendant waived them. After he had waived his rights, the defendant asked Det. Bustle if he "should do what we talked about." Det. Bustle said that it would be helpful. The defendant then made an inculpatory statement. The court did not make findings of fact but denied the defendant's motion to suppress.

[1] The defendant's principal argument under his first assignment of error is that evidence which had been illegally gained was used against him. He says that the evidence seized at the airport was obtained as a result of an unconstitutional detention and that his statement to Det. Whitmire in the Sheriff's office was the result of an unconstitutional arrest. The defendant argues first that he was seized by the officers at the airport without any reasonable, articulable suspicion that he had been involved in a homicide. He argues further that as a result of the unconstitutional detention, evidence was obtained which led to his arrest. He says that his statement to the officers, made while he was being unconstitutionally held, should have been excluded.

In *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), the United States Supreme Court recognized the right of a law enforcement officer to detain a person for investigation of a crime without probable

cause to arrest him if the officer can point to specific and articulable facts, which with inferences from those facts create a reasonable suspicion that the person has committed a crime. Any investigation that results must be reasonable in light of the surrounding circumstances.

In this case, when the airline employee directed the officers' attention to the defendant the officers knew: that the victim had been murdered; that his Porsche automobile had been taken; that a person with a "lot of hair," a gold watch and large frame glasses had been seen driving the automobile toward the airport; that the Porsche was in the airport parking lot with the hood still warm; and that a clerk who directed them to the defendant told them that he had long brown hair, was wearing a gold watch and acted suspiciously. If this was not enough evidence to show probable cause that the defendant had murdered the victim, it provided the officers with articulable facts which created a reasonable suspicion that he had committed the crime. The officers could detain the defendant to investigate the matters about which they were suspicious.

When there is an investigative stop of a person based on a reasonable suspicion, any investigation must not exceed the circumstances which justified the stop. *Florida v. Royer*, 460 U.S. 491, 75 L. Ed. 2d 229 (1983). In order to resolve the suspicion in this case that the defendant had driven the Porsche to the airport, the officers could ask him for the automobile key without exceeding the circumstances that justified the stop.

The defendant contends that if the officers were justified in detaining him at the airport, any statement he made and any evidence seized should have been excluded because he had not been advised of his right to remain silent and his right to have an attorney. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). We do not believe the defendant's rights pursuant to *Miranda* were violated. The officers did not interrogate the defendant in regard to his commission of the crime. They questioned him in regard to his identity and matters incident to the investigation they were authorized to make. The defendant did not make an inculpatory statement at that time.

The defendant also says his statement made in the Sheriff's office should have been suppressed because it was the product of an illegal arrest. He bases this argument on his contention that the stop at the airport was illegal and says the illegal stop caused his arrest to be illegal. We have held that the stop was not illegal.

[2] The defendant also argues that he must have a new trial because he was denied the right to fully cross-examine witnesses at the hearing on his motion to suppress and was denied the right to have the answers put in the record for appeal. Mike Bustle testified at the hearing that he stayed with the defendant in the Sheriff's office until Hank Whitmire arrived to question him. On cross-examination, the defendant's attorney asked several questions of the witness which were designed to show that during the time he was waiting with the defendant Det. Bustle was encouraging the defendant to talk to Det. Whitmire when Det. Whitmire arrived. The court sustained objections to these questions. The court should have allowed the answers to be put in the record, but the substance of the evidence the defendant wanted to present was apparent from the context within which the questions were asked. N.C.G.S. § 8C-1, Rule 102(a)(2) (1992). We can review it. The defendant was not prejudiced by the exclusion of these answers. The questions were largely repetitious. Several questions of the same import were asked of Det. Bustle and he answered them.

When Det. Whitmire was testifying on cross-examination, the court sustained an objection to the following question: "In fact, he was led to believe during the course of the interview he didn't need to talk to a lawyer, wasn't he?" This was an argumentative question the objection to which was properly sustained. The court could make its own conclusion as to what the defendant was led to believe by hearing the evidence. Det. Whitmire was also asked, "[d]id you feel that if a lawyer came down, you wouldn't get a statement from him?" It was not error to sustain an objection to this question. What the detective felt was not relevant. The manner in which the interrogation was conducted determined whether the defendant's statement was admissible. The court sustained objections to several other questions to Det. Whitmire which were designed to show what Det. Whitmire wanted rather than what had happened at the interrogation. In this we find no error.

We also find no error in the sustaining of an objection to a question asked of one of the officers who was at the airport when the defendant was detained. The court would not allow the defendant's counsel to ask the officer whether he intended to let the defendant leave. The officer had already testified that he would not have allowed the defendant to leave. The defendant's question was repetitious.

[3] The defendant also argues under his first assignment of error that he must have a new trial or at least the case must be remanded for a

new hearing on his motion to suppress for the failure of the court to make findings of fact or conclusions of law before denying his motion to suppress. N.C.G.S. § 15A-977 provides that after a hearing on a motion to suppress evidence, the judge must make findings of fact and conclusions of law which must be set forth in the record. If there is not a material conflict in the evidence, it is not reversible error to fail to make such findings because we can determine the propriety of the ruling on the undisputed facts which the evidence shows. *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980).

In this case, there was not a material conflict in the evidence as to the facts upon which the resolution of this issue depends. The evidence as to articulable facts which gave officers a reasonable suspicion that the defendant had committed a crime was introduced without contradiction. It was not reversible error for the court not to make findings of fact or conclusions of law after the *voir dire* hearing.

This assignment of error is overruled.

[4] The defendant next assigns error to the court's refusal to allow the jury to see two pornographic videotapes which the officers found while searching the condominium of the victim. These two tapes depicted violent acts of anal intercourse which the defendant contended were similar to the attack the victim attempted to make on him. The defendant argues that this was evidence having a tendency to make the existence of a fact that was of consequence to the determination of the case more probable and was relevant pursuant to N.C.G.S. § 8C-1, Rule 401. *See State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988). The defendant argues that the tapes would have been of great value to the jury in determining whether the victim was the aggressor with the intent to sodomize him, justifying his killing of the victim in self-defense.

We believe that the fact that the victim had in his possession videotapes which depicted violent homosexual acts has little tendency to show that the victim was the aggressor with intent to sodomize the defendant. It is evidence the victim was homosexual, but the victim's homosexuality is not at issue in the case. Witnesses testified about the victim's homosexuality, and the State conceded the matter. If the tapes had been shown to the jury to prove the victim was homosexual it would have added little to the proof of this fact and could have been very inflammatory and unfairly prejudicial. N.C.G.S.

§ 8C-1, Rule 403 (1992). It was not error to exclude them. *State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986).

This assignment of error is overruled.

[5] The defendant next assigns error to the exclusion from evidence of an affidavit offered to corroborate the testimony of a witness who testified for the defendant. A corporal in the Marine Corps who had attended high school with the defendant testified that in the spring of 1989, when he was seventeen or eighteen years old, he had fallen asleep in the victim's condominium. He was awakened by the victim reaching into his trousers and fondling his penis. The corporal testified that it took "almost all my force" to repel the victim.

The State cross-examined the corporal with prior statements he had made in two interviews with his attorney, an interview with a detective and an affidavit he had given the defendant's attorney shortly before the trial. This affidavit corroborated the testimony of the corporal. The defendant then asked that the corporal be allowed to read the entire affidavit to the jury. The court refused this request.

The affidavit contained a prior statement of the witness consistent with his testimony. It was admissible to corroborate his testimony. *State v. Yancey*, 291 N.C. 656, 231 S.E.2d 637 (1977); *State v. Britt*, 291 N.C. 528, 231 S.E.2d 644 (1977). We do not believe the error in not allowing the reading of the entire affidavit was prejudicial to the defendant. The affidavit was prepared a few days before the trial. It would have added little to the weight given the testimony of the witness that shortly before the trial he had made a consistent statement to the defendant's attorney. There is not a reasonable possibility that the result of the trial would have been different had the entire affidavit been read to the jury. N.C.G.S. § 15A-1443(a) (1988). This assignment of error involves a question of the law of evidence in North Carolina. It does not, as contended by the defendant, implicate a constitutional question.

This assignment of error is overruled.

[6] The defendant next assigns error to the court's sustaining objections to questions he asked during the cross-examination of the State's witness Angela Mermis. Ms. Mermis lived in Kansas and she had been the defendant's "girlfriend." During the direct examination, she testified that the defendant called her on the day of the murder. She said:

> So I asked him, I said, "I just don't understand this," and he seemed so happy and he told me, "Well, I've just been raising a little hell this morning," and he started laughing. I said, "I don't understand what you mean." He said, "We'll talk about this later." He said he had to go shopping and buy some stuff, and that pretty well ended it at that.

The defendant elicited testimony on cross-examination of Ms. Mermis that the defendant called her again on that day while he was in jail. The following colloquy then occurred:

> Q. . . . And he also called you again later that afternoon from the jail; is that right?
>
> A. Uh-huh.
>
> Q. And you described what he told you to the investigator for the district attorney's office, Miss Betsy Ervin, and Detective George Sprinkle; is that right?
>
> A. Yes.
>
> Q. He called you collect from the jail?
>
> A. Yes.
>
> Q. And he told you he had shot a man who tried to rape him?
>
> MS. DREHER: Objection; self-serving.
>
> MR. BELSER: If your Honor please, this is—
>
> COURT: Overruled.
>
> Q. Isn't that right?
>
> A. Yes.
>
> Q. And he told you that he had shot the man in self-defense; is that right?
>
> A. Uh-huh.
>
> Q. And he said that he had seen a gun in the house, and that morning, Hodgin had called him into the room and was undressed?
>
> MS. DREHER: I'll object that it's hearsay, self-serving.
>
> COURT: Sustained.

MR. BELSER: If your Honor please, she's already gone into part of the conversation. This is the other part of the conversation.

MS. DREHER: Objection.

COURT: Objection sustained.

Q. Didn't he also tell you that Hodgin had asked him to do something he didn't want to do?

MS. DREHER: Objection; self-serving.

COURT: Sustained.

Q. You told all this to the investigator for the district attorney's office, didn't you?

A. Yes.

Q. And he told you that he was in the bedroom when he fired the first shot?

MS. DREHER: I object to the whole line.

COURT: Objection sustained.

. . . .

Q. He wrote you letters describing what happened when Mr. Hodgin assaulted him?

A. He wrote me one letter about that.

. . . .

Q. And in that letter does he describe the confrontation and the sexual assault by Mr. Hodgin?

MS. DREHER: Your Honor, I object. It's self-serving and hearsay.

COURT: Objection sustained.

The defendant argues that when the State introduced a part of a statement made by a defendant the defendant was entitled to have the rest of the statement introduced. *State v. Watts*, 224 N.C. 771, 32 S.E.2d 348 (1944). We have held that if the State introduces into evidence a statement made by a defendant, this does not open the door for the introduction of another statement made by the defendant later in the day. *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988). When

the State elicited testimony from Ms. Mermis of a statement made by the defendant earlier in the day, it did not open the door for a statement the defendant later made from the jail to Ms. Mermis. The statement did not corroborate defendant's testimony because he did not testify. It would have been hearsay testimony and was properly excluded. *State v. Stanton*, 319 N.C. 180, 353 S.E.2d 385 (1987).

The defendant, relying on *State v. Burgin*, 313 N.C. 404, 406, 329 S.E.2d 653, 656 (1985), and *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981), contends that the State, by eliciting testimony from Ms. Mermis as to a telephone conversation with the defendant, raised "specific issues" or offered "evidence as to a particular fact or transaction" which opened the door to cross-examination by the defendant in regard to the later telephone conversation. The "specific issue" or "particular . . . transaction" to which the State opened the door was the first telephone conversation between Ms. Mermis and the defendant. It did not include later telephone conversations.

[7] The defendant argues further that it was error to exclude this testimony because of the provision of N.C.G.S. § 8C-1, Rule 806, which provides in part:

> When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.

The defendant argues that the State introduced through Ms. Mermis his statement to her for the purpose of impeaching statements other witnesses testified he had made showing he had killed the victim in self-defense. He says that under these circumstances, Rule 806 gave him the right to corroborate his statements with a prior consistent statement that he killed in self-defense as if he had testified to it.

Assuming it was error not to allow the admission of this testimony to corroborate the exculpatory statements of the witness, we hold it was not prejudicial error. The testimony could not have been considered as substantive evidence. It was not likely that the jury would have felt it added much to the evidence that the defendant would make an exculpatory statement to his girlfriend.

This assignment of error is overruled.

The defendant next assigns error to the court's refusal to allow him to make an offer of proof of the testimony of Ms. Mermis if she

had been allowed to answer the questions to which objections were sustained. The defendant contends that the court should have let the defendant put those answers in the record for appellate review. In this case, the record is sufficient for us to determine the question presented. This was harmless error. *State v. Chapman*, 294 N.C. 407, 241 S.E.2d 667 (1978).

This assignment of error is overruled.

[8] The defendant next assigns error to the court's refusal to admit into evidence two letters which he had written to Ms. Mermis while he was in jail. The defendant was able to elicit testimony that he said in the letters that he had killed the victim while defending himself from homosexual assault. He wanted to use the letters to show in more detail how he contended the assault occurred.

The State asked Ms. Mermis several questions in regard to what she had done with the letters after she received them and before giving them to the defendant's attorney. The defendant contends that the State by its questions opened the door for him to have the letters put into evidence. The defendant says that by its questions the State infused the letters with relevance and they should have been admitted. The statements in the letters would have been hearsay evidence if admitted. Assuming the letters were admissible under N.C.G.S. § 8C-1, Rule 806, it was not prejudicial to exclude the letters. The defendant was able to get into evidence that he said in the letters that he killed in self-defense. We cannot hold that if the defendant had put before the jury more details of the killing as corroborative evidence, there is a reasonable possibility there would have been a different result.

This assignment of error is overruled.

[9] The defendant next assigns error to the elicitation of certain testimony from Ms. Mermis on redirect examination by the State. The defendant on cross-examination elicited testimony from Ms. Mermis that she and the defendant considered running away to California and on one occasion had started to do so. She testified that defendant "had told me a different story about why I had to leave Waukeenee other than running away."

On redirect examination, the State, over the objection of the defendant, elicited testimony from Ms. Mermis as to the story defendant told her to induce her to leave with him. She said he told her that her father had been in the Mafia and that his grandfather had been

head of a Mafia family. She testified that the defendant told her that if she would go with him to California, he would get a home for her and would get her father a good job. Later in the trial, she testified over objection that the defendant told her that he would probably serve five years for the murder and that they could then go to Mexico.

The defendant contends this testimony on redirect examination was irrelevant and prejudicial. He says it was reversible error not to exclude it. The witness had testified on cross-examination that defendant had "told me a different story" as to why she should leave with him. This opened the door for the State to have her explain on redirect examination as to the "story." *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). The testimony that the defendant told the witness that he would serve only five years for the murder was irrelevant. We do not see, however, how it was prejudicial.

This assignment of error is overruled.

[10] The defendant next assigns error to the exclusion of certain testimony in corroboration of the testimony of Ruth Bockelman. Mrs. Bockelman lived in the same building as the victim. She testified that at the approximate time the victim was shot she heard four or five "metallic reports" which, at the time, she thought was the sound of a hedge clipper or gravel in a lawn mower, but which, upon hearing news accounts of her neighbor's death, she decided could have been the sound of gunshots. On cross-examination, she testified that she told the officers all the sounds she heard could have been rocks in a lawn mower.

The defendant put on a witness who would have corroborated the testimony of Mrs. Bockelman by testifying Mrs. Bockelman told her she had heard shots at the approximate time the victim was killed. The court excluded this testimony. The tendered testimony would have corroborated the testimony of Mrs. Bockelman and should have been admitted. *State v. Royal*, 300 N.C. 515, 268 S.E.2d 517 (1980). This was harmless error. There was not a dispute that Mrs. Bockelman first thought the sound she heard was from a hedge clipper or gravel in a lawn mower. The witness' testimony would have been cumulative.

This assignment of error is overruled.

[11] The defendant next assigns error to the allowance of certain questions on cross-examination of his expert witness. Dr. Faye

Sultan, a clinical psychologist, testified as to an extensive evaluation she had done of the defendant. She concluded that the defendant suffered from a post-traumatic stress disorder and child abuse accommodation syndrome and that he reacted in terror under a mental and emotional disturbance to the sexual assault upon him.

The State, on cross-examination of Dr. Sultan, asked her if the defendant had told her he had taken cocaine the night before the killing. The State also asked Dr. Sultan whether she was aware the defendant had been in jail with someone who had used the defense which the defendant was using, thus putting the idea in the defendant's mind. The State next asked Dr. Sultan whether she would think the defendant had a preoccupation with knives if the defendant had told someone that he had engaged in a knife fight in response to the killing of his brother and that his parents had been shot to death in Germany.

The defendant says first that these questions were improper because they referred to matters not in evidence. On cross-examination, a party is not limited to asking questions about matters in evidence. N.C.G.S. § 8C-1, Rule 611(b) provides "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." The questions asked of the witness were designed to elicit testimony relevant to issues in the case. We have said, in regard to cross-examination, "generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith." *State v. Williams*, 279 N.C. 663, 675, 185 S.E.2d 174, 181 (1971). Questions asked on cross-examination will be considered proper unless the record shows they were asked in bad faith. *State v. Dawson*, 302 N.C. 581, 586, 276 S.E.2d 348, 352 (1981). There is nothing in the record to show the prosecutor's questions were asked in bad faith. The court did not abuse its discretion.

[12] The defendant also argues under this assignment of error that he must have a new trial because of other questions propounded on cross-examination of Dr. Sultan. During the cross-examination, the following colloquy occurred:

> Q. . . . Have you ever seen an article called, "An Expert Witness in Psychology and Psychiatry" written by David Foust and Jay Siskan?
>
> A. No, I have not, but I've been examined about it before.
>
> . . . .

Q. . . . did anyone point out to you that that article contains reference that studies show that profession[al] clinicians do not, in fact, make a more accurate clinical judgment than lay persons?

. . . .

A. Yes, I think that quote was read to me yesterday.

Q. And, in fact, was the follow up to that quote read to you that professional psychologists perform no better than office secretaries in distinguishing visual motor deductions on normal versus brain damaged individuals on commonly employed screening tests?

A. No, that was not read to me.

The article about which the State cross-examined Dr. Sultan was not established as a learned treatise and was not admissible as substantive evidence. N.C.G.S. § 8C-1, Rule 803(18) (1992). If this testimony was admissible, it would be for the purpose of impeaching the witness. The question is whether it was proper to allow the State to impeach the defendant's expert witness by reading to her a statement from an article that denigrated clinical psychologists when the witness had not read the article and there was no showing of its validity. We hold that this testimony should have been excluded. *See State v. Black*, 111 N.C. App. 284, 432 S.E.2d 710 (1993).

The defendant argues that this error was prejudicial. He says the accuracy of Dr. Sultan's testimony was crucial to his case and if believed could have tended to negate the element of deliberation. We cannot hold that there is a reasonable possibility that had the error in question not been committed a different result would have been reached at the trial. N.C.G.S. § 15A-1443(a) (1988). The evidence against the defendant was strong. The questioning about the article was a small part of the cross-examination of Dr. Sultan. It did not impeach the method she used in her diagnosis. It did not directly impeach the result, but referred to a statement by someone who obviously did not like the profession of psychologists. The jurors knew there were such people and were able to take this prejudice into account.

This assignment of error is overruled.

[13] The defendant next assigns error to the court's failure to remove one of the jurors and substitute an alternate juror for him. During the trial, the defendant's counsel made the court aware of the fact that a

courtroom bailiff, Paul Robinson, had told him that one of the jurors had been asleep during a part of the trial. The defendant made a motion that the juror be removed.

The court excused the jury and held a hearing on this motion. The defendant's attorney then made a statement that he had observed the juror who was asleep on several occasions during the trial. Dep. Robinson was not in the courtroom, so the court called the chief bailiff, Sgt. Ron Harwood, to the witness stand. Sgt. Harwood testified that he had observed the juror on several occasions when he thought he might be asleep, but each time he started toward the juror to investigate, the juror raised his head. Sgt. Harwood also testified that the juror got off the elevator on the wrong floor several times and on occasion had to be told which door to enter to get to the jury lounge.

The court recited that it had observed the juror during the trial and that like other jurors at times he would appear to be inattentive. The court concluded that based on the observations of Sgt. Harwood it would not remove the juror.

Later in the trial, the court allowed the defendant to call Dep. Robinson to testify further as to the juror. Dep. Robinson testified that on several occasions the juror was on the wrong floor of the courthouse and had to be directed to the floor that contained the courtroom. He said the juror seemed to be confused. He said that the juror looked as if he was asleep a good part of the time "because his head was nodding quite a bit, and sometimes he could lower his head in this manner and stay that way for several seconds before he would come back—jerk his head back up in that manner." Dep. Robinson also testified that on one occasion when a photographic exhibit was passed to the jury, the juror in question did not turn it over to look at it but simply passed it to the next juror. The court did not change its ruling after the testimony by Dep. Robinson.

The defendant contends that because one of the jurors was dysfunctional he was tried by eleven jurors in violation of the rule of *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971). In *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990), we held it was not error for the court to replace a juror who was having child-care problems. In that case we said:

> The trial court's discretion in supervising the jury continues beyond jury selection and extends to decisions to excuse a juror

and substitute an alternate. *State v. Nelson*, 298 N.C. 573, 593, 260 S.E.2d 629, 644 (1979) (juror replaced because could not appear on Saturday), *cert. denied*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980). "These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error." *Id.* (quoted in *State v. Allen*, 323 N.C. 208, 224, 372 S.E.2d 855, 864 (1988)).

State v. Davis, 325 N.C. at 628, 386 S.E.2d at 429. We can find no abuse of discretion by the court in this case. There was a showing by the defendant that a juror might have been inattentive to parts of the case, but the testimony of the chief bailiff and the observations of the court support the conclusion that the juror could perform his duties.

This assignment of error is overruled.

The defendant next assigns error to what he contends was the refusal to let him make an offer of proof on the issue of the competency of the juror to preserve this question for appellate review. The defendant does not say how any additional offer of proof could have given us a better understanding of this issue. We cannot hold the defendant was prejudiced by this ruling of the court. This assignment of error is overruled.

[14] The defendant's final assignment of error is based on a question asked of Ms. Mermis on direct examination and on her answer. The following colloquy occurred:

Q. He also talked about Satanism with you, didn't he?

MR. BELSER: Objection; motion for a mistrial and ask that the State be admonished.

COPURT: Counsel approach the bench, please.

(All counsel approach the bench.)

Q. Angie, my question to you was, "Did he also talk to you about Satanism?"

A. Yes.

The defendant argues that this question and answer together with two references by the district attorney in his final argument to Satanism constituted prejudicial error. In *State v. Kimbrell*, 320 N.C. 762, 360 S.E.2d 691 (1987), we held that it was reversible error for the State to ask the defendant on cross-examination whether he believed

in devil worship. We hold, based on *Kimbrell*, that it was error to ask Ms. Mermis whether the defendant had discussed Satanism with her.

The question is whether this was prejudicial error requiring a new trial. We hold that it is not prejudicial error. This case differs from *Kimbrell* in that the questions in that case were designed to show the defendant practiced devil worship. There was a series of questions asked of the defendant in regard to his participation with that cult. In this case, there was only one question in regard to Satanism. There were also two references to it in the jury argument which should not have been allowed. There was no real contention that the defendant practiced Satanism. There was enough other evidence of the defendant's bizarre behavior and conversations that we do not believe he was prejudiced by this testimony.

This assignment of error is overruled.

For the reasons stated in this opinion, we hold there was

NO ERROR.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

CAROLYN STANLEY AND RALPH ALLEN TRIVETTE v. JOHN MOORE AKA JOHN TYREE

No. 114PA94

(Filed 3 March 1995)

Ejectment § 37 (NCI4th)— wrongful eviction—unfair practice—recovery of treble damages and attorney fees

Where a landlord's conduct violates both the Ejectment of Residential Tenants Act and the Unfair and Deceptive Practices Act, the prohibition against punitive or treble damages in wrongful eviction actions contained in N.C.G.S. § 42-25.9(a) of the Ejectment of Residential Tenants Act does not preclude a recovery of treble damages and attorney's fees under the Unfair and Deceptive Practices Act. The provision of N.C.G.S. § 42-25.9(c) that the remedies created by the Ejectment of Residential Tenants Act are supplementary to all existing common law and statutory remedies preserves the rights of a tenant who is wrongfully

evicted to pursue alternative common law and statutory claims for relief, including claims for treble damages and attorney's fees under the Unfair and Deceptive Practices Act. The decision of *Dobbins v. Paul*, 71 N.C. App. 113, is expressly overruled to the extent that it is inconsistent with this opinion. N.C.G.S. §§ 75-16 and 75-16.1.

Am Jur 2d, Landlord and Tenant § 1246; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

Scope and exemptions of state deceptive trade practice and consumer protection acts. 89 ALR3d 399.

Award of attorneys' fees in actions under state deceptive trade practice and consumer protection acts. 35 ALR4th 12.

Coverage of leases under state consumer protection statutes. 89 ALR4th 854.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 113 N.C. App. 523, 439 S.E.2d 250 (1994), affirming a judgment and order, which, *inter alia*, denied plaintiffs' claims for treble damages and attorney's fees under the North Carolina Unfair and Deceptive Practices Act, heard by Jones (Jonathan), J., at the 9 September 1991 session of District Court, Caldwell County. Heard in the Supreme Court 15 February 1995.

Catawba Valley Legal Services, Inc., by Andrew Cogdell, for plaintiff-appellants.

No brief filed for defendant-appellee.

FRYE, Justice.

The sole issue presented on this appeal is whether the Court of Appeals erred in affirming the trial court's denial of plaintiffs' claims for treble damages and attorney's fees under Chapter 75 of the General Statutes of North Carolina (the Unfair and Deceptive Practices Act). Plaintiffs contend that the prohibition against punitive or treble damages in wrongful eviction actions contained in N.C.G.S. § 42-25.9(a) of the North Carolina Ejectment of Residential Tenants Act, Article 2A, Chapter 42 of the North Carolina General Statutes,

does not preclude them from recovering treble damages under N.C.G.S. § 75-16 and attorney's fees under N.C.G.S. § 75-16.1 of the Unfair and Deceptive Practices Act. We agree and, therefore, reverse the Court of Appeals on this issue.

The facts and circumstances surrounding this case are as follows: Sometime in July 1990, plaintiffs entered into an oral agreement with defendant's mother to lease a mobile home owned by defendant for $70.00 per week. Plaintiffs' household consisted of themselves and four minor children, including a four-month-old infant. At the time plaintiffs leased the mobile home, defendant was living out of state.

In mid-February 1991, defendant went to plaintiffs' home and demanded that they move immediately. Plaintiffs called the Sheriff's Department. Defendant was advised that summary ejectment procedures were necessary in order to regain possession of the property. That same day, defendant cut the water supply to the residence and removed the thermostat from the water heater.

The next day, defendant forced his way into the residence and demanded to know why plaintiffs had not moved. During this encounter, defendant forcibly removed the breaker box from the bedroom wall, leaving exposed live wiring. Although plaintiffs were able to restore electrical service to the residence that day, on or about 22 February, defendant went to the home and again removed the breaker box. Plaintiffs called the electric company to restore electrical service; however, while utility workers were in the process of restoring service, defendant returned to the residence and, using a hatchet, cut the underground electrical wiring leading to the home. Consequently, the utility company could not restore service due to the extensive damage done to the outside lines to the residence. Plaintiffs were left with no water or electricity and were forced to buy bottled water and other sources of heat. Over $200.00 worth of food was spoiled due to lack of refrigeration.

On 27 February 1991, plaintiffs filed a complaint in District Court, Caldwell County, alleging that defendant had trespassed on their leasehold property and subjected them to unlawful self-help eviction practices, in violation of the North Carolina Ejectment of Residential Tenants Act and the North Carolina Unfair and Deceptive Practices Act. Plaintiffs sought damages for the above claims from defendant, whom they alleged constructively evicted them from the mobile home they rented. On the same day, a temporary restraining order was issued ordering defendant to restore plaintiffs' utilities. On 13 March

1991, a preliminary injunction was issued; it also ordered defendant to restore the utilities.

Defendant failed to respond to the complaint, and on 4 April 1991, plaintiffs filed a motion for entry of default. On that same day, the trial court entered an order for contempt against defendant for his failure to comply with the court's previous orders of 27 February and 13 March 1991. As part of the contempt order, the trial court ordered defendant to pay to plaintiffs $820.00 in expenses and $1,000 in attorney's fees.

On 5 August 1991, plaintiffs filed a motion for judgment by default. A hearing was held on the issue of damages in District Court, Caldwell County, on 12 September 1991. The trial court found that plaintiffs had been damaged, pursuant to N.C.G.S. § 42-25.9, in the amount of $798.00 in actual damages. The court further awarded plaintiffs $1.00 in nominal damages and $100.00 in punitive damages on the trespass claim. In addition, the court entered a second order for contempt for defendant's failure to comply with the previous contempt order and ordered defendant to pay $798.00 to plaintiffs (or get set-off in a like amount) and to pay $1,000 in attorney's fees. The trial court denied plaintiffs' claim for relief pursuant to the Unfair and Deceptive Practices Act and their application for attorney's fees. Plaintiffs moved for reconsideration of the Unfair and Deceptive Practices Act determination and the denial of further attorney's fees; however, the trial court ruled that it would not reconsider either claim.

On plaintiffs' appeal, the Court of Appeals concluded that plaintiffs had clearly established a claim under the Unfair and Deceptive Practices Act. This conclusion is not challenged on this appeal. However, that court also affirmed the trial court's denial of treble damages and attorney's fees under the Act, concluding that its prior decision in *Dobbins v. Paul*, 71 N.C. App. 113, 321 S.E.2d 537 (1984), and N.C.G.S. § 42-25.9(a) precluded recovery of punitive or treble damages in actions for wrongful eviction. On 16 June 1994, this Court allowed plaintiffs' petition for discretionary review of that portion of the Court of Appeals' decision which denied plaintiffs' claims for treble damages and attorney's fees under the Unfair and Deceptive Practices Act.

In affirming the trial court's denial of plaintiffs' claims for treble damages and attorney's fees, the Court of Appeals relied upon binding precedent from that court. In *Dobbins v. Paul*, 71 N.C. App. 113,

321 S.E.2d 537, the plaintiff was wrongfully evicted by her landlords and filed a complaint seeking, *inter alia*, compensatory damages for wrongful eviction and breach of warranty of quiet enjoyment, punitive damages, treble damages for unfair trade practices, and reasonable attorney's fees. The Court of Appeals affirmed the trial court's grant of directed verdicts for the defendant landlords on the treble damages and punitive damages claims, stating:

> Plaintiff's evidence having shown that she was wrongfully evicted . . . after her lease was in effect, plaintiff's statutory remedy for damages under G.S. 42-25.9(a) attached. . . .
>
> In that the statute expressly disallows treble or punitive damages in such cases, it is clear that the trial court correctly allowed defendants' motion for a directed verdict as to . . . such damages.

Id. at 117, 321 S.E.2d at 541 (footnote omitted).

While constrained to follow the precedent of *Dobbins* in the present case, the Court of Appeals astutely recognized the danger in limiting tenants, such as plaintiffs, to recovering only their actual damages. Judge (now Justice) Orr wrote for the court:

> While we are bound by the rule which denies a tenant recovery of punitive or treble damages as a result of her constructive eviction due to the exclusivity of the remedies under N.C.G.S. § 42-25.9(a), we note that such a result would appear inappropriate when it is clear that in North Carolina a landlord may be held liable pursuant to G.S. § 75-1.1 *et seq.*, for merely failing to maintain a rental unit in fit condition. Common sense dictates that if a landlord must make necessary repairs to a rental unit in order to avoid liability for treble damages and attorney's fees under the Unfair Trade Practices Act, *see e.g.*, *Allen [v. Simmons]*, 99 N.C. App. 636, 394 S.E.2d 478 (1990)], and *Foy [v. Spinks]*, 105 N.C. App. 534, 414 S.E.2d 87 [(1992)], he should not be able to actively create an uninhabitable condition in the rental unit in order to force a tenant to leave, exposing himself only to actual damages incurred by the tenant under G.S. § 42-25.9(a). By engaging in intentionally tortious conduct, he could limit his liability, unless a plaintiff elects to forego the remedies of G.S. § 42-25, and brings suit specifically pursuant to Chapter 75.

Stanley v. Moore, 113 N.C. App. 523, 527, 439 S.E.2d 250, 252-53 (1994). We agree that it is inappropriate to limit a tenant's recovery to actual damages where a landlord's conduct violates both the Eject-

ment of Residential Tenants Act and the Unfair and Deceptive Practices Act and the tenant seeks recovery under both Acts.

N.C.G.S. § 42-25.9, which designates the remedies available to tenants under the Ejectment of Residential Tenants Act, provides, in pertinent part:

> (a) If any lessor, landlord, or agent removes or attempts to remove a tenant from a dwelling unit in any manner contrary to this Article, the tenant shall be entitled to recover possession or to terminate his lease and the lessor, landlord or agent shall be liable to the tenant for damages caused by the tenant's removal or attempted removal. *Damages in any action brought by a tenant under this Article shall be limited to actual damages as in an action for trespass or conversion and shall not include punitive damages, treble damages or damages for emotional distress.*
>
> . . . .
>
> (c) The remedies created by this section are *supplementary to all existing common-law and statutory rights and remedies.*

N.C.G.S. § 42-25.9 (1994) (emphases added).

In deciding that treble damages under the Unfair and Deceptive Practices Act were unavailable in a wrongful eviction action, the Court of Appeals in *Dobbins* focused only on subsection (a) of N.C.G.S. § 42-25.9. However, the conclusion reached by the *Dobbins* court is expressly contradicted by the plain language of subsection (c) of the statute, which provides that the remedies provided under the Ejectment of Residential Tenants Act are supplementary to all existing common law and statutory remedies. We are convinced that the language of subsection (c) expressly preserves the rights of a tenant who is wrongfully evicted to pursue alternative common law and statutory claims for relief, including claims for treble damages and attorney's fees under the Unfair and Deceptive Practices Act, an Act which predated the enactment of the Ejectment of Residential Tenants Act. Accordingly, we must reverse the decision of the Court of Appeals on this issue. Furthermore, to the extent the Court of Appeals' decision in *Dobbins v. Paul*, 71 N.C. App. 113, 321 S.E.2d 537, is inconsistent with this opinion, it is expressly overruled.

Our interpretation of the statute is supported by the history of landlord/tenant law in this state. Prior to the enactment of the Ejectment of Residential Tenants Act, the common law prohibited forcible

reentry by a landlord but allowed a landlord to use peaceful means or to resort to the courts in order to regain possession of the leased premises. *See Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981) (narrowing the definition of peaceful self-help by holding that any entry against the tenant's will is a forcible entry). In 1977, the Court of Appeals held that a landlord's trespass upon the leased premises, eviction of the tenant without resort to judicial process, and conversion of the tenant's personal property constituted unfair or deceptive acts or practices in commerce within the meaning of N.C.G.S. § 75-1.1. *Love v. Pressley*, 34 N.C. App. 503, 517, 239 S.E.2d 574, 583 (1977), *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978).

In 1981, the legislature further expanded the protections afforded residential tenants by adopting the Ejectment of Residential Tenants Act, which prohibited all self-help evictions in residential tenancies and mandated judicial proceedings in every eviction. N.C.G.S. § 42-25.6 (1994) (providing that the summary ejectment procedures of Article 3, Chapter 42A are the proper vehicle for a tenant's eviction). It is clear that in enacting this statute, the legislature supplanted the common law as to peaceful self-help evictions and created the supplemental remedy of actual damages for such evictions because no such remedy existed at common law. Accordingly, in light of the legislature's intent to expand the protections afforded residential tenants, we conclude that, in adopting subsection (c) of N.C.G.S. § 42-25.9 as part of the Act, the legislature intended to specifically preserve "all existing common-law and statutory rights and remedies," including a tenant's right to pursue an unfair or deceptive practices claim.

Our interpretation of the statute is also consistent with prior decisions of this Court holding that violations of statutes designed to protect the consuming public and violations of established public policy may constitute unfair and deceptive practices. This Court has previously held that the violation of a statute designed to protect the consuming public may constitute an unfair and deceptive practice, even where the statute itself does not provide for a private right of action. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 343 S.E.2d 174 (1986) (action based on violation of N.C.G.S. § 58-54.4 (now § 58-63-15), which regulated the insurance industry); *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E.2d 677 (1985) (involving violation of N.C.G.S. § 95-47.6, which regulates private personnel services). We have also stated that a practice is unfair when it offends established public policy. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d

397 (1981). The Ejectment of Residential Tenants Act undoubtedly is intended to protect the consuming public, specifically consumers of residential rental housing, and also provides for a private cause of action. Furthermore, the Act embodies the public policy of this state, as determined by the legislature, that residential tenants not be evicted through self-help measures without resort to judicial process. N.C.G.S. § 42-25.6 ("It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, . . . only in accordance with the procedure prescribed in Article 3 of this Chapter."). Accordingly, it is clear that conduct which violates the Ejectment of Residential Tenants Act may also constitute a violation of the Unfair and Deceptive Practices Act, thus giving rise to an award of treble damages and attorney's fees under that Act.

Furthermore, our conclusion is consistent with the general rule that a party may plead alternative theories of recovery based on the same conduct or transaction and then make an election of remedies. *See Smith v. Gulf Oil Corp.*, 239 N.C. 360, 79 S.E.2d 880 (1954) (stating that the purpose of an election of remedies is not to prevent recourse to any remedy, but to prevent a plaintiff from recovering inconsistent remedies or from receiving double redress of a single wrong); *Wilder v. Hodges*, 80 N.C. App. 333, 342 S.E.2d 57 (1986) (noting that when the same course of conduct supports claims for fraud and for an unfair and deceptive trade practice, recovery can be had on either claim, but not on both); *see also Ellis v. Northern Star*, 326 N.C. 219, 227-28, 388 S.E.2d 127, 132 ("Plaintiffs may in proper cases elect to recover either punitive damages under a common law claim or treble damages under N.C.G.S. § 75-16, but they may not recover both."), *reh'g denied*, 326 N.C. 488, 392 S.E.2d 89 (1990). *But see United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (1993) (recovery of punitive damages under a common law claim and attorney's fees pursuant to an unfair practices claim not prohibited where recoveries serve different interests and are not based on the same conduct).

For the foregoing reasons, that portion of the Court of Appeals' decision that affirmed the trial court's denial of plaintiffs' claims for treble damages and attorney's fees under the Unfair and Deceptive Practices Act is reversed. Consequently, this case is remanded to that court for further remand to District Court, Caldwell County, for further proceedings not inconsistent with this decision.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA v. STEVE ALLEN CHEEK

No. 3PA94

(Filed 3 March 1995)

Criminal Law § 1283 (NCI4th)— habitual felon indictment— predicate substantive offense—allegation not required

An indictment against defendant as a habitual felon was not required by N.C.G.S. § 14-7.3 to refer specifically to the predicate substantive felony charge against defendant. Rather, the habitual felon indictment fully comported with the requirements of § 14-7.3 by setting forth the three prior felony convictions relied on by the State, the dates those offenses were committed, the name of the state against which they were committed, the dates defendant's guilty pleas for these offenses were entered, and the identity of the court wherein these convictions took place. The decisions of *State v. Moore*, 102 N.C. App. 434, and *State v. Hawkins*, 110 N.C. App. 837, are overruled to the extent that they hold that a habitual felon indictment must specifically reference the predicate substantive felony on which the defendant is also being tried.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 ALR2 1196.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished opinion of the Court of Appeals, reported at 113 N.C. App. 203, 438 S.E.2d 759 (1993), arresting judgment on defendant's conviction as a habitual felon entered by Martin (Lester P.), J., at the

7 October 1991 Criminal Session of Superior Court, Guilford County, and remanding for entry of judgment on the conviction for possession of marijuana with intent to sell and deliver. Heard in the Supreme Court 10 January 1995.

Michael F. Easley, Attorney General, by Jeffrey P. Gray and Patricia Bly Hall, Assistant Attorneys General, for the State-appellant and -appellee.

Frederick G. Lind, Assistant Public Defender, for defendant-appellant and -appellee.

PARKER, Justice.

Defendant was indicted in two separate indictments for possession of marijuana with intent to sell and deliver and for being a habitual felon. Defendant was convicted of both charges in a two-step procedure pursuant to N.C.G.S. § 14-7.5. First, defendant was convicted of the predicate substantive felony of possession of marijuana with intent to sell and deliver. After his conviction on this charge, defendant moved to dismiss the habitual felon indictment on the ground that the indictment did not state the predicate substantive felony of possession of marijuana with intent to sell and deliver. This motion was denied by the trial court, and defendant was subsequently convicted as a habitual felon. The trial judge consolidated the convictions for sentencing, found the aggravating factor of an additional prior conviction, and sentenced defendant to a term of twenty years' imprisonment.

A unanimous panel of the Court of Appeals found no error in defendant's conviction for possession of marijuana with intent to sell and deliver but arrested judgment on defendant's conviction as a habitual felon. The Court of Appeals held that the indictment against defendant as a habitual felon was fatally defective because it failed to refer specifically to the predicate substantive charge against defendant for possession of marijuana with intent to sell and deliver. As a result of this holding, the Court of Appeals remanded defendant's conviction for possession of marijuana with intent to sell and deliver for entry of "proper judgment." The Court of Appeals also held that as a result of the remand, the substantive charge of possession with intent to sell and deliver marijuana had not been prosecuted to completion but remained pending so that a new habitual felon proceeding could attach. Both the State and defendant petitioned for discre-

tionary review, and this Court allowed both petitions. We will first address the issues raised by the State.

The State first contends that the Court of Appeals erred in concluding that defendant's habitual felon indictment was fatally defective since it did not specifically refer to defendant's indictment for possession of marijuana with intent to sell and deliver. We agree with the State that a habitual felon indictment is not required to specifically refer to the predicate substantive felony and conclude that the Court of Appeals erred on this issue.

The Habitual Felons Act, N.C.G.S. §§ 14-7.1 to -7.6 (1993), provides for indictment as a habitual felon of a defendant who has been convicted of or pled guilty to three felony offenses. *State v. Allen*, 292 N.C. 431, 432-33, 233 S.E.2d 585, 587 (1977). "The effect of such a proceeding 'is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past.' " *Id.* at 435, 233 S.E.2d at 588 (quoting *Spencer v. Texas*, 385 U.S. 554, 556, 17 L. Ed. 2d 606, 609 (1967)). The Habitual Felons Act does not authorize an independent proceeding to determine defendant's status as a habitual felon separate from the prosecution of a predicate substantive felony, and the habitual felon indictment is necessarily ancillary to the indictment for the substantive felony. *Id.* at 434, 233 S.E.2d at 587.

N.C.G.S. § 14-7.3 sets forth the requirements for a habitual felon indictment and provides:

> An indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony. An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place. No defendant charged with being an habitual felon in a bill of indictment shall be required to go to trial on said charge within 20 days of the find-

ing of a true bill by the grand jury; provided, the defendant may waive this 20-day period.

N.C.G.S. § 14-7.3 (1993)[1]. This procedure contemplates two separate indictments, one for the predicate substantive felony and one for the ancillary habitual felon charge. *State v. Allen*, 292 N.C. at 433, 233 S.E.2d at 587. "One basic purpose behind [the] Habitual Felons Act is to provide notice to defendant that he is being prosecuted for some substantive felony as a recidivist." *Id.* at 436, 233 S.E.2d at 588.

The Court of Appeals relied on two of its prior cases to support its interpretation of the notice requirements of N.C.G.S. § 14-7.3. In *State v. Moore*, 102 N.C. App. 434, 402 S.E.2d 435 (1991), the Court of Appeals held that it was error to sentence the defendant as a habitual felon when the predicate substantive felony for which he was convicted was not specified in the habitual offender indictment, as the defendant did not have sufficient notice of that charge against him. In that case, two of three predicate substantive felonies were listed on the habitual offender indictment; and the defendant was convicted of only the third, unlisted felony. *Id.* at 438, 402 S.E.2d at 437. In *State v. Hawkins*, 110 N.C. App. 837, 431 S.E.2d 503, *disc. rev. dismissed*, 334 N.C. 624, 435 S.E.2d 345 (1993), the Court of Appeals relied on *Moore* to hold that the defendant's habitual offender indictment was fatally defective because it did not specifically refer to the predicate substantive felony.

Based on our reading of N.C.G.S. § 14-7.3, we conclude that a requirement that the habitual felon indictment specifically refer to the predicate substantive felony is not supported by the plain wording of the statute. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Nothing in the plain wording of N.C.G.S. § 14-7.3 requires a specific reference to the predicate substantive felony in the habitual felon indictment. The statute requires that the State give defendant notice of the felonies on which it is relying to support the habitual felon charge; nowhere in the statute does it mention the predicate substantive felony or require it to be included in the indictment.

1. N.C.G.S. §§ 14-7.1 to -7.6, the Habitual Felons Act, were originally enacted in 1967. N.C.G.S. § 14-7.3, which sets forth the requirements for a habitual felon indictment, has not been amended since that time.

Defendant's misunderstanding of the notice required in a habitual felon indictment apparently stems from his reliance on *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563, *cert. denied*, 434 U.S. 998, 54 L. Ed. 2d 493 (1977). In *Squire*, this Court held that an indictment must allege all the elements of the offense charged to provide defendant with sufficient notice to enable him to prepare an adequate defense. *Id.* at 506, 234 S.E.2d at 570. Defendant contends that it is necessary that he have notice of the predicate substantive felony to which the habitual felon indictment is ancillary so that he can defend himself against that particular charge.

However, a defendant charged as a habitual felon is not defending himself against the predicate substantive felony, but against a charge that he has at least three prior felony convictions. The trial for the substantive felony is held first, and only after defendant is convicted of the substantive felony is the habitual felon indictment revealed to and considered by the jury. N.C.G.S. § 14-7.5 (1993)[2]. N.C.G.S. § 14-7.3 requires the State to allege all the elements of the offense of being a habitual felon thereby providing a defendant with sufficient notice that he is being tried as a recidivist to enable him to prepare an adequate defense to that charge.

To the extent that *Moore* and *Hawkins* hold that a habitual felon indictment must specifically reference the predicate substantive felony on which defendant is also being tried, those cases are expressly overruled.

The State further contends that the Court of Appeals erred in arresting judgment on defendant's habitual felon conviction on the grounds that the habitual felon indictment was fatally defective. The habitual felon charge was consolidated with defendant's sentence on the predicate substantive felony; therefore, the Court of Appeals remanded that charge for an entry of "proper judgment." As we have found error in the basis on which the Court of Appeals found the habitual felon indictment defective, we agree with the State that the Court of Appeals erred in arresting judgment on the habitual felon charge and in remanding the substantive felony charge for entry of proper judgment.

Defendant's habitual felon indictment fully comports with the requirements of N.C.G.S. § 14-7.3 by setting forth the three prior felony convictions relied on by the State, the dates these offenses

2. N.C.G.S. § 14-7.5 was originally enacted in 1967 as part of the Habitual Felons Act and has not been amended since that time.

were committed, the name of the state against whom they were committed, the dates defendant's guilty pleas for these offenses were entered, and the identity of the court wherein these convictions took place. Since the indictment against defendant was not defective, the judgment against defendant as a habitual felon was proper and must be reinstated.

In light of our decision to reinstate the habitual felon judgment against defendant, it is unnecessary to address defendant's contentions that the Court of Appeals erred in holding that he could be reindicted as a habitual felon on remand.

For the foregoing reasons, we reverse the decision of the Court of Appeals and remand to that court for further remand to the Superior Court, Guilford County, for reinstatement of the judgments previously entered.

REVERSED AND REMANDED.

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

LINDA R. SHARP v. D. KEITH TEAGUE AND D. KEITH TEAGUE, P.A.

No. 155PA94

(Filed 3 March 1995)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 113 N.C. App. 589, 439 S.E.2d 792 (1994), affirming a judgment of Owens, J., entered on 24 September 1992 in Superior Court, Dare County. Heard in the Supreme Court 14 February 1995.

Carol M. Schiller for plaintiff-appellant.

Baker, Jenkins, Jones & Daly, P.A., by Ronald G. Baker and Kevin N. Lewis, for defendants-appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

TATE v. CHRISTY

[339 N.C. 731 (1995)]

CYNTHIA RAYFIELD TATE AND CAROL T. TAYLOR v. ARTHUR L. CHRISTY

No. 171A94

(Filed 3 March 1995)

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 114 N.C. App. 45, 440 S.E.2d 858 (1994), finding no error in the judgment of Guice, J., at the 19 October 1992 session of Superior Court, Gaston County and affirming the order of Guice, J., at the 14 December 1992 session of Superior Court, Gaston County. Heard in the Supreme Court 15 February 1995.

James, McElroy & Diehl, P.A., by Richard B. Fennell, for plaintiff-appellant Tate; and Tim L. Harris & Associates, by Jerry N. Ragan, for plaintiff-appellant Taylor.

Stott, Hollowell, Palmer & Windham, by Martha Raymond Thompson, for defendant-appellee.

PER CURIAM.

Justice Orr recused and took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Nesbit v. Howard*, 333 N.C. 782, 429 S.E.2d 730 (1993).

AFFIRMED.

BARLOWE v. BARLOWE

[339 N.C. 732 (1995)]

GARY O. BARLOWE v. MARCELLA D. BARLOWE

No. 154A94

(Filed 3 March 1995)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 113 N.C. App. 797, 440 S.E.2d 279 (1994), affirming the equitable distribution judgment entered by Honeycutt, J., on 2 July 1993 in District Court, Alexander County. Heard in the Supreme Court 16 February 1995.

Edward Jennings for plaintiff-appellant.

Homesley, Jones, Gaines & Fields, by Edmund L. Gaines, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE v. BALLEW

[339 N.C. 733 (1995)]

STATE OF NORTH CAROLINA v. DEVON EL BALLEW

No. 141A94

(Filed 3 March 1995)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 113 N.C. App. 674, 440 S.E.2d 565 (1994), finding no error in a trial before Sitton, J., in Superior Court, Gaston County, in which defendant was sentenced to judgments of imprisonment upon his conviction of two counts of first-degree rape and one count of sexual activity by a substitute parent. Heard in the Supreme Court 15 February 1995.

Michael F. Easley, Attorney General, by K.D. Sturgis, Assistant Attorney General, for the State.

Reid C. James for defendant-appellant.

PER CURIAM.

AFFIRMED.

ONER MACARTHUR STEFFEY AND PATRICIA STEFFEY v. MAZZA CONSTRUCTION GROUP, INC. AND CITY OF BURLINGTON

No. 117PA94

(Filed 3 March 1995)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 113 N.C. App. 538, 439 S.E.2d 241 (1994), reversing the order of the trial court entered by Allen (J.B., Jr.), J., on 11 September 1992 in Superior Court, Alamance County. Heard in the Supreme Court 13 February 1995.

Donaldson & Horsley, P.A., by Jay A. Gervasi, Jr., and William F. Horsley, for plaintiff-appellees.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Cathleen M. Plaut, for defendant-appellant City of Burlington.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. JONES

[339 N.C. 735 (1995)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
WILLIAM QUENTIN JONES	)	

No. 395A91-3

(Filed 8 March 1995

This cause is before the Court upon the defendant's Petition for Writ of Certiorari to review the Order of the Superior Court entered 27 February 1995, denying defendant's motion for appointment of counsel for the purpose of filing a motion for appropriate relief and upon defendant's Motion for Stay of Execution pending disposition of any motion for appropriate relief.

The Petition for Certiorari is allowed for the sole purpose of entering the following order:

> This cause is remanded to the Superior Court, Wake County, for the purpose of appointment of counsel to represent the defendant in filing a motion for appropriate relief. Upon appointment of counsel, the Superior Court shall order that the motion for appropriate relief be filed within 120 days of his appointment.
>
> The Motion for Stay of Execution is allowed pending further order of this Court upon appropriate motion.

By order of the Court in Conference, this the 8th day of March, 1995.

s/Orr, J.
For the Court

BRITTAIN v. CINNOCA

No. 546P94

Case below: 111 N.C.App. 653

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 March 1995.

BROOKWOOD UNIT OWNERSHIP ASSN. v. DELON

No. 51P95

Case below: 117 N.C.App. 613

Petition by defendants for writ of supersedeas denied 2 March 1995. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied and stay dissolved 2 March 1995.

BRYANT v. ADAMS

No. 590P94

Case below: 116 N.C.App. 448

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

BUCHANAN v. ATLANTIC INDEMNITY CO.

No. 541PA94

Case below: 116 N.C.App. 735

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 2 March 1995.

CUSTOM MOLDERS, INC. v. AMERICAN YARD PRODUCTS, INC.

No. 326PA94

Case below: 115 N.C.App. 156

338 N.C. 514

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 March 1995 upon reconsideration ex mero motu. Petition by plaintiff to rehear pursuant to Rule 31 dismissed 2 March 1995.

DAVIS v. TOWN OF SOUTHERN PINES

No. 598P94

Case below: 116 N.C.App. 663

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

ECHOLS v. ZARN, INC.

No. 538A94

Case below: 116 N.C.App. 364

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 allowed 2 March 1995.

ENNS v. ZAYRE CORP.

No. 591A94

Case below: 116 N.C.App. 687

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 2 March 1995. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 March 1995. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

FISH v. STEELCASE, INC.

No. 605P94

Case below: 116 N.C.App. 703

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 March 1995.

FRASIER v. DUN-WELL JANITORIAL SERVICES

No. 49P95

Case below: 117 N.C.App.463

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

GUNTER v. ANDERS

No. 359P94

Case below: 339 N.C. 612

Petition by plaintiffs to rehear pursuant to Rule 31 dismissed 2 March 1995.

HAMBRIGHT v. EDWARDS

No. 46P95

Case below: 117 N.C.App. 463

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

HARWOOD v. PEACOCK

No. 575P94

Case below: 116 N.C.App. 735

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

LIDA MANUFACTURING CO. v. U.S. FIRE INS. CO.

No. 607PA94

Case below: 116 N.C.App. 592

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 2 March 1995.

McLEAN v. MECHANIC

No. 526P94

Case below: 116 N.C.App. 271

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

MORRISON-TIFFIN v. HAMPTON

No. 37P95

Case below: 117 N.C.App. 494

Motion by defendants to dismiss the appeal for lack of substantial constitutional question allowed 2 March 1995. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

PEACE RIVER ELECTRIC COOPERATIVE v.
WARD TRANSFORMER CO.

No. 567P94

Case below: 116 N.C.App. 493

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

QUAKER STATE CORP. v. ALLIED OIL & MOTOR CO.

No. 30P95

Case below: 117 N.C.App. 613

Notice of appeal by defendants (W.T. Denman, III and Charles E. Russell) (substantial constitutional question) dismissed 2 March 1995. Petition by defendants (W.T. Denman, III and Charles E. Russell) for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

SEARCY v. SEARCY

No. 18P95

Case below: 117 N.C.App. 305

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

STATE v. ATWATER

No. 621P94

Case below: 110 N.C.App. 314

Petition by defendant (Fennell) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 March 1995.

STATE v. BRAXTON

No. 24P95

Case below: 117 N.C.App. 305

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

STATE v. CONAWAY

No. 389A92

Case below: 339 N.C. 487

Motion by defendant for temporary stay of mandate denied 2 March 1995. Motion by defendant for reconsideration denied 2 March 1995.

STATE v. FIELDS

No. 47P95

Case below: 117 N.C.App. 464

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 March 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

STATE v. FLOYD

No. 390A94

Case below: 115 N.C.App. 412

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 2 March 1995.

STATE v. HOWELL

No. 534P94

Case below: 116 N.C.App. 491

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 March 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

STATE v. HUNT

No. 17A91

Case below: 339 N.C. 622

Upon motion by defendant for reconsideration of the opinion originally filed on 30 December 1994, issuance of the mandate was temporarily stayed 19 January 1995 pending further order of the Court. Motion by the defendant for reconsideration was denied on 2 March 1995.

STATE v. KEITT

No. 6P95

Case below: 117 N.C.App. 465

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

STATE v. LILLY

No. 20A95

Case below: 117 N.C.App. 192

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 2 March 1995.

STATE v. WILLIAMS

No. 28P95

Case below: 117 N.C.App. 614

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

STATE v. WILLIAMS

No. 524P94

Case below: 116 N.C.App. 225

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 March 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

THOMPSON v. NATIONWIDE MUTUAL INS. CO.

No. 615P94

Case below: 117 N.C.App. 140

Petition by defendant (Nationwide) for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

TURNER v. LA PETITE ACADEMY

No. 22P95

Case below: 117 N.C.App. 467

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

UNISUN INS. CO. v. GOODMAN

No. 31P95

Case below: 117 N.C.App. 454

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

WELLING v. WALKER

No. 42PA95

Case below: 117 N.C.App. 445

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 2 March 1995.

YEOMAN v. BOONE CONST. CO.

No. 592P94

Case below: 117 N.C.App. 140

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

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

PETITION TO REHEAR

SWANSON v. STATE

No. 64PA91-3

Case below: 335 N.C. 674

Motion by plaintiffs to suspend rules to allow rehearing denied 2 March 1995.

APPENDIXES

AMENDMENT TO THE
RULES AND REGULATIONS OF THE
NORTH CAROLINA STATE BAR
REGARDING LEGAL SPECIALIZATION
HEARINGS AND APPEALS

AMENDMENT TO THE
RULES AND REGULATIONS OF THE
NORTH CAROLINA STATE BAR
REGARDING MEETINGS OF THE COUNCIL

AMENDMENT TO THE RULES AND REGULATIONS OF THE THE NORTH CAROLINA STATE BAR REGARDING LEGAL SPECIALIZATION HEARINGS AND APPEALS

The following amendment to the rules, regulations, and the certificate of organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 14, 1995.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. ID .1801(b)(1) ("Reconsideration of applications, failure of written examinations, and appeals"), be amended by striking the words, "but may upon request be furnished a copy of all questions and answers upon which he or she did not receive full credit on the examination. The costs of the reproduction of the examination shall be borne by the applicant." at the end of the rule, so that the entire rule shall read as follows:

> Within 30 days of the mailing of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director. The applicant shall not remove the examination from the board's office.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 14, 1995.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of May, 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 1st day of June, 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 1st day of June, 1995.

s/Orr, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR REGARDING MEETINGS OF THE COUNCIL

The following amendment to the rules, regulations, and the certificate of organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 14, 1995.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 1A .0601 ("Meeting time of Council meetings") be amended by striking the words, "on the first Friday after the second Monday," in the first sentence of the rule, so that the entire rule shall read as follows:

> Regular meetings of the council shall be held in each of the months of January, April, and July, at such time and place after such notice (but not less than 30 days) as the council may determine; and on the day before the annual meeting of the North Carolina State Bar, at the location of said annual meeting. Any regular meeting may be adjourned from time to time as a majority of members present may determine.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 14, 1995.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of May, 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 1st day of June, 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 1st day of June, 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

ACTIONS AND PROCEEDINGS

§ 10 (NCI4th). Requirement for controversy between parties; mootness

Plaintiff Simeon's claim challenging the statutes which authorize the district attorney to set the criminal trial calendar was not rendered moot when plaintiff pled guilty to two felony assault charges and was sentenced to time served on one count and received a PJC on the other. **Simeon v. Hardin,** 358.

Assuming that plaintiff Zegler's claim challenging the statutes which authorize the district attorney to set the trial calendar was rendered moot when the criminal charges against this plaintiff were dismissed, this case belongs to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of unnamed members of the class, and plaintiff may continue to represent the interests of the class of similarly situated criminal defendants alleged in plaintiffs' complaint. **Ibid.**

APPEAL AND ERROR

§ 147 (NCI4th). Preserving question for appeal; necessity of request, objection, or motion

A first-degree murder defendant being retried waived his right to assign error to his testimony from his first trial regarding a prior conviction where defendant objected to the introduction of the testimony but there were no specific objections to the questions concerning his plea. **State v. Hunt,** 622.

§ 203 (NCI4th). Appeal in civil actions generally; notice of appeal

The trial court's denial of plaintiffs' motion to supplement their complaint so as to satisfy the seven-year requirement for color of title was not before the appellate courts where plaintiffs failed to properly give notice of their intent to appeal the denial of their motion. **Foreman v. Sholl,** 593.

§ 451 (NCI4th). Supreme Court review of Court of Appeals generally

Plaintiffs' appeal in an action to quiet title based upon adverse possession under color of title is dismissed where the Court of Appeals held that the seven-year period had not run at the time this action was instituted, there was no dissent as to this issue in the Court of Appeals, and this issue is dispositive of plaintiffs' appeal. **Foreman v. Sholl,** 593.

ARSON AND OTHER BURNINGS

§ 37 (NCI4th). Jury instructions; lesser included offense of attempted arson

There was no plain error in a prosecution for multiple offenses including second-degree arson where the court did not charge the jury that it could find defendant guilty of willful and malicious damage to real or personal property by the use of any explosive or incendiary device as a lesser included offense. **State v. Beamer,** 477.

ASSAULT AND BATTERY

§ 82 (NCI4th). Discharging firearm into occupied property; instructions

The trial court properly charged the jury that the law does not require any specific intent for the defendant to be guilty of the crime of discharging a firearm into occupied property and that defendant's intoxication thus can have no bearing upon the determination of his guilt or innocence of this crime. **State v. Jones,** 114.

ASSAULT AND BATTERY — Continued

§ 82 (NCI4th). Discharging barreled weapons or firearm into occupied property; instructions

There was no plain error in a noncapital first-degree murder prosecution where defendant contended that the court erred in its instruction on felony murder in that the court correctly defined the underlying felony, discharging a firearm into an occupied vehicle, but did not inform the jury that this definition contained separate elements that must be found in order to find defendant guilty of felony murder. The trial court did not err in instructing on the burden of proof or the essential elements of discharging a firearm into occupied property as the underlying felony for felony murder. **State v. Alford,** 562.

AUTOMOBILES AND OTHER VEHICLES

§ 253 (NCI4th). Express warranties of quality generally

Plaintiff produced sufficient evidence that a new vehicle leased by plaintiff was expressly warranted against defects which would cause a clicking sound in a wheel or the front end to vibrate, although the written warranty was not introduced into evidence. **Tailor v. Volvo North America Corp.,** 238.

§ 254 (NCI4th). Effect of failure to conform to warranties

Plaintiff presented sufficient evidence that a continuing and uncorrected clicking sound in a wheel and a vibration in the front end of a new car leased by plaintiff was caused by a "defect" in the braking system and that the vehicle thus did not conform to defendant manufacturer's express warranty, although plaintiff introduced no evidence of any specific mechanical defect that caused the problems. **Taylor v. Volvo North America Corp.,** 238.

§ 254 (NCI4th). Express warranties; effect of failure to conform

The trial court correctly granted a directed verdict in defendant's favor on the issue of whether defendant unreasonably failed or refused to comply with the New Motor Vehicles Warranties Act (the Lemon Law). **Buford v. General Motors Corp.,** 396.

§ 259 (NCI4th). Relief available; liability

The trial court did not err by finding that defendant manufacturer unreasonably refused to comply with the New Motor Vehicles Warranties Act and that plaintiff was entitled to treble damages where plaintiff made a written assertion of rights under the Act and defendant did nothing more than make one unsuccessful attempt to reach plaintiff's attorney by phone. **Taylor v. Volvo North America Corp.,** 238.

When the trier of fact finds that a manufacturer unreasonably refused to comply with the New Motor Vehicles Warranties Act, the reasonable allowance for plaintiff consumer's use of the vehicle should be deducted from the damages recoverable before the damages are trebled. **Ibid.**

§ 259 (NCI4th). Express warranties; relief available; liability

The trial court did not abuse its discretion by denying plaintiffs' motion for attorney fees in an action under the New Motor Vehicles Warranties Act arising from the purchase of a Suburban. **Buford v. General Motors Corp.,** 396.

The trial court did not err in a Lemon Law action arising from the purchase of a Suburban by conditioning recovery of damages on return of the vehicle. **Ibid.**

CONSTITUTIONAL LAW — Continued

§ 352 (NCI4th). Self-incrimination generally

The trial court did not err in a noncapital first-degree murder prosecution by allowing the admission of defendant's testimony from the first trial where defendant contended that he was induced to testify at the first trial by the improper use of another witness's prior statements. **State v. Hunt**, 622.

§ 371 (NCI4th). Prohibition on cruel and unusual punishment; death penalty; first-degree murder

The North Carolina death penalty statute is constitutional. **State v. Williams,** 1; **State v. Basden,** 288; **State v. Conaway**, 487.

COURTS

§ 2 (NCI4th). Advisory opinions and moot questions

Plaintiff Simeon's claim challenging the statutes which authorize the district attorney to set the criminal trial calendar was not rendered moot when plaintiff pled guilty to two felony assault charges and was sentenced to time served on one count and received a PJC on the other. **Simeon v. Hardin,** 358.

§ 60 (NCI4th). Superior court jurisdiction over miscellaneous matters

The superior court is empowered to review the constitutionality of the statutes which prescribe the duties of the district attorney and to fashion an appropriate remedy should such statutes violate the Constitution. **Simeon v. Hardin,** 358.

§ 67 (NCI4th). Actions properly brought before superior court; injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights

Plaintiffs' pending criminal prosecutions did not deprive the superior court of jurisdiction to consider plaintiffs' constitutional challenge to the statutes which authorize the district attorney to set the criminal trial calendar. **Simeon v. Hardin,** 358.

CRIMINAL LAW

§ 78 (NCI4th). Circumstances insufficient to warrant change of venue

The trial court did not err in denying defendant's motion for a change of venue of his first-degree murder and armed robbery trial on the ground of pretrial publicity. **State v. Rose,** 172.

§ 107 (NCI4th). Information not subject to disclosure by State; reports not subject to disclosure

The trial court did not err in a first-degree murder retrial by denying defendant's motion for in camera inspection of an SBI investigative file prepared after the first trial. **State v. Hunt**, 622.

§ 145 (NCI4th). Factual basis for plea of guilty generally

The trial court erred by accepting defendant's plea of guilty to failure to appear for trial because there was no factual basis for the plea. **State v. Weathers,** 441.

§ 172 (NCI4th). Mental incapacity to plead or stand trial; defendant's right to examination and hearing

The trial court acted within its discretion under G.S. 15A-1002(b)(1) in denying defense counsel's request for a psychological examination of defendant after defend-

ant broke the glass in the door of his holding cell and cut his wrist during a recess in his capital sentencing proceeding; furthermore, the court did not violate G.S. 15A-1002(b)(3) by failing to conduct a hearing on defendant's capacity to proceed, but if such a hearing were required, the court substantially complied with the statute. **State v. Rouse,** 59.

§ 181 (NCI4th). Mental capacity to plead or stand trial; miscellaneous matters

The trial court did not err by concluding that defendant was competent to stand trial where the evidence supported the trial court's finding that defendant's attitude, rather than a mental illness or defect, prevented him from cooperating in the preparation of his defense. **State v. Brown,** 426.

§ 301 (NCI4th). Consolidation of particular offenses; homicide count and other offense

The trial court erred by joining for trial a 1989 murder charge and a 1991 failure to appear for the murder trial charge, but this error was harmless. **State v. Weathers,** 441.

§ 372 (NCI4th). Expression of opinion on evidence during trial; comments when ruling on objections

The trial court in a noncapital first-degree murder prosecution did not express an opinion in sustaining an objection. **State v. Corbett,** 313.

§ 375 (NCI4th). Expression of opinion on evidence during trial; miscellaneous comments and actions

The trial court's question, "You are ready for the sentencing—sorry, charge conference at this time?" was not an expression of opinion as to defendant's guilt but was a mere lapsus linguae which was not prejudicial to defendant. **State v. Rose,** 172.

§ 380 (NCI4th). Expression of opinion on evidence during trial; colloquies with counsel; miscellaneous matters

There was no impropriety and no prejudice in a noncapital first-degree murder prosecution where defendant asked to view an SBI agent's notes which had been relied upon during direct examination, the State responded that the notes were in the evidence locker, and the court told defense counsel that had the district attorney been notified that the defense wished to use the document during its cross-examination of the witness, arrangements could have been made to have them in the courtroom when they were needed. **State v. Corbett,** 313.

§ 382 (NCI4th). Expression of opinion on evidence during trial; clarification of testimony

The trial court did not err in a noncapital first-degree murder prosecution by asking the medical examiner questions which defendant contended were irrelevant and placed undue emphasis on the wound, but the questions were intended to clarify the medical examiner's description of the position of the bullet which caused the victim's death and did not intimate the judge's opinion. **State v. Corbett,** 313.

§ 387 (NCI4th). Expression of opinion on evidence during trial; instructions and admonitions to witnesses to speak louder

There was no error in a noncapital first-degree murder prosecution where the court asked defendant to speak up during his testimony. **State v. Corbett,** 313.

CRIMINAL LAW — Continued

§ 413 (NCI4th). Order of argument generally

The trial court properly denied defense counsel's request to make both the opening and closing arguments in a capital sentencing proceeding. **State v. Jones,** 114.

§ 425 (NCI4th). Argument of counsel; comment on defendant's failure to offer evidence; failure to call other particular witnesses or offer particular evidence

The trial court did not err in a first-degree murder retrial by overruling defendant's objections to the prosecutor's arguments that defendant did not call alibi witnesses to prove his alibi from the first trial and did not introduce a photograph which he had testified was taken on the night of the murder. **State v. Hunt,** 622.

§ 426 (NCI4th). Argument of counsel; defendant's silence, generally

The prosecutor's statements in his jury argument in a capital sentencing proceeding about defendant's lack of remorse shown by his falling asleep after his arrest were not improper comments on defendant's silence after being given the Miranda warnings. **State v. Rouse,** 59.

§ 427 (NCI4th). Argument of counsel; defendant's failure to testify; comment by prosecution

The prosecutor's statements in his jury argument in a capital sentencing proceeding to the effect that defendant had a pattern of denying and avoiding responsibility and that "We're here today, the same situation. Only this time he's not doing it, he's got everybody else to do it for him" was not an improper comment on defendant's assertion of his right to silence at trial since the gist of the comments was that defendant was trying to avoid responsibility for his actions by means of his psychiatric experts. **State v. Rouse,** 59.

There was no plain error in a first-degree murder retrial where the court did not intervene ex mero motu to stop the prosecutor from commenting on defendant's decision not to testify. **State v. Hunt,** 622.

§ 432 (NCI4th). Argument of counsel; appeals to prejudice, passion, and the like

The trial court did not err in a first-degree murder prosecution by not intervening ex mero motu where the prosecutor referred to defendant as "just like in Nazi Europe." **State v. Basden,** 288.

§ 433 (NCI4th). Argument of counsel; comment on defendant's character and credibility; defendant as professional criminal, outlaw, or bad person

The prosecutor's statements describing defendant as a "maniac," a "mean, cold-blooded killer" and a "violent murderer" were not grossly improper but were fair characterizations of defendant based on the brutality of the crime and were aimed at the penalty sought by the State. **State v. Rouse,** 59.

The prosecutor's reference to defendant as a "killer" was not improper. **Ibid.**

The prosecutor could properly argue that one who, without provocation, shoots an unarmed man is the moral equivalent of a "back shooter." **State v. Jones,** 114.

§ 436 (NCI4th). Argument of counsel; defendant's callousness, lack of remorse, or potential for future crime

The prosecutor's argument that defendant had shown no remorse for killing the victim was supported by the evidence and not otherwise improper even though defendant did not testify. **State v. Jones,** 114.

that mitigating circumstances reduced the conviction to second-degree murder. **State v. Rouse,** 59.

It was not improper for the prosecutor to argue that defendant's honorable discharge from the military was not a circumstance which mitigated against imposition of the death penalty or to use Lee Harvey Oswald as an example of a person who also received an honorable discharge. **State v. Jones,** 114.

§ 454 (NCI4th). Argument of counsel; capital cases, generally

The prosecutor did not improperly express his opinion or argue matters outside the record in a capital sentencing proceeding when he argued that defendant was one of the most brutal, vicious murderers in Randolph County, asked whether any murder was ever sufficient to call for the death penalty "if this isn't one," and stated that the victim's family, a detective and the prosecution had "put faith in you" and "believe you'll do the right thing." **State v. Rouse,** 59.

There was no gross impropriety in the prosecutor's argument that the Bible contained arguably conflicting provisions regarding capital punishment and that it was the jury's role to determine defendant's fate depending solely on the law. **Ibid.**

The prosecutor could properly discourage the jury in a capital sentencing proceeding from having its decision affected by mere sympathy not related to the evidence in the case. **Ibid.**

The prosecutor's argument that defendant proved that he "believed in the death penalty" was a reasonable inference from evidence of defendant's shotgun killing of an unarmed man. **State v. Jones,** 114.

The prosecutor's jury argument urging the jury to act as the voice and conscience of the community and his arguments that defendant "put himself in this position" and "gave himself the death penalty" were not improper. **Ibid.**

The prosecutor's jury argument that the Bible states that those who have committed murder should be punished with death was not so grossly improper as to require ex mero motu intervention by the trial court. **State v. Rose,** 172.

There was no error in a first-degree murder sentencing hearing requiring intervention ex mero motu where defendant contended that the prosecutor's argument misstated the law governing mitigating circumstances and belittled defense counsels' role. **State v. Basden,** 288.

There was no error in a first-degree murder sentencing hearing where defendant contended that the prosecutor improperly argued that the jury could prevent defendant from killing again only by giving the death penalty, that the prosecutor improperly referred to defendant as a "mad dog killer," and that the prosecutor mocked defendant's procedural and substantive rights and penalized him for exercising his rights. **State v. Basden,** 288.

The trial court properly sustained the prosecutor's objection to defense counsel's closing argument in a capital sentencing proceeding asking the jurors to disregard the facts, speak from their hearts, and find "some reason on earth" to recommend a life sentence rather than the death penalty. **State v. Robinson,** 263.

There was no plain error in a first-degree murder sentencing hearing where defendant contended that the prosecutor implicitly argued parole eligibility by reiterating that defendant had been paroled for prior Maryland convictions. **State v. Conaway,** 487.

§ 455 (NCI4th). Argument of counsel; deterrent effect of death penalty

It was not improper for the prosecutor to urge the jury to recommend the death penalty in order to deter defendant from killing again, and the prosecutor's statements that "it's not too late in saving some officers from seeing any other person in this condition" and that the crime was not a "one-shot deal" were permissible. **State v. Rouse,** 59.

The prosecutor's arguments that the only way the jury could prevent the defendant from killing again was to return a recommendation that he be sentenced to death and that defendant had earned a sentence of death were not improper. **State v. Jones,** 114.

Where defendant had escaped from prison in Alabama after being sentenced to life imprisonment for murder, the prosecutor could properly argue to the jury that defendant might again escape and kill if given a life sentence for two murders in this state. **State v. Rose,** 172.

§ 460 (NCI4th). Argument of counsel; permissible inferences

The prosecutor's jury argument in a murder trial that a psychiatrist who testified for defendant "is not interested in the truth" because he did not interview witnesses to the killing was a proper inference based on the psychiatrist's testimony. **State v. Jones,** 114.

The prosecutor's jury argument that a psychiatrist admitted that "he was hired for the sole purpose to form this intoxication defense" was not improper where it was evident that this was the reason he was employed. **Ibid.**

§ 461 (NCI4th). Argument of counsel; comment on matters not in evidence

There was no prejudicial error in a first-degree murder prosecution where the prosecutor in his closing argument used the excluded transcript of an audio tape. **State v. Williams,** 1.

There was no error in a first-degree murder prosecution where the prosecutor argued that the victim received at least one blow on the ground where that was a reasonable inference from the testimony. **Ibid.**

The trial court properly refused to permit defense counsel to argue that capital defendants usually put their mothers on the stand during the sentencing proceeding since there was no evidence to support this assertion. **State v. Robinson,** 263.

There was no error requiring the trial court to intervene ex mero motu in the prosecutor's argument in a first-degree murder prosecution where defendant contends that the prosecutor grossly misrepresented the facts concerning an expert's compensation. **State v. Basden,** 288.

§ 463 (NCI4th). Argument of counsel; comments supported by evidence

The trial court did not err in a first-degree murder sentencing hearing by overruling defendant's objection to the prosecutor's argument that the second victim begged for his life after defendant shot and killed the first victim. **State v. Conaway,** 487.

§ 465 (NCI4th). Argument of counsel; explanation of applicable law

The prosecutor's closing argument on reasonable doubt that it was sufficient if the jurors "believed basically" that defendant was guilty and that they could find defendant guilty if their doubts were no greater than the substantial level of uncertainty confronted by farmers when they plant each year did not lower the State's burden of proof in violation of defendant's due process rights. **State v. Rose,** 172.

CRIMINAL LAW — Continued

§ 468 (NCI4th). Argument of counsel; miscellaneous comments

There was no error in a first-degree murder prosecution where the prosecutor in his summation compared footprint evidence to fingerprint evidence in rape cases. **State v. Williams,** 1.

There was no error in a first-degree murder sentencing hearing where defendant contended that photographs of the victims' partially decomposed bodies were not relevant to sentencing and should not have been shown to the jury during the prosecutor's closing argument, but the record reflects only that pictures of the victims while living were shown to the jury during this argument. **State v. Conaway,** 487.

§ 496 (NCI4th). Deliberations; review of testimony

The trial court did not abuse its discretion in a prosecution for first-degree murder and discharging a firearm into a vehicle by denying the jury's request to review the transcript during its deliberation. **State v. Corbett,** 313.

§ 680 (NCI4th). Peremptory instructions involving particular mitigating circumstances in capital cases generally

Although the trial court erred by refusing to give a requested peremptory instruction on sixteen nonstatutory mitigating circumstances, this error was harmless beyond a reasonable doubt where the jury rejected the mitigating circumstances not found because they determined that those circumstances had no mitigating value. **State v. Jones,** 114.

The trial court did not err during a first-degree murder sentencing hearing by refusing to give peremptory instructions on allegedly uncontroverted statutory and non-statutory mitigating circumstances. **State v. Miller,** 663.

§ 687 (NCI4th). Court's discretion to give substance of, or to refuse to give, requested instruction

The trial court did not err in a noncapital prosecution for first-degree murder, armed robbery, first-degree burglary, and second-degree arson by not giving defendant's requested jury instruction on seeking truth. **State v. Beamer,** 477.

§ 757 (NCI4th). Approved or nonprejudicial definitions of reasonable doubt generally

The trial court did not err during a first-degree murder retrial by not giving the Pattern Jury Instruction on reasonable doubt as requested by defendant. **State v. Hunt,** 622.

§ 762 (NCI4th). Reasonable doubt; instruction omitting or including phrase "to a moral certainty"

The trial court did not err in a prosecution for first-degree murder, burglary with explosives, breaking and entering, armed robbery, and attempted safecracking by giving an instruction on reasonable doubt which included moral certainty. **State v. Williams,** 1.

The trial court did not err in a noncapital prosecution for first-degree murder, armed robbery, first-degree burglary, and second-degree arson by using the phrase moral certainty in its instruction on reasonable doubt. **State v. Beamer,** 477.

§ 775 (NCI4th). Instructions on defense of voluntary intoxication

The trial court properly charged the jury that the law does not require any specific intent for the defendant to be guilty of the crime of discharging a firearm into

occupied property and that defendant's intoxication thus can have no bearing upon the determination of his guilt or innocence of this crime. **State v. Jones,** 114.

§ 793 (NCI4th). Instruction as to "acting in concert" generally

There was no plain error in a first-degree murder retrial by failing to instruct the jury that defendant's active or constructive presence at the scene of the crime is an essential element of the theories of acting in concert and aiding and abetting. **State v. Hunt,** 622.

§ 794 (NCI4th). Acting in concert instructions appropriate under the evidence generally

There was no error in a noncapital prosecution for first-degree murder, armed robbery, first-degree burglary, and second-degree arson in the instruction on acting in concert where the court refused to instruct the jury as defendant requested that it must find that defendant was acting pursuant to a common plan to commit a crime. **State v. Beamer,** 477.

§ 797 (NCI4th). Instruction as to aiding and abetting; shared intent with principal

The trial court erred by instructing the jury that defendant would be guilty of aiding and abetting a first-degree murder if, in addition to other elements, the jury found that when defendant handed a gun to the perpetrator he "should have known" or had "reasonable grounds to believe" that the perpetrator intended to kill the victim because the instructions do not convey the concept of specific intent necessary for aiding a first-degree murder committed with premeditation and deliberation, but this error did not constitute plain error. **State v. Allen,** 545.

Neither the trial court's instructions on aiding and abetting as a theory of guilt of first-degree murder nor its instructions on involuntary manslaughter shifted the burden of proof of intent to defendant. **Ibid.**

§ 884 (NCI4th). Appellate review of jury instructions; objections; waiver of appeal rights

A question concerning the trial court's instructions on aiding and abetting was not preserved for appeal under Rule 10(b)(2) where defendant failed to object when the trial court granted the request for an instruction on aiding and abetting, did not make a specific request as to the form of the instruction, and did not object after the court gave its instruction. **State v. Allen,** 545.

§ 869 (NCI4th). Requirement of notice of additional instructions; court's discretion to permit additional argument

When the trial court is merely repeating a previous instruction, the reinstruction is not an "additional instruction" within the meaning of G.S. 15A-1234(c), and the court is not required to give the parties an opportunity to be heard prior to the reinstruction. **State v. Weathers,** 441.

§ 872 (NCI4th). Jury's request for additional instructions

The trial court did not err in a first-degree murder prosecution which resulted in a felony murder conviction where defendant contended that the court had disavowed its authority to satisfy the jury's request for an explanation of felony murder, but the jury was not asking for written instructions as defendant contended and the court reinstructed the jury as requested. **State v. Moore,** 456.

CRIMINAL LAW — Continued

§ 876 (NCI4th). Instructions to jury having difficulty reaching decision or in deadlock

The trial court did not coerce a unanimous sentencing verdict in a capital trial by instructing the jury in accordance with G.S. 15A-1235(b) when the jury returned to the courtroom without having reached a unanimous verdict. **State v. Jones,** 114.

There was no error in a first-degree murder prosecution where the trial court did not give defendant's requested instruction on deadlocked juries but the jury never indicated that it was deadlocked or having trouble reaching a unanimous verdict and defendant essentially received the instruction he sought. **State v. Williams,** 1.

§ 880 (NCI4th). Instructing jury on costs involved should it not return a verdict

There was no plain error in a first-degree murder prosecution where the court advised the jury that "five weeks of work would go down the drain" if a mistrial were declared. **State v. Williams,** 1.

§ 903 (NCI4th). Form, effect, and sufficiency of verdict; unanimity of verdict

There was no plain error in noncapital first-degree murder prosecution where defendant contended that the court's disjunctive instruction on premeditated and deliberated murder and felony murder were fatally ambiguous but the actual instructions given by the court made it clear that the jury had to be unanimous on both the verdict and the basis for that verdict and the verdict sheet returned by the jury and the jury poll indicate that the jurors did not construe the instructions to allow conviction on a basis that was not unanimous. **State v. Alford,** 562.

§ 904 (NCI4th). Denial of right to unanimous verdict

Defendant was not denied his right to a unanimous verdict by the trial court's final mandate directing the jury to find defendant guilty of first-degree murder if the State had proved beyond a reasonable doubt all of the elements of either the theory of defendant as the principal or the theory of defendant aiding and abetting another who acted as the principal. **State v. Allen,** 545.

§ 1013 (NCI4th). New trial; grounds; newly-discovered evidence generally

Motions for appropriate relief in the trial and appellate divisions in a first-degree murder retrial were denied. **State v. Hunt,** 622.

§ 1054 (NCI4th). Sentencing hearing; continuance

Defendant's due process rights were not violated by the trial court's denial of defendant's motion for a one-week continuance of the sentencing hearing in a capital trial to prepare for the testimony of the victims of defendant's three prior violent felonies. **State v. Jones,** 114.

§ 1156 (NCI4th). Aggravating factors under Fair Sentencing Act; use of or armed with deadly weapon; element of other offenses

A resentencing hearing was ordered for a first-degree burglary conviction where the court found as an aggravating factor that defendant was armed with a deadly weapon at the time of the crime and the State proved forcible entry as an element of burglary by showing that defendant's accomplice held a gun on the victim so that the two men were able to enter the mobile home. **State v. Beamer,** 477.

CRIMINAL LAW — Continued

§ 1315 (NCI4th). Capital sentencing; competence of evidence; character or reputation

Any error was harmless beyond a reasonable doubt in a first-degree murder sentencing hearing where the trial court sustained the State's objection to defendant's question to defendant's psychotherapist concerning the witness's opinion of defendant as a friend and defense counsel concluded his questioning without an offer of proof. **State v. Miller**, 663.

§ 1316 (NCI4th). Capital sentencing; competence of evidence; prior criminal record or other crimes

The State's inadvertent introduction in a capital sentencing proceeding of a search warrant and its supporting affidavit, along with the judgment documents pertaining to defendant's 1969 murder conviction in Colorado, did not violate defendant's right of confrontation. **State v. Robinson,** 263.

§ 1318 (NCI4th). Capital sentencing; instructions generally

The trial court did not abuse its discretion by refusing to give defendant's requested preliminary instruction explaining the specific procedures of a capital case and instead giving the pattern jury instruction on the bifurcated nature of a capital trial. **State v. Jones,** 114.

§ 1320 (NCI4th). Capital sentencing; instructions; consideration of evidence

The trial court did not commit plain error by failing to instruct the jury in a capital sentencing proceeding that it should not consider the same evidence for both the "course of conduct" and "prior violent felony" aggravating circumstances. **State v. Rose,** 172.

The trial court did not commit plain error by failing to instruct the jury in a capital sentencing proceeding ex mero motu that it should not consider the same evidence for both the heinous, atrocious, or cruel and commission of the murder during the course of other felonies aggravating circumstances. **State v. Rouse,** 59.

The trial court did not err in a first-degree murder sentencing hearing by giving what defendant contended was a peremptory instruction on the one aggravating circumstance in the case. **State v. Basden,** 288.

There was no plain error in a first-degree murder sentencing hearing where the court failed to instruct the jury that it could not use the same evidence to support more than one aggravating circumstance. **State v. Conaway,** 487.

§ 1322 (NCI4th). Capital sentencing; instructions; parole eligibility

The trial court properly gave the jury the instruction approved in *State v. Robbins*, 319 N.C. 365, in response to a question from the jury regarding the length of a life sentence. **State v. Jones,** 114.

The trial court did not err during a first-degree murder sentencing hearing by refusing to instruct the jury regarding defendant's potential to be paroled if given a life sentence. **State v. Miller**, 663.

The trial court did not err in a first degree murder sentencing hearing by denying defendant's motion to argue parole eligibility. **State v. Conaway**, 487,

§ 1323 (NCI4th). Capital sentencing; instructions; aggravating and mitigating circumstances generally

The trial court did not err in a first-degree murder sentencing hearing by requiring the jury to find that the proffered nonstatutory mitigating circumstances existed

CRIMINAL LAW — Continued

and had mitigating value before considering these circumstances in the final balancing process on issues three and four. **State v. Williams,** 1.

The trial court did not err in a capital sentencing hearing by permitting the jurors to reject nonstatutory mitigating circumstances as having no mitigating value. **State v. Basden,** 288.

The trial court did not err in a first-degree murder sentencing hearing by instructing that each juror may consider any mitigating circumstance found in sentencing issue two when answering issues three and four. **Ibid.**

The trial court did not err in a first-degree murder sentencing hearing by failing to instruct the jury that it must consider any mitigating circumstances found by a juror. **State v. Miller,** 663.

§ 1325 (NCI4th). Capital sentencing; instructions; unanimous decision as to mitigating circumstances

The jury in a capital sentence proceeding was not given the discretion to disregard mitigating circumstances found in Issue Two by the trial court's pattern instruction in Issues Three and Four that each juror "may consider any mitigating circumstance or circumstances that the juror determines exist by a preponderance of the evidence in Issue Two." **State v. Rouse,** 59.

The trial court did not err by instructing the jury in Issue Two in a capital sentencing proceeding that the jury "should" consider whether a circumstance existed and that it "would" find that circumstance if the evidence supported it and if, with respect to nonstatutory circumstances, it had mitigating value. **Ibid.**

The pattern capital sentencing instructions given by the trial court did not allow jurors to disregard properly found mitigating circumstances by instructing in Issue Three, the weighing issue, and Issue Four, the substantiality issue, that each juror may consider any mitigating circumstance or circumstances that the juror determines to exist by a preponderance of the evidence. **State v. Jones,** 114.

The trial court's use of the word "may" in issues three and four in a capital sentencing proceeding did not permit each juror to decide whether to consider in mitigation evidence which that juror had already found to exist in issue two. **State v. Robinson,** 263.

The trial court did not err in a first-degree murder sentencing hearing in its instruction on mitigating circumstances where the court used the pattern jury instruction, which uses the word "may" regarding consideration of mitigating circumstances. **State v. Conaway,** 487.

§ 1334 (NCI4th). Aggravating circumstances; notice

A first-degree murder defendant's federal and state constitutional rights to notice of the charges against him and adequate time to prepare his defense were not violated by the denial of his motion for a bill of particulars on the aggravating circumstances to be relied upon by the State. **State v. Williams,** 1.

§ 1335 (NCI4th). Capital sentencing; consideration of aggravating circumstances; unanimous decision

The trial court did not err in a capital sentencing hearing by denying defendant's motion that a life sentence be imposed where defendant argued that the jury had deliberated more than a reasonable time and had asked if it could sentence defendant to life without parole. **State v. Basden,** 288.

CRIMINAL LAW — Continued

§ 1337 (NCI4th). Particular aggravating circumstances; previous conviction for felony involving violence

The trial court did not err by submitting both the "course of conduct" and "prior violent felony" aggravating circumstances in a capital sentencing proceeding where different evidence supported each circumstance. **State v. Rose,** 172.

Where the State introduced the record of defendant's conviction of common law robbery, the trial court properly instructed the jury that robbery is a felony which by definition involves the use or threatened use of violence. **State v. Jones,** 114.

The jury's finding of the aggravating circumstance that defendant had previously been convicted of a felony involving the use or threatened use of violence to the person was supported by evidence that defendant had previously been convicted of common law robbery and two counts of assault with a deadly weapon inflicting serious injury. **Ibid.**

There was no plain error in a first-degree murder sentencing hearing in the court's instruction on the aggravating circumstance of a previous conviction of a felony involving violence where, properly understood, the instruction was correct. **State v. Williams,** 1.

§ 1339 (NCI4th). Particular aggravating circumstances; capital felony committed during commission of another crime

The trial court did not improperly submit two aggravating circumstances based on the same evidence in a capital sentencing hearing when it submitted the circumstance that the murder was especially heinous, atrocious, or cruel and the circumstance that the murder was committed during the course of the felonies of armed robbery and attempted first-degree rape. **State v. Rouse,** 59.

§ 1340 (NCI4th). Particular aggravating circumstances; capital felony committed during commission of another crime; effect of felony murder rule

The trial court erred by imposing judgment on defendant's conviction for discharging a firearm into occupied property where that crime was the underlying felony for a felony murder conviction. **State v. Moore,** 456.

The trial court did not err during a first-degree murder sentencing hearing in submitting the aggravating circumstance that the murders occurred during the kidnapping of the victims where the prosecutor had refused to request a felony murder instruction during the guilt innocence phase of the trial. **State v. Conaway,** 487.

§ 1343 (NCI4th). Particular aggravating circumstances; particularly heinous, atrocious, or cruel offense; instructions

The trial court did not err in a first-degree murder sentencing hearing by submitting the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. **State v. Williams,** 1.

§ 1345 (NCI4th). Particular aggravating circumstances; heinous, atrocious, or cruel offense; evidence sufficient to support finding

The trial court did not improperly submit two aggravating circumstances based on the same evidence in a capital sentencing hearing when it submitted the circumstance that the murder was especially heinous, atrocious, or cruel and the circumstance that the murder was committed during the course of the felonies of armed robbery and attempted first-degree rape. **State v. Rouse,** 59.

CRIMINAL LAW — Continued

§ 1346 (NCI4th). Particular aggravating circumstances; creating risk of death to more than one person

The jury's finding of the aggravating circumstance that defendant knowingly created a great risk of death to more than one person by a weapon hazardous to the lives of more than one person was supported by evidence that defendant fired a shotgun into the rear seat of the vehicle occupied by the victim and three other persons. **State v. Jones,** 114.

§ 1347 (NCI4th). Particular aggravating circumstances; murder as course of conduct

The trial court did not err by submitting both the "course of conduct" and "prior violent felony" aggravating circumstances in a capital sentencing proceeding where different evidence supported each circumstance. **State v. Rose,** 172.

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury on the course of conduct aggravating circumstance where defendant argued that the supporting evidence was duplicative of evidence supporting other aggravating circumstances. **State v. Conaway,** 487.

§ 1348 (NCI4th). Consideration of mitigating circumstances generally; definition

The trial court properly refused to instruct the jury in a capital sentencing proceeding that it was entitled to base its recommendation on any sympathy or mercy the jury might have for the defendant that arises from the evidence presented in this case. **State v. Jones,** 114.

The trial court did not err by giving an instruction defining "mitigating circumstance" which had been approved by prior N. C. Supreme Court decisions, and defendant waived any error by the court in also reading a dictionary definition of "mitigate." **Ibid.**

The trial court did not err in a first-degree murder sentencing hearing in its definition of mitigating circumstances. **State v. Conaway,** 487.

The trial court did not err in a first-degree murder sentencing hearing by refusing to give defendant's requested peremptory instruction on the ground that it required the jury to accord weight to nonstatutory circumstances. **State v. Miller,** 663.

§ 1349 (NCI4th). Submission of mitigating circumstances

Defendant waived any error with respect to the nonstatutory mitigating circumstances submitted by the trial court in a capital sentencing proceeding by expressing approval to the trial court of the nonstatutory circumstances submitted. **State v. Rouse,** 59.

A defendant may be entitled to a directed verdict on the existence of a statutory mitigating circumstance if the evidence in support of the circumstance is substantial, manifestly credible and uncontradicted. **Ibid.**

§ 1350 (NCI4th). Consideration of mitigating circumstances; necessity of specific findings

Where the issues and recommendation form indicated that at least one juror had found mitigating circumstance five to exist and have mitigating value, the jury foreman's response to an inquiry by the court indicating that the jury had rejected mitigating circumstance five did not show that the jury did not pass on the existence of all mitigating circumstances so as to entitle defendant to a new sentencing hearing. **State v. Rose,** 172.

CRIMINAL LAW — Continued

§ 1354 (NCI4th). Particular mitigating circumstances generally

Since the jury could reject any of the submitted nonstatutory mitigating circumstances on the basis that they had no mitigating value, defendant is not entitled to a new sentencing proceeding on the basis of the jury's rejection of certain nonstatutory mitigating circumstances which were supported by credible and uncontradicted evidence. **State v. Rouse,** 59.

§ 1355 (NCI4th). Particular mitigating circumstances; lack of prior criminal activity

Evidence that defendant's blood alcohol level was .19 at the time of an accident, that he lost his driver's license, that defendant resisted arrest after a suicide attempt, and that defendant used illegal drugs did not require the trial court to submit the no significant criminal history mitigating circumstance. **State v. Rouse,** 59.

The trial court did not err by refusing to submit the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. **State v. Jones,** 114.

§ 1357 (NCI4th). Particular mitigating circumstances; mental or emotional disturbance

The trial court did not err in a first-degree murder sentencing hearing by not submitting the statutory mitigating circumstance that defendant was under the influence of mental or emotional disturbance based on cocaine and opiate withdrawal. **State v. Miller,** 663.

The trial court did not err during a first-degree murder sentencing hearing by not submitting the statutory mitigating circumstance of mental or emotional disturbance where defendant contended that a racial slur provoked him to shoot but he told police in a statement that he shot the victim because the man tried to stop him from getting money for drugs. **Ibid.**

§ 1360 (NCI4th). Particular mitigating circumstances; impaired capacity of defendant; instructions

Although the trial court's statement in its instructions on the impaired capacity mitigating circumstance that the jury would have to find that defendant suffered from a personality disorder and had consumed alcohol and cocaine before the killing in order to find the existence of this circumstance may have been misleading when considered in isolation, this statement was not plain error in light of the trial court's entire impaired capacity instruction which did not require defendant to establish both a personality disorder and intoxication in order for the jury to find this circumstance. **State v. Rouse,** 59.

Although testimony by defendant's two mental health experts in support of the impaired capacity mitigating circumstance was uncontradicted, the jury could reject this circumstance on the ground that it did not find the evidence of the mental health experts credible or convincing. **Ibid.**

There was no error in a first-degree murder sentencing hearing where the court submitted defendant's borderline retardation as a nonstatutory mitigating circumstance rather than as the statutory impaired capacity mitigating circumstance. **State v. Williams,** 1.

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury to find the mitigating circumstance of impaired capacity if defendant suffered from major depression, chronic pain from health problems, and substantial drug

use where defendant requested the instruction, did not object to it, and stated that he was satisfied with it. **State v. Basden,** 288.

The trial court did not err in a first-degree murder sentencing hearing by refusing to submit the impaired capacity mitigating circumstance where defendant relied on evidence of drug withdrawal to show impairment. **State v. Miller,** 663.

§ 1362 (NCI4th). Particular mitigating circumstances; age of defendant

Where the evidence was contradictory as to whether defendant's age had mitigating value, the trial court properly instructed the jurors that it was within their province to determine whether defendant's age had mitigating value. **State v. Rouse,** 59.

§ 1363 (NCI4th). Other mitigating circumstances arising from the evidence

The trial court did not err by instructing the jury that it "may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value." **State v. Rouse,** 59.

The jury in a capital sentencing proceeding did not arbitrarily refuse to consider established mitigating evidence when it found that the nonstatutory mitigating circumstance that defendant voluntarily confessed without counsel had mitigating value in the murder of the male victim but not in the murders of the two female victims. **State v. Robinson,** 263.

The trial court did not err in a first-degree murder sentencing hearing by refusing to submit the nonstatutory mitigating circumstance that defendant was conceived when his mother was raped at age thirteen. **State v. Conaway,** 487.

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury that it should refuse to consider the nonstatutory mitigating circumstance of good conduct in jail if it deemed the evidence to have no mitigating value. **State v. Basden,** 288.

The trial court did not err in a first-degree murder sentencing hearing by not submitting the nonstatutory mitigating circumstance that defendant neither threatened nor harmed witnesses to the crime. **State v. Miller,** 663.

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury that it could consider nonstatutory mitigating circumstances it found to exist and to have mitigating value when weighing aggravating and mitigating circumstances. **Ibid.**

§ 1373 (NCI4th). Death penalty held not excessive or disproportionate

A death sentence for a first-degree murder was not disproportionate. **State v. Williams,** 1.

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where the murder was committed during the commission of the felonies of attempted rape and attempted armed robbery and defendant stabbed the victim at least seventeen times with a butcher knife. **State v. Rouse,** 59.

A sentence of death imposed on defendant for the first-degree murder of his son by shooting him with a shotgun while he begged for his life was not disproportionate. **State v. Jones,** 114.

Sentences of death imposed upon defendant for two first-degree murders were not disproportionate where defendant, while on escape from an Alabama sentence for murder, shot the two victims at close range and stole many of their possessions. **State v. Rose,** 172.

DISTRICT ATTORNEYS — Continued

particular criminal case and are not facially invalid under the Due Process Clause of the U. S. Constitution or the law of the land, open courts, or criminal jury trial clauses of the N. C. Constitution. **Ibid.**

Plaintiffs' complaint and exhibits raised a genuine issue of material fact as to whether statutes authorizing the district attorney to calendar criminal cases for trial are being applied in the Fourteenth Prosecutorial District in a manner violative of the Due Process Clause of the U. S. Constitution and the law of the land, open courts, and jury trial clauses of the N. C. Constitution. **Ibid.**

EJECTMENT

§ 37 (NCI4th). Liability of landlord for wrongful removal of tenant or tenant's property

Where a landlord's conduct violates both the Ejectment of Residential Tenants Act and the Unfair and Deceptive Trade Practices Act, the prohibition against punitive or treble damages in wrongful eviction actions contained in G.S. 42-25.9(a) of the Ejection of Residential Tenants Act does not preclude a recovery of treble damages and attorney's fees under the Unfair and Deceptive Practices Act. **Stanley v. Moore,** 717.

EVIDENCE AND WITNESSES

§ 84 (NCI4th). Relation of evidence to facts in issue

The trial court did not err in a prosecution for noncapital first-degree murder by allowing the State to cross-examine defendant concerning the motivations a person may have for lying where defendant contended that this line of questioning was irrelevant. **State v. Corbett,** 313.

§ 116 (NCI4th). Evidence incriminating persons other than accused; evidence creating inference or conjecture; remoteness

The trial court properly excluded a detective's testimony that, immediately after investigating the murders at issue, he believed that a named person knew about and might have been involved in the murders. **State v. Rose,** 172.

§ 188 (NCI4th). Facts indicating self-defense generally

Two videotapes depicting violent homosexual acts which were found in a murder victim's condominium were not admissible to support defendant's contention that he had killed the victim while defending himself from a homosexual assault. **State v. Lovin,** 695.

§ 256 (NCI4th). Possession or ownership or property; weapons

The trial court did not err in a first-degree murder prosecution which resulted in a felony murder conviction by sustaining the State's objection to portions of defendant's cross-examination of a prosecution witness concerning the illegality of the deceased's possession of a sawed-off shotgun. **State v. Moore,** 456.

§ 264 (NCI4th). Character or reputation of persons other than witness; victim

There was no prejudicial error in a noncapital first-degree murder prosecution in admitting evidence of the victim's character for peacefulness. **State v. Alford,** 562.

EVIDENCE AND WITNESSES — Continued

§ 308 (NCI4th). Other crimes, wrongs, or acts; instrumentality linked to offense charged and other acts

A witness's testimony which described acts of prostitution between the witness and defendant and her finding a metal pipe under defendant's pillow a month before the death of the victim, a known prostitute, was properly admitted in defendant's murder trial to show that the pipe was in defendant's bedroom in reasonable proximity to the time of the victim's death. **State v. Weathers,** 441.

§ 364 (NCI4th). Other crimes, wrongs, or acts; admissibility to show common plan or design as part of same chain of circumstances

Chain-of-events evidence about defendant's escape from an Alabama prison and thefts he committed after his escape and before he committed the two murders at issue was properly admitted to establish defendant's intent and motive for the murders. **State v. Rose,** 172.

§ 472 (NCI4th). Lineups generally

The trial court did not err in a first-degree murder retrial by admitting identification testimony, notwithstanding alleged defects or irregularities in the lineup procedure. **State v. Hunt,** 622.

§ 651 (NCI4th). Motions to suppress; finding of fact requirement; where voir dire evidence not conflicting

The trial court did not err by failing to make findings of fact or conclusions of law before denying defendant's motion to suppress after a voir dire hearing where there was no material conflict in the evidence. **State v. Lovin,** 695.

§ 663 (NCI4th). Ruling on objection

There was no prejudicial error in a noncapital first-degree murder prosecution where the trial court failed to rule on defendant's objection to an allegedly improper victim impact argument by the prosecutor. **State v. Alford,** 562.

§ 693 (NCI4th). Offer of proof; record of excluded evidence generally

When the trial court sustained objections to questions defendant asked a witness at a hearing on his motion to suppress, the trial court should have allowed defendant to have the answers placed in the record for appeal, but defendant was not prejudiced by the court's failure to do so. **State v. Lovin,** 695.

§ 701 (NCI4th). Evidence admissible for a restricted purpose; content or sufficiency of limiting instruction

There was no prejudicial error in a noncapital first-degree murder prosecution where the jury was instructed that it could not consider the evidence in the victim's diary to prove the character of the defendant, but was in effect instructed that it could consider the contents of the diary entry as substantive evidence for other purposes. **State v. Hardy,** 207.

§ 716 (NCI4th). Requirement that error be prejudicial

There was no prejudicial error in a noncapital prosecution for first-degree murder, armed robbery, first-degree burglary, and second-degree arson where defendant's teacher testified on direct examination that there was an odor of feces about defendant in the classroom two days after the crime and that she thought he had had a bowel movement, which he did when under stress, and testified on cross-examination that this had happened to defendant fifteen or twenty times in the past. **State v. Beamer,** 477.

EVIDENCE AND WITNESSES — Continued

§ 731 (NCI4th). Prejudicial error in admission of evidence; religious or other affiliation or belief

It was error in a murder prosecution for the court to permit the State to elicit testimony from defendant's girlfriend that defendant had discussed Satanism with her and for the prosecutor to refer to Satanism in his final argument, but defendant was not prejudiced by this error. **State v. Lovin,** 695.

§ 850 (NCI4th). Hearsay evidence generally; statement offered to prove truth of matter asserted

The trial court did not err in a prosecution for multiple offenses including arson where defendant's teacher had testified for the State that she smelled petroleum on defendant's bookbag and clothes two days after the fire and the court would not let defendant question the teacher on cross-examination as to the explanation defendant gave when she questioned him. **State v. Beamer,** 477.

§ 860 (NCI4th). Hearsay evidence; attacking credibility of declarant

Assuming that the State introduced a statement made by defendant to his girlfriend to impeach statements other witnesses testified he had made that he had killed the victim in self-defense and that the trial court erred under Rule 806 by refusing to permit defendant to elicit testimony by the girlfriend on cross-examination concerning a later statement made to her by defendant to corroborate defendant's exculpatory statements, this error was not prejudicial. **State v. Lovin,** 695.

Assuming that two letters defendant wrote to his girlfriend in which he set forth details concerning his contention that he had killed the victim while defending himself from a homosexual assault were admissible for corroboration under Rule 806, the trial court's exclusion of these letters was not prejudicial error. **Ibid.**

§ 867 (NCI4th). Hearsay evidence; to explain conduct or actions taken by law enforcement officers

The trial court did not err in a noncapital first-degree murder prosecution by admitting the testimony of an S.B.I. agent that defendant's wife had said that defendant was at his father's home on the day defendant had promised to give the agent his gun. **State v. Corbett,** 313.

§ 876 (NCI4th). Hearsay evidence; to show state of mind

The diary of a murder victim was not admissible under the state-of-mind hearsay exception in the noncapital first-degree murder prosecution of her husband. **State v. Hardy,** 207.

The trial court did not err in a noncapital first-degree murder prosecution by admitting testimony that the victim, a practical nurse, had told a person at whose house she worked that defendant was the father of her child and that she feared for her life if she went to court to obtain child support from defendant. **State v. Corbett,** 313.

§ 897 (NCI4th). Hearsay evidence; contents of search warrant or affidavit to obtain search warrant

The State's inadvertent introduction in a capital sentencing proceeding of a search warrant and its supporting affidavit, along with the judgment documents pertaining to defendant's 1969 murder conviction in Colorado, did not violate defendant's right of confrontation. **State v. Robinson,** 263.

EVIDENCE AND WITNESSES — Continued

The trial court did not commit plain error by admitting into evidence in a first-degree murder trial the search warrant which authorized a search of defendant's home. **State v. Weathers,** 441.

§ 927 (NCI4th). Relationship of hearsay evidence admitted under exceptions to hearsay rule to right of confrontation

Where the evidence showed that a murder victim's wife was worthy of belief, admission of her statements to a police detective under the residual hearsay exception did not violate the Confrontation Clause of the Sixth Amendment. **State v. Brown,** 426.

§ 963 (NCI4th). Exceptions to hearsay rule; statements for purposes of medical diagnosis or treatment; trial preparation

Statements made by defendant to a medical expert who stated an opinion that defendant was so intoxicated at the time of a killing that he was incapable of premeditation and deliberation were not admissible under the medical diagnosis and treatment exception to the hearsay rule where the statements were made by defendant ten months after the killing for the purpose of preparing and presenting a defense. **State v. Jones,** 114.

§ 964 (NCI4th). Exceptions to hearsay rule; statements for purposes of medical diagnosis or treatment; statements by person other than one being treated

Statements made by defendant's mother and wife to defendant's medical expert were not admissible under the medical diagnosis and treatment exception to the hearsay rule. **State v. Jones,** 114.

§ 969 (NCI4th). Exceptions to hearsay rule; public records, reports, vital statistics, and the like

The trial court did not err in a first-degree murder retrial by refusing to admit factual findings contained in a report by a city manager of a review of an investigation conducted after the first trial. **State v. Hunt,** 622.

§ 982 (NCI4th). Exceptions to hearsay rule; former testimony generally

There was no error in a first-degree murder retrial where a witness who had testified at the first trial had subsequently been indicted and refused to answer questions based upon the Fifth Amendment and the witness's testimony at the first trial was admitted. **State v. Hunt,** 622.

§ 1009 (NCI4th). Hearsay evidence; residual exception; equivalent guarantees of trustworthiness

Two statements made by a murder victim's wife to a police detective possessed equivalent circumstantial guarantees of trustworthiness for their admission into evidence at defendant's murder trial under the residual hearsay exception set forth in Rule 804(b)(5) where the wife later died from AIDS. **State v. Brown,** 426.

The trial court in a first-degree murder trial erred by admitting into evidence under the residual hearsay exception of Rule 804(b)(5) a jail inmate's letter to a detective concerning statements allegedly made by defendant about the murder because the letter did not possess equivalent guarantees of truthworthiness. **State v. Swindler,** 469.

EVIDENCE AND WITNESSES — Continued

§ 1070 (NCI4th). Flight as implied admission; sufficiency of evidence to support instruction

Although evidence that defendant was charged with failure to appear for his murder trial would not support an instruction on flight, the court's instuction on flight was supported by other evidence. **State v. Weathers,** 441.

§ 1218 (NCI4th). Confessions and other inculpatory statements; matters affecting admissibility or voluntariness

The trial court did not err in a noncapital first-degree murder prosecution by admitting defendant's inculpatory statements where defendant contended that the statements were not made knowingly, intelligently, or voluntarily. **State v. Corbett,** 313.

§ 1235 (NCI4th). Custodial interrogation defined

The trial court did not err in a noncapital first-degree murder prosecution by admitting defendant's inculpatory statements made at his home and at the crime scene where defendant was not in custody for Miranda purposes. **State v. Corbett,** 313.

§ 1247 (NCI4th). Confessions and other inculpatory statements; necessity that warnings be repeated

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to suppress the clothes he was wearing at the time of the murder on the ground that defendant's Miranda warnings had grown stale. **State v. Hardy,** 207.

§ 1289 (NCI4th). Waiver of constitutional rights; exhortations that it would be beneficial to confess or tell truth

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to suppress inculpatory statements based on statements by an officer urging defendant to confess to ease his conscience. **State v. Hardy,** 207.

§ 1294 (NCI4th). Waiver of constitutional rights; fraud, deception, or trickery generally

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to suppress inculpatory statements because some of the officer's statements to defendant were untrue. **State v. Hardy,** 207.

§ 1694 (NCI4th). Photographs of homicide victims generally; location and appearance of victim's body

The trial court did not err in a noncapital first-degree murder prosecution by allowing into evidence twenty gruesome photographs of the crime scene and the victim and in allowing the photographs to be held in front of the jury. **State v. Corbett,** 313.

The trial court did not err in a noncapital first-degree murder prosecution by admitting photographs depicting the victim's body in the back seat of an automobile which was wrecked on the way to the hospital following a shooting. **State v. Alford,** 562.

§ 1710 (NCI4th). Photographs of crime scene; automobile

The trial court did not err in a noncapital first-degree murder prosecution by allowing into evidence twenty gruesome photographs of the crime scene and the victim and in allowing the photographs to be held in front of the jury. **State v. Corbett,** 313.

EVIDENCE AND WITNESSES — Continued

§ 1728 (NCI4th). Videotapes; requirement that objections be made to specific portions; effect of no objection

The trial court did not commit plain error in the exclusion without objection of a portion of a police videotape depicting a box behind the door of a convenience store storage room where defendant and the victim's body were found, although defendant contended that this evidence rebutted the State's evidence that defendant was found hiding behind the door and thus acknowledged wrongdoing. **State v. Rouse,** 59.

§ 1939 (NCI4th). Professional standards or practice; learned treatise

The trial court erred by allowing the State to impeach defendant's expert witness (a clinical psychologist) by reading to her a statement from an article that denigrated clinical psychologists when the witness had not read the article and there was no showing of its validity, but this error was not prejudicial. **State v. Lovin,** 695.

§ 1941 (NCI4th). Diaries

There was error which was not prejudicial in a first-degree murder prosecution where the court admitted statements from the victim's diary which recounted assaults upon her and a threat to kill her by defendant. **State v. Hardy,** 207.

§ 2298 (NCI4th). Reliability of psychological test

The trial court erred in refusing to permit defendant's expert medical witness, who opined that defendant was incapable of premeditation and deliberation due to alcohol intoxication at the time of a killing, to state his opinion as to whether defendant was lying to him during his evaluation of defendant, but the exclusion of this testimony was harmless error. **State v. Jones,** 114.

§ 2479 (NCI4th). Exclusion or sequestration of witnesses in particular cases generally

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion to sequester three codefendants expected to testify against him at trial. **State v. Conaway,** 487.

§ 2507 (NCI4th). Qualifications of witnesses; personal knowledge of matter generally

The trial court did not err in a noncapital first-degree murder prosecution by permitting an SBI agent to testify that the local doctor had said that the fatal bullet was .38 caliber, that defendant had told the officer that he shot the victim with a .38 caliber pistol at a point in the investigation when no one had informed defendant of the caliber of the gun used to kill the victim, and that no one else would have known the caliber other than the person who shot the victim. **State v. Corbett,** 313.

There was no error in a first-degree murder prosecution where the trial court allowed an SBI agent to testify about a drill and bit seized from defendant and tested unsuccessfully to determine whether the shavings on the bit came from a drilled out gun barrel, and that the effect of the drilling was to eliminate the agent's ability to determine whether the fatal bullet was fired from the gun and the distance between the gun and the victim. **Ibid.**

§ 2750.1 (NCI4th). Scope of examination; when party "opens door"

When the State elicited testimony from a witness as to a telephone conversation with defendant on the day of a murder, it did not open the door to cross-examination of the witness by defendant in regard to a second telephone conversation with defendant later that same day. **State v. Lovin,** 695.

EVIDENCE AND WITNESSES — Continued

§ 2873 (NCI4th). Scope and extent of cross-examination generally; relevant matters

Questions asked by the State on cross-examination of defendant's expert witness were not improper because they referred to matters not in evidence. **State v. Lovin,** 695.

§ 2899 (NCI4th). Cross-examination as to particular matters; imprisonment

There was no plain error in a first-degree murder prosecution in denying defendant's motion in limine to exclude evidence of the length of his prior sentences. **State v. Conaway,** 487.

§ 2908 (NCI4th). Redirect examination when defendant "opens door" on cross-examination

Testimony by defendant's girlfriend on cross-examination by defendant that defendant had "told me a different story" as to why she should leave with him opened the door for the State to have her explain this "story" on redirect examination. **State v. Lovin,** 695.

§ 2973 (NCI4th). Basis for impeachment; character for truthfulness or untruthfulness

There was no prejudicial error in a first-degree murder retrial where the court prohibited defendant from impeaching the testimony of a prosecution witness regarding a lawsuit in which he had made false accusations. **State v. Hunt,** 622.

§ 2974 (NCI4th). Basis for impeachment; reputation

The trial court did not err in a first-degree murder retrial by excluding testimony by a defense witness about the basis for his opinion about the untruthfulness of his brother, a prosecution witness. **State v. Hunt,** 622.

§ 3052 (NCI4th). Basis for impeachment; drug use or addiction

There was no error in a noncapital first-degree murder prosecution where defendant contended that the court prevented him from impeaching a witness based upon marijuana use and poor memory, but, if there was error in sustaining the State's initial objections, it was cured by the later ruling permitting inquiry into the witness's marijuana use. **State v. Hardy,** 207.

§ 3157 (NCI4th). Expert opinion as to veracity

The trial court erred in refusing to permit defendant's expert medical witness, who opined that defendant was incapable of premeditation and deliberation due to alcohol intoxication at the time of a killing, to state his opinion as to whether defendant was lying to him during his evaluation of defendant, but the exclusion of this testimony was harmless error. **State v. Jones,** 114.

§ 3179 (NCI4th). Corroboration; witness testifying as to prior statement of another witness generally

Testimony by a witness that another witness had told her that she heard shots at the approximate time the victim was killed should have been admitted for corroboration of the other witness's testimony. **State v. Lovin,** 695.

§ 3201 (NCI4th). Affidavits

An affidavit given by a defense witness to defendant's attorney which contained a prior statement consistent with his trial testimony should have been admitted to corroborate the witness's testimony, but defendant was not prejudiced by the exclusion of this affidavit. **State v. Lovin,** 695.

GRAND JURY

§ 43 (NCI4th). Race discrimination; selection of foreman

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion to quash the indictment based upon racial discrimination in the selection of the grand jury foreperson where the motion was filed on the first day of the trial. **State v. Miller**, 663.

HOMICIDE

§ 226 (NCI4th). Evidence of identity linking defendant to crime sufficient

The State's evidence was sufficient for the jury to find that defendant was the perpetrator of the first-degree murders of two persons who were camped near the campsite where defendant was living. **State v. Rose,** 172.

§ 244 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; intent to kill generally

The trial court did not err by submitting first-degree murder to the jury where defendant contended that the evidence of premeditation and deliberation was insufficient. **State v. Miller**, 663.

§ 250 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; intent to kill; prior altercations, threats

There was sufficient evidence of premeditation and deliberation in a noncapital first-degree murder prosecution where a threat defendant made to kill his wife within one week of the murder was strong evidence that defendant premeditated the murder. **State v. Hardy,** 207.

§ 252 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; intent to kill; statements and actions after killing

There was sufficient evidence of premeditation and deliberation in a noncapital first-degree murder prosecution where defendant's actions after the killing especially indicate that he deliberated the killing of his wife in that he immediately attempted to make the killing seem connected to a robbery, soon attempted to destroy incriminating evidence, and returned to the restaurant where he feigned shock upon finding the fate of his wife and concocted an alibi which he repeatedly told the police. **State v. Hardy,** 207.

§ 253 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; intent to kill; nature and execution of crime, severity of injuries, along with other evidence

There was sufficient evidence of premeditation and deliberation in a noncapital first-degree murder prosecution where the manner in which defendant obtained a knife, held his wife down, and inflicted numerous stab wounds shows an intent to kill formed before the murder. **State v. Hardy,** 207.

§ 254 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; nature and number of wounds

The State's evidence was sufficient for the jury to find that defendant committed a homicide with premeditation and deliberation so as to support his conviction for first-degree murder where the victim bled to death as a result of seven lacerations to the scalp caused by a blunt instrument such as a pipe. **State v. Weathers,** 441.

HOMICIDE — Continued

§ 262 (NCI4th). What constitutes murder in perpetration of felony; unbroken chain of events

The evidence was sufficient to carry charges of first-degree murder and discharging a firearm into an occupied vehicle to the jury in a first-degree murder prosecution which resulted in a conviction based on felony murder. **State v. Corbett,** 313.

§ 489 (NCI4th). Premeditation and deliberation; use of examples in instructions

There was ample evidence to support the trial court's instruction that the jury could rely on the nature of the killing to find premeditation and deliberation. **State v. Weathers**, 441.

§ 503 (NCI4th). Instructions; felony-murder rule; effect of no break in chain of events

The trial court did not err in a first-degree murder prosecution which resulted in a felony murder conviction based on discharging a firearm into occupied property by denying defendant's motion to dismiss the felony murder charge. **State v. Moore,** 456.

The trial court did not err in its instructions in a first-degree murder prosecution which resulted in a felony-murder conviction based on discharging a firearm into occupied property where the court's use of the words "while committing the felony of discharging a firearm into occupied property" was sufficiently broad to include the entire series of relevant events beginning with the original shooting into the house and continuing until the sirens were heard and the shooting ceased. **Ibid.**

§ 550 (NCI4th). Instructions; lesser included offenses generally

The trial court did not abdicate its duty to instruct on all charges supported by the evidence in a first-degree murder trial by its failure to instruct on the lesser offense of second-degree murder although defendant had requested, against the advice of counsel, that the court instruct only on first-degree murder. **State v. Brown,** 426.

§ 552 (NCI4th). Instructions; second-degree murder as lesser included offense of first-degree murder generally; lack of evidence of lesser crime

The trial court did not err by refusing to instruct the jury on second-degree murder in this prosecution for two first-degree murders based on premeditation and deliberation. **State v. Rose,** 172.

The trial court did not err in a first-degree murder prosecution by denying defendant's request for an instruction on second-degree murder where the evidence supported all of the elements of first-degree murder and no evidence was presented to support a conviction of second-degree murder. **State v. Conaway,** 487.

There was no evidence negating the State's evidence of premeditation and deliberation in a first-degree murder trial which required the trial court to instruct the jury on the lesser included offense of second-degree murder. **State v. Brown,** 426.

§ 556 (NCI4th). Instructions; second-degree murder as lesser included offense of first-degree murder; felony murder

The trial court did not err in a prosecution for first-degree felony murder by refusing to instruct on second-degree murder and manslaughter where defendant's defense was an alibi. **State v. Corbett,** 313.

HOMICIDE — Continued

§ 612 (NCI4th). Instructions; self-defense; reasonableness of apprehension

The trial court did not err in a first-degree murder prosecution by instructing the jury that it could return a verdict of voluntary manslaughter for imperfect self-defense only if defendant reasonably believed it was necessary to kill in self-defense. **State v. Moore,** 456.

§ 707 (NCI4th). Cure of error in instructions by conviction; alleged error in regard to self-defense instruction

There was no plain error in a first-degree murder prosecution in the instruction on imperfect self-defense and manslaughter because, in finding defendant guilty solely of first-degree murder based on felony murder, the jury specifically rejected premeditated and deliberate murder, second-degree murder, and voluntary manslaughter. **State v. Moore,** 456.

§ 709 (NCI4th). Cure of error in instructions by conviction; alleged error in regard to involuntary manslaughter instruction

Where the jury was properly instructed on the elements of first-degree and second-degree murder and returned a verdict of guilty of first-degree murder based on premeditation and deliberation, any error in the trial court's failure to instruct the jury on involuntary manslaughter is harmless even if the evidence would have supported such an instruction. **State v. Jones,** 114.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

§ 50 (NCI4th). Variance between averment and proof generally

There was no prejudicial error where the indictment alleged that defendant committed first-degree burglary by breaking and entering with intent to commit larceny and the court charged the jury that it could find the defendant guilty of first-degree burglary if it found the defendant or someone acting in concert with him intended to commit armed robbery at the time of the breaking and entering. **State v. Beamer,** 477.

INDIGENT PERSONS

§ 19 (NCI4th). Supporting services generally; psychologist and psychiatrist

The trial court did not abuse its discretion in the denial of defendant's motion in a first-degree murder and armed robbery trial for funds to hire a neuropsychiatrist to determine whether defendant suffered from Fetal Alcohol Syndrome where defendant had already been examined and evaluated by two psychiatrists who indicated that defendant suffered from alcohol abuse. **State v. Rose,** 172.

§ 27 (NCI4th). Other supporting services; investigators

The trial court did not err in denying an indigent defendant's motion for funds to hire an investigator to aid in the preparation of his defense to a charge of first-degree murder. **State v. Jones,** 114.

INTENTIONAL INFLICTION OF MENTAL DISTRESS

§ 2 (NCI4th). Sufficiency of claim

The trial court erred in an action arising from an automobile repossession by granting summary judgment for defendants on a claim for intentional infliction of emo-

JURY — Continued

§ 103 (NCI4th). Examination of veniremen individually or as group; sequestration of venire generally

The trial court did not err in a first-degree murder prosecution by denying defendant's motion for individual voir dire and sequestration of prospective jurors. **State v. Conaway,** 487.

§ 123 (NCI4th). Voir dire examination; hypothetical questions tending to stake out or indoctrinate jurors

The trial court did not err in refusing to permit defense counsel to ask prospective jurors a series of questions relating to their views of mental illness as a mitigating circumstance since the questions were hypothetical and an impermissible attempt to indoctrinate the prospective jurors regarding the existence of a mitigating circumstance. **State v. Jones,** 114.

The trial court did not abuse its discretion during jury selection in a first-degree murder prosecution by denying defendant's motion to ask two potential jurors if they could consider impaired capacity arising from drug use as a mitigating circumstance and to ask potential jurors whether they thought people could change their lives for the better. **State v. Miller,** 663.

§ 127 (NCI4th). Voir dire examination; questions relating to juror's qualifications, personal matters, and the like generally

The trial court did not deny a first-degree murder defendant due process during jury selection by allowing the prosecutor to ask prospective jurors whether they would have trouble hearing a recording and whether they would refuse to consider such a recording as evidence "just for the fact that it was secretly recorded without the knowledge of one of the parties." **State v. Williams,** 1.

There was no error during jury selection in a first-degree murder prosecution where the court asked, or permitted the prosecutor to ask, potential jurors whether they were "qualified." **State v. Basden,** 288.

§ 131 (NCI4th). Voir dire examination; perceptions regarding criminal justice system

The trial court did not err by refusing to permit defense counsel to ask prospective jurors in a capital trial whether they felt that the legal system may be too soft on criminals. **State v. Jones,** 114.

§ 137 (NCI4th). Voir dire examination; questions regarding race or homosexuality

The trial court did not deny a first-degree murder defendant due process during jury selection by allowing the prosecutor to ask prospective jurors whether they could put the issue of race completely out of their minds. **State v. Williams,** 1.

§ 138 (NCI4th). Voir dire examination; other particular questions generally

The trial court did not err in refusing to permit defense counsel to ask prospective jurors whether they believed that alcoholism is a disease or an illness. **State v. Jones,** 114.

§ 139 (NCI4th). Voir dire examination; presumption of innocence and principle of reasonable doubt

The trial court did not deny a first-degree murder defendant due process during jury selection by allowing the prosecutor to refer to the fact that the case had arisen

pursuant to an arrest and indictment where the prosecutor emphasized defendant's presumed innocence. **State v. Williams,** 1.

§ 141 (NCI4th). Voir dire examination; parole procedures

The trial court did not err in refusing to permit defense counsel to ask prospective jurors in a capital trial about their understanding of the meaning of a life sentence since such questioning was an improper attempt to inject the subject of parole eligibility into the jury selection process. **State v. Jones,** 114.

The trial court properly denied defendant's motion to permit questioning of prospective jurors in a capital sentencing proceeding regarding parole eligibility where defendant would be eligible for parole if he received a life sentence. **State v. Robinson,** 263.

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to voir dire prospective jurors about their misconceptions concerning parole eligibility. **State v. Conaway,** 487.

The trial court did not err in a first-degree murder sentencing hearing by denying defendant's motion to permit questioning of potential jurors regarding their beliefs about parole eligibility. **State v. Miller,** 663.

§ 142 (NCI4th). Voir dire examination; jurors' decision under given set of facts

The trial court properly refused to permit defense counsel to ask prospective jurors how their decision would be affected if it was shown that many people in defendant's community thought highly of him, how they would react if they were the only juror on a particular side or issue, or whether they would consider life imprisonment even though a young girl was injured. **State v. Jones,** 114.

The trial court did not err by refusing to permit defendant to ask two of the jurors who sat on his jury in a capital sentencing proceeding for three murders whether they could follow the court's instructions and weigh the aggravating and mitigating circumstances and consider life imprisonment as a sentencing option if they were to find that defendant had a previous first-degree murder conviction since the question was an improper attempt to "stake out" the jurors. **State v. Robinson,** 263.

§ 145 (NCI4th). Voir dire examination in relation to cases involving capital punishment generally

The trial court did not err in refusing to allow the defendant in a capital trial to ask prospective jurors how they felt about the concept of considering mitigating circumstances in determining an appropriate sentence. **State v. Jones,** 114.

The trial court properly refused to permit defense counsel to ask prospective jurors in a capital trial whether they understood that the trial court would automatically impose a life sentence if they could not reach a unanimous sentencing verdict. **Ibid.**

The trial court properly refused to permit defense counsel to ask prospective jurors whether they had any problem with "the law" that "with nothing else appearing the punishment for first degree murder is life in prison." **Ibid.**

The trial court did not err in refusing to permit defense counsel to ask prospective jurors whether they believed the death penalty should be imposed because it is less expensive than keeping a person imprisoned for life, and whether they could impose a life sentence for "a terrible, tragic crime." **Ibid.**

The trial court did not err during jury selection for a first-degree murder prosecution where defendant contended that the prosecutor engineered a jury predisposed to voting for the death penalty by asking questions which implied that only the weak would vote for life imprisonment. **State v. Williams,** 1.

§ 146 (NCI4th). Propriety of instructions to jurors regarding death penalty

The trial court did not err during jury selection for a first-degree murder by refusing to give defendant's requested preselection instruction where the actual instructions given were substantially similar to those requested by defendant. **State v. Conaway,** 487.

§ 151 (NCI4th). Voir dire examination; jurors' beliefs as to capital punishment or imposition of death penalty

The trial court did not err in refusing to permit defendant to ask a prospective juror in a capital trial whether the juror believed "that every person convicted of premeditated or intentional murder should be put to death" where the court stated it would allow defendant to ask prospective jurors whether their support for the death penalty was so strong that they would find it difficult to vote for life in prison for a person convicted of murder. **State v. Jones,** 114.

§ 153 (NCI4th). Voir dire examination; question whether jurors could vote for death penalty verdict

The trial court did not deny a first-degree murder defendant due process during jury selection by allowing the prosecutor to ask two prospective female jurors whether they would have any difficulty performing their duties, given that there would likely be more women on the jury than men, and to ask one of the jurors whether she felt she would be "less able to return a death sentence than say a male." **State v. Williams,** 1.

§ 154 (NCI4th). Voir dire examination; propriety of nondeath qualifying questions

The trial did not err during jury selection during a first-degree murder prosecution by sustaining the State's objections to questions intended to reveal potential jurors' latent biases in favor of the death penalty. **State v. Miller,** 663.

There was no prejudicial error in a first-degree murder prosecution where the trial court sustained the State's objection to defendant's question as to whether a person convicted in a case such as this should automatically be put to death. **Ibid.**

§ 157 (NCI4th). Order of challenges generally

The trial court did not err during jury selection in a first-degree murder prosecution where the prosecutor passed an initial group of twelve jurors to defendant for questioning; defendant conducted a voir dire and exercised peremptory challenges to exclude six of the prospective jurors; the court required defendant to pass on the six remaining jurors; and defendant contends that he may have had further questions for that group. When a defendant peremptorily challenges some prospective jurors but wishes to continue asking questions of those remaining in the panel before passing them back to the prosecution, he must inform the trial court that he wishes to continue questioning the remaining prospective jurors. **State v. Conaway,** 487.

§ 223 (NCI4th). Effect and application of Witherspoon decision

The trial court did not abuse its discretion in determining that a prospective juror's death penalty views would prevent or substantially impair her from performing

her duties as a juror in a capital trial although she gave equivocal answers to some of the dispositive questions. **State v. Rouse,** 59.

The trial court did not erroneously excuse a juror for cause because of her death penalty views where the juror's answers to the prosecutor's questions left the trial court with the definite impression that the juror would be unable to faithfully and impartially apply the law. **State v. Jones,** 114.

§ 226 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; rehabilitation of jurors

The trial court did not err by excusing a juror for cause without permitting defendant to question her about her ability to impose the death penalty where the record does not indicate that the juror would have responded differently to the dispositive questions had defendant questioned her. **State v. Rouse,** 59.

The trial court did not err during jury selection for a first-degree murder trial by granting the prosecutor a challenge for cause without permitting defendant to attempt to rehabilitate the potential juror. **State v. Basden,** 288.

The trial court did not err during jury selection in a first-degree murder prosecution by failing to allow defendant to rehabilitate a juror where defendant failed to preserve rehabilitation for appellate review by failing to make any request to rehabilitate the juror. **State v. Conaway,** 487.

The trial court did not abuse its discretion during jury selection in a first-degree murder prosecution where the court stated that it would allow rehabilitation if a potential juror's answers were equivocal or if it determined that a juror did not understand the question posed and the defendant contended that the court allowed the prosecution to rehabilitate potential jurors but did not grant defendant the same privilege. **State v. Miller,** 663.

§ 227 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; effect of equivocal, uncertain, or conflicting answers

The trial court did not err during jury selection in a first-degree murder prosecution by excusing a prospective juror for cause where the juror gave conflicting answers about her opposition to the death penalty and her ability to set aside her own beliefs and follow the law. **State v. Conaway,** 487.

The trial court did not err during jury selection for a first-degree murder prosecution by excusing two jurors for cause who had unequivocally stated that they could not vote for the death penalty under any circumstances, then stated during rehabilitation that they could set aside their personal beliefs and follow the court's instructions, and later said when asked by the prosecutor or the court said that they could not vote for the death penalty. **State v. Miller,** 663.

§ 256 (NCI4th). What constitutes prima facie case of racially motivated peremptory challenges; rebuttal

Where the prosecutor volunteered explanations for peremptory challenges of three blacks, the preliminary issue of a prima facie showing of racial discrimination became moot, and the trial court correctly determined that the prosecutor did not intentionally discriminate. **State v. Williams,** 1.

MUNICIPAL CORPORATIONS — Continued

§ 234 (NCI4th). Particular contracts as ultra vires

The City of High Point was not estopped from asserting ultra vires where plaintiffs worked for the City as police officers, they queried an assistant manager regarding the calculation of their separation allowance for early retirement, the assistant city manager calculated the allowance including longevity, overtime, and accrued vacation in the base rate calculation, plaintiffs retired and began drawing benefits, the City subsequently determined that the base rate should not have included longevity, overtime, and accrued vacation, and the benefits were reduced. **Bowers v. City of High Point,** 413.

PARTIES

§ 82 (NCI4th). Qualification of class representative generally; fair and adequate representation of class members

Assuming that plaintiff Zegler's claim challenging the statutes which authorize the district attorney to set the trial calendar was rendered moot when the criminal charges against this plaintiff were dismissed, this case belongs to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of unnamed members of the class, and plaintiff may continue to represent the interests of the class of similarly situated criminal defendants alleged in plaintiffs' complaint. **Simeon v. Hardin,** 358.

PLEADINGS

§ 63 (NCI4th). Imposition of sanctions in particular cases

The Court of Appeals decision affirming the trial court's award of Rule 11 sanctions against defendant's attorney on the grounds that a claim for contribution alleged in a third-party complaint was not well-grounded in law or fact and was filed for an improper purpose is reversed for the reasons stated in the dissenting opinion in the Court of Appeals. **Benton v. Thomerson,** 598.

PROCESS AND SERVICE

§ 17 (NCI4th). Content, form, and requisites of summons; defects relating to county of action

The designation of the incorrect county in a personal injury action arising from an automobile accident rendered a summons voidable rather than void. **Hazelwood v. Bailey,** 578.

§ 21 (NCI4th). Cure of defects; waiver and amendment generally

A motion to amend a summons which had designated the wrong county was remanded where it was apparent that the court had refused to allow the amendment in the erroneous belief that the designation of the wrong county rendered the summons void rather than voidable. **Hazelwood v. Bailey,** 578.

ROBBERY

§ 53 (NCI4th). Sufficiency of evidence; applicability of doctrine of possession of recently stolen property

Evidence that defendant killed the two victims and possessed their goods a few days after the killings was sufficient to support defendant's conviction of two armed robberies. **State v. Rose,** 172.

SEARCHES AND SEIZURES

§ 53 (NCI4th). Observation of objects in plain view; objects within or on vehicle

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to suppress evidence obtained without a warrant where the items in the car were visible through the window. **State v. Hardy,** 207.

§ 63 (NCI4th). Consent to search vehicle

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to suppress evidence obtained without a warrant; Miranda warnings are not necessary prior to obtaining a consent to search. **State v. Hardy,** 207.

§ 68 (NCI4th). Persons from whom effective consent may be obtained; premises search generally

A search of defendant's home based on the consent of defendant's stepdaughter who lived with defendant in the home was lawful. **State v. Weathers,** 441.

§ 80 (NCI4th). Investigatory stops; reasonable suspicion of criminal activity

Officers has a reasonable and articulable suspicion that defendant had been involved in a homicide and properly detained defendant at an airport to investigate the matters about which they were suspicious. Furthermore, officers could ask defendant about the keys in his possession without exceeding the circumstances of his stop, their arrest of defendant after they determined that a key in defendant's possession fit the victim's car was legal, and defendant's subsequent inculpatory statement made at the sheriff's office was not the result of an illegal detention and arrest. **State v. Lovin,** 695.

UNFAIR COMPETITION OR TRADE PRACTICES

§ 39 (NCI4th). Evidence that alleged act was unfair or deceptive

The trial court erred by granting summary judgment for defendants on plaintiffs' unfair or deceptive practices claim where the record contains a forecast of evidence from which a jury could find that defendants knowingly, or in reckless disregard of the truth, made and distributed statements which were both false and designed to injure or destroy plaintiffs' business in Nash County, thereby eliminating competition in that area. **Martin Marietta Corp. v. Wake Stone Corp.,** 602.

WATERS AND WATERCOURSES

§ 68 (NCI4th). Rights of owners of submerged land

RJR did not own the exclusive fishing rights to two adjacent tracts of submerged land lying beneath the navigable waters of the Albemarle Sound where the lands were described in two grants from the State in 1892 but the words "exclusive" and "several" are absent from the statute under which the grant was made, that statute contains no language whatsoever which expressly authorizes the conveyance of exclusive fishing rights, and it has been repeatedly held that exclusive or several fisheries could not be obtained in the navigable waters of the State. **RJR Technical Co. v. Pratt,** 588.

WORKERS' COMPENSATION

§ 62 (NCI4th). Employer's misconduct tantamount to intentional tort; "substantial certainty" test

The decision of the Court of Appeals that the trial court properly entered summary judgment for defendant employer on plaintiff's Woodson claim is reversed for the reasons stated in the dissenting opinion except to the extent that it may be read as implying that actions authorized under *Woodson v. Rowland*, 329 N.C. 330 seek recovery for "intentional torts" in the true sense of that term. **Owens v. W.K. Deal Printing, Inc.**, 603.

WORD AND PHRASE INDEX