NORTH CAROLINA REPORTS

VOLUME 340

SUPREME COURT OF NORTH CAROLINA

7 APRIL 1995

28 JULY 1995

RALEIGH
1996

CITE THIS VOLUME
340 N.C.

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

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OF
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1. Deceased 19 November 1995.
2. Appointed Acting Director effective 18 September 1995 to replace James C. Drennan who resigned 31 August 1995.

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1. Appointed and sworn in 11 August 1995 to succeed George G. Greene who retired 31 March 1995.
2. Sworn in as Special Judge 1 September 1995.
3. Deceased 14 October 1995.
4. Recalled to the Court of Appeals 1 September 1995.

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JOHN M. WALKER	Wilmington

1. Appointed and sworn in 4 December 1995 to replace Stanley Peele who retired 30 November 1995.

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10	C. COLON WILLOUGHBY, JR.	Raleigh
11	THOMAS H. LOCK	Smithfield
12	EDWARD W. GRANNIS, JR.	Fayetteville
13	REX GORE	Bolivia
14	JAMES E. HARDIN, JR.	Durham
15A	STEVE A. BALOG	Graham
15B	CARL R. FOX	Chapel Hill
16A	JEAN E. POWELL	Raeford
16B	L. JOHNSON BRITT III	Lumberton
17A	BELINDA J. FOSTER	Wentworth
17B	CLIFFORD R. BOWMAN	Dobson
18	HORACE M. KIMEL, JR.	Greensboro
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19B	GARLAND N. YATES	Asheboro
19C	WILLIAM D. KENERLY	Concord
20	KENNETH W. HONEYCUTT	Monroe
21	THOMAS J. KEITH	Winston-Salem
22	EUGENE T. MORRIS, JR.	Lexington
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24	JAMES T. RUSHER	Boone
25	DAVID T. FLAHERTY, JR.	Lenoir
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29	JEFF HUNT	Rutherfordton
30	CHARLES W. HIPPS	Waynesville

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

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

ORDERS

PETITIONS TO REHEAR

MOTION FOR RECONSIDERATION

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examination of the Board of Law Examiners as of the 8th day of September, 1995, and said persons have been issued license certificates.

JULY 1995 NORTH CAROLINA BAR EXAMINATION

MICHAEL S. ALLEN ..... Cary
JOHN DESAUSSURE ALLISON ..... Charlotte
COURTNEY DODGE ALLISON ..... Charlotte
NEIL PATRICK ANDREWS ..... Charlotte
PHILLIP GARRETT ASBY ..... Arlington
MARCELLA CAROLINE BARKLEY ..... Winston-Salem
WILLARD TRAVIS BARKLEY ..... Akron, Ohio
THOMAS KENNEDY BARLOW ..... Columbia, South Carolina
SUSAN DIANE BRIGHTMAN ..... Lillington
BRADFORD COLEMAN BROWN ..... Raleigh
ANGELA HUMES BROWN ..... Hampstead
DANIEL CLARKSON BRUTON ..... Winston-Salem
KEVIN JARRETT BULLARD ..... Tabor City
STEVEN MARC CARLSON ..... Winston-Salem
GREGORY STEPHEN CONNOR ..... Bethesda, Maryland
ANNA ELIZABETH DALY ..... Charlotte
DEANNA L. DAVIS ..... Raleigh
ZABRINA WHITE DEMPSON ..... Durham
ROBBIE J. DIMON ..... Marietta, Georgia
DEREK EDGAR DITTNER ..... Severna Park, Maryland
JENNIFER NICOLE FOSTER ..... Chapel Hill
G. RICHARD GOLD ..... Arlington, Virginia
TAUNULA C. GRAYSON ..... Los Angeles, California
KIMBERLY CARR HARE ..... Atlantic Beach
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JOSEPH BRUCE KENNEDY ..... Charlotte
ANNA MARIE KENT ..... Charlotte
JEFFREY G. MARSOCCI ..... Peacedale, Rhode Island
EUGENE HAMILTON MATTHEWS ..... Charlottesville, Virginia
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C. WAYNE MCKINZIE ..... Charlotte
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DONNA GOODEN PAYNE ..... Austin, Texas
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REBECCA ZOE ULSHEN ..... Chapel Hil
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FEBRUARY 1995 NORTH CAROLINA BAR EXAMINATION

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MAUREEN H. DRUMMOND-CLOSSON ..... Granby, Connecticutt
DAVID LAWRENCE FERGUSON ..... Longwood, Florida
TRACY LEON GASTON ..... Charlotte
VIRGINIA C. MCGEE ..... Charlotte
JAMES EDWARD MCNEIL ..... Cleveland, Ohio
DAN G. MEADE ..... Pollocksville
ANURADHA MURTHY ..... Gastonia
THOMAS PIERRE SHELBY ..... Goldsboro

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 15th day of September, 1995, and said persons have been issued license certificates.

JULY 1995 NORTH CAROLINA BAR EXAMINATION

GLEN DAVID BACHMAN ..... Durham
MELEISA CASSANDRA RUSH-LANE ..... Clinton
MICHAEL SCOTT PETTY ..... Raleigh
ROBERT LEE NEWTON, JR. ..... Columbia, South Carolina
FRANCISCO JOSE ROSALES-BRICIO ..... Cary

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 15 day of September, 1995 and said persons have been issued certificates of this Board:

CHARLES WILLIAM CALKINS ..... Greensboro
Applied from the District of Columbia
ROBERT WARD LEAS ..... Monroe
Applied from the State of Texas

Given over my hand and seal of the Board of Law Examiners this the 2nd day of October, 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 13th day of October, 1995 and said persons have been issued certificates of this Board:

ROBERT S. KRAMER ..... Elgin, Illinois
Applied from the State of Illinois
PATRICK JOSEPH O'CONNELL ..... Unionville, Connecticut
Applied from the State of Connecticut
DAVID ONUSCHECK ..... Raleigh
Applied from the State of Pennsylvania
ANDREW TALLMER .....Bayside, New York
Applied from the State of New York
STEVEN I. TURNER .....New York, New York
Applied from the State of New York
DAVID EDWARD BALLARD .....Concord
Applied from the State of Ohio
ROBERT HOWARD BENNA .....Potomac, Maryland
Applied from the District of Columbia
DEBORAH PIPKIN FREELAND .....Greensboro
Applied from the State of Texas
JEAN GREENBAUM .....New York, New York
Applied from the State of New York
James Anthony Kane, Jr. .....Central Islip, New York
Applied from the State of New York
Alpha Christine Ward-Burns .....Plano, Texas
Applied from the State of Connecticut

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 20th day of October, 1995 and said person has been issued certificate of this Board:

SHARON Y. SEATE ..... Houston, Texas
Applied from the State of Texas

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

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 3rd day of November, 1995 and said person has been issued certificate of this Board:

EMILY ANNE KERN ..... Charlotte
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 7th day of November, 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 8th day of December, 1995, and said persons have been issued license certificates.

JULY 1996 NORTH CAROLINA BAR EXAMINATION

STANFORD DAVIS BAIRD ..... Bluefield, West Virginia
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JAMES L. GRIFFIN ..... Chapel Hill
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ROGER WADE RIZK ..... Belmont
BENJAMIN MILTON TURNAGE ..... Greenville
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FEBRUARY 1995 NORTH CAROLINA BAR EXAMINATION

SARAH YATES TOOMEY . . . . . Huntington, West Virginia

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 15th day of December, 1995 and said persons have been issued certificates of this Board:

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Applied from the State of New York
MARILYN SHEPPARD DREWRY . . . . . .Centerport, New York
Applied from the State of New York
LEAH Q. GRIFFIN . . . . . .Charleston, West Virginia
Applied from the State West Virginia
LAURA STONE LAWRENCE . . . . . .Charlotte
Applied from the State of Pennsylvania
MARY FRANCES MCDANIEL . . . . . Greensboro
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SUSAN PAULINE STROMMER . . . . . .Winston-Salem
Applied from the District of Columbia
BARRY WAYNE TAYLOR . . . . . .Charlotte
Applied from the State of Illinois
A. RANDALL VOGELZANG . . . . . .Cary
Applied from the State of Indiana

Given over my hand and seal of the Board of Law Examiners this the 18th day of December, 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. EDWARD EARL DAVIS, ROGER DALE HOOD

No. 135A92

(Filed 7 April 1995)

1. Criminal Law § 762 (NCI4th)— instruction on reasonable doubt

The trial court's instruction on reasonable doubt did not unconstitutionally lower the State's burden of proof.

Am Jur 2d, Trial § 1385.

2. Robbery § 84 (NCI4th)— attempted armed robbery—sufficient evidence of intent

The State presented sufficient evidence of intent to commit robbery to support defendants' conviction of attempted armed robbery of a pawn shop where the State's evidence tended to show that defendants were in the pawn shop three times on the day in question; other customers and employees were in the shop the first two times; the third time was right before closing, and a brief discussion ensued about the sale of a shotgun; defendants then drew their pistols, and one defendant told the victim, a pawn shop employee, "Buddy, don't even try it," and then shot the victim twice; the victim returned fire once after falling to the floor; the second defendant then shot the victim; a second employee was ordered into the back room at gunpoint; both defendants fled the scene without taking any money or other property from the pawn shop; and defendants had robbed a

McDonald's restaurant one week prior to the incident at the pawn shop.

Am Jur 2d, Robbery § 89.

3. Evidence and Witnesses § 342 (NCI4th)— attempted armed robbery—evidence of prior robbery—admissibility to show intent

Evidence that defendants committed an armed robbery of a McDonald's restaurant one week prior to the shooting of a pawn shop employee was admissible to show intent in a prosecution for attempted armed robbery of the pawn shop where, in both incidents, defendants entered the premises armed and waited until near closing time, when no other customers were present, to commit the crime; defendants initially carried on as though they were on the premises to conduct legitimate business; and one defendant did not speak during either crime. Furthermore, the trial court did not err by refusing to exclude this evidence under the balancing test required by N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Robbery § 59.

Admissibility, in robbery prosecution, of evidence of other robberies. 42 ALR2d 854.

4. Homicide § 257 (NCI4th)— first-degree murder—shooting of pawn shop employee—premeditation and deliberation

There was sufficient evidence of premeditation and deliberation to support defendants' convictions of first-degree murder of a pawn shop employee where the evidence tended to show that (1) the first defendant drew his pistol, pointed it at the victim, told the victim, "Don't even try it," and twice shot the victim without just cause or legal provocation while the victim was standing on the pawn shop premises, and (2) after the victim had been felled by the first defendant's shots and fired his own pistol through the counter, the second defendant pointed his pistol over the counter at the wounded victim and shot him a third time.

Am Jur 2d, Homicide §§ 437 et seq.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.

5. Jury § 226 (NCI4th)— prospective juror—death penalty views—excusal for cause—refusal to permit rehabilitation

The trial court did not err by excusing a prospective juror for cause during *voir dire* on death penalty views without giving defendant an opportunity to attempt to rehabilitate the juror where the juror's answers to questions by the State which formed the basis for her excusal for cause were clear and unequivocal, and there was no indication that she would have changed her position in response to questioning by defendant.

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 § 111 (NCI4th)— capital trial—jury selection—denial of individual voir dire

The trial court did not abuse its discretion in denying defendant's request for individual *voir dire* of potential jurors in a capital first-degree murder trial because the case attracted extraordinary publicity, billboards about the case were posted along a major thoroughfare in the county, and there was a hotline for case information where the record reflects that potential jurors were questioned as a group and individually, by both the State and defendant, regarding their knowledge of the case, whether they had read newspaper articles or seen television broadcasts regarding the trial, whether they had discussed the case in their community, and whether they had formed any opinion as to defendant's guilt; those potential jurors living in the area of the billboards were asked specific questions about the billboards; and defendant had one remaining peremptory challenge at the time of selection of the alternate jurors and was given three additional challenges for the three alternates to be selected.

Am Jur 2d, Jury § 199.

7. Jury § 222 (NCI4th)— capital trial—jury selection—death penalty views—allowance of challenges for cause

The trial court did not err by allowing the State's challenges for cause of two prospective jurors in a capital trial because of their death penalty views where both jurors were somewhat uncertain initially as to whether they could vote for the death penalty, but both ultimately answered unequivocally that they had

feelings about the death penalty that would impair their ability to perform their duties as jurors in accordance with the trial court's instructions.

Am Jur 2d, Jury § 279.

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

8. Jury § 141 (NCI4th)— capital trial—jury selection—life imprisonment—disallowance of questions about parole eligibility

The trial court properly refused to permit defense counsel to question prospective jurors in a capital trial as to their knowledge about parole eligibility for a defendant sentenced to life imprisonment.

Am Jur 2d, Jury §§ 205 et seq.

9. Jury § 148 (NCI4th)— capital trial—jury selection—feelings about death penalty as deterrent—disallowance of questions

The trial court did not err by refusing to permit defense counsel to ask prospective jurors in a capital trial how they felt about the death penalty as a deterrent to crime since the trial court may refuse to allow questions that are overly broad, incomplete, hypothetical, or that attempt to "stake-out" a potential juror.

Am Jur 2d, Jury §§ 205 et seq.

10. Jury § 124 (NCI4th)— jury selection—improper hypothetical question

The trial court properly sustained the prosecutor's objection to defendant's question to prospective jurors in a capital trial as to whether any of them agreed with the cliche "an eye for an eye and a tooth for a tooth" since (1) a hypothetical question which is ambiguous and confusing or contains an incorrect or inadequate statement of the law is improper, and (2) the trial court was willing to allow the question if defendant provided more clarity but defendant chose instead to abandon the question.

Am Jur 2d, Jury §§ 205 et seq.

11. Kidnapping and Felonious Restraint § 21 (NCI4th)— second-degree kidnapping—purpose of terrorizing victim—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of second-degree kidnapping based upon an indictment alleging that defendant unlawfully confined and restrained the victim "for the purpose of terrorizing her" where the evidence tended to show that defendant shot a pawn shop employee during an attempted robbery; defendant then pointed his gun at the kidnapping victim and ordered her to get on the floor or he was going to shoot her, too; the victim fell to the floor and began crawling toward the back room; and defendant, in a voice that sounded as if it were right behind the victim, kept repeating the words, "Crawl back there." The restraint or removal of the victim was not a necessary part of the attempted armed robbery and shooting, and the jury could reasonably infer from the evidence that defendant intended to terrorize the victim.

Am Jur 2d, Abduction and Kidnapping § 32.

12. Evidence and Witnesses § 2172 (NCI4th)— mental health expert—episode during interview with another—basis for diagnosis—exclusion as harmless error

Defendant's mental health expert should have been permitted to testify concerning what she had been told about an episode during a jail interview of defendant by another member of the medical group charged with evaluating defendant's mental health status where earlier testimony had established that the expert relied upon information supplied by other group members in formulating her final diagnosis, since the testimony was admissible under N.C.G.S. § 8C-1, Rule 703 to show the basis for the expert's opinion. However, the exclusion of this testimony was harmless error where the jury heard testimony by the expert that she had conducted interviews with defendant and administered a battery of psychological tests to him; the expert testified that defendant manifested symptoms of child abuse, testified to instances of "self-mutilating behavior" by defendant, and described instances of verbal abuse of defendant by his father; and the expert told the jury that she ultimately diagnosed defendant as suffering from major depression, post-traumatic stress disorder, and a schizoid personality, and that defendant suffered from serious mental illness and viewed the world as a "place of constant danger."

Am Jur 2d, Expert and Opinion Evidence §§ 32 et seq.

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludible as hearsay—state cases. 89 ALR4th 456.

13. Criminal Law § 1337 (NCI4th)— first-degree murder—same evidence not used for two aggravating circumstances

The trial court's submission in a capital trial of the aggravating circumstances of a previous conviction of a violent felony and commission of the murder while defendant was engaged in an attempted armed robbery of a pawn shop did not constitute impermissible "double counting" where the trial court's instructions permitted the jury to consider only a prior McDonald's robbery and an Ohio murder for the previous conviction of a violent felony circumstance and did not permit the jury to consider the attempted armed robbery as evidence of this circumstance.

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.

14. Criminal Law § 1340 (NCI4th)— first-degree murder—felony murder and premeditation and deliberation—underlying felony as aggravating circumstance

Where the evidence was sufficient to support defendant's conviction by the jury of first-degree murder based on both felony murder and premeditation and deliberation, the trial court did not err in submitting the underlying felony of attempted armed robbery as an aggravating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599.

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

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

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, where the jury convicted defendant under theories of felony murder and premeditation and deliberation; the jury found as aggravating circumstances (1) that defendant had previously been convicted of a felony involving the use of violence to the person and (2) that the murder was committed while defendant was attempting to commit armed robbery; the jury found only four of twenty-two submitted mitigating circumstances, and only one of those four (mental or emotional disturbance) was a statutory circumstance; defendant was twenty-four years old and had been previously convicted of murder in another state several years earlier and of armed robbery committed one week prior to this murder; the evidence showed that defendant shot an innocent businessman in cold blood before an eyewitness and then threatened the life of the eyewitness; and the jury found that a nineteen-year-old codefendant played a lesser role in the murder and attempted robbery and would not have committed the crimes except for defendant's influence.

Am Jur 2d, Criminal Law § 628.

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.

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

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 as to defendant Davis and a judgment imposing a sentence of life as to defendant Hood entered by Downs, J., at the 24 February 1992 Criminal Session of Superior Court, Buncombe County, upon jury verdicts of guilty of first-degree murder in a case in which defendants were capitally tried. Defendant Davis' motion to bypass the Court of Appeals as to additional judgments imposed for attempted robbery with a dangerous weapon and second-degree kidnapping and defendant Hood's motion to bypass as to an additional judgment of attempted robbery with a dangerous weapon were allowed on 15 July 1993. Heard in the Supreme Court 16 March 1994.

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.

J. Clark Fischer for defendant-appellant Davis.

Scott F. Wyatt and Thomas Courtland Manning for defendant-appellant Hood.

FRYE, Justice.

Defendants were indicted on 9 September 1991 for first-degree murder and attempted robbery with a dangerous weapon. Defendant Davis was also indicted for second-degree kidnapping. They were tried capitally and jointly at the 24 February 1992 Criminal Session of Superior Court, Buncombe County, Judge James U. Downs presiding.

Defendants were found guilty of first-degree murder on theories of both premeditation and deliberation and felony murder and attempted robbery with a dangerous weapon. Defendant Davis was also found guilty of second-degree kidnapping.

Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended death for defendant Davis and life imprisonment for defendant Hood. The judge sentenced each defendant accordingly. Davis was also sentenced to forty years' imprisonment for the robbery with a dangerous weapon conviction and thirty years' imprisonment for the kidnapping conviction. The judge sentenced Hood to forty years' imprisonment for the robbery with a dangerous weapon conviction.

The State's evidence introduced during the guilt phase tended to show the following narrated facts. On 16 August 1991, defendants visited the Leicester Pawn Shop in Buncombe County where Mark Lane, the murder victim, was working and his girlfriend, Kathleen Shively, the kidnapping victim, was helping. They made three visits. The first was between 12:00 and 12:30 p.m. Defendants purchased a police scanner. Davis asked whether Lane bought or pawned shotguns. When Lane told him that he did, Davis stated they would be back.

The next visit was at approximately 2:30 p.m. when defendants returned with a shotgun. Lane offered them $50.00. Davis rejected the offer and defendants left. During both the first and second visits, there were other customers in the store. A sign on the store stated that the store closed at 6:00 p.m.

The third visit occurred at 5:55 p.m. while Lane and Shively were preparing to close the store. Lane had placed $1,000 in cash from the cash register and a pistol in his back pocket. As defendants entered, Davis was carrying a shotgun and told Lane he would accept Lane's earlier offer of $50.00. Lane laid the shotgun on the counter and asked Shively to write up the ticket. Upon Shively's request, Davis handed her his driver's license. Immediately thereafter, Davis pulled a "cowboy type gun" from under his shirt and stated, "Buddy, don't even try it. Buddy, don't even try it." Davis was pointing the gun right at Lane, who stood with both hands at his sides. Davis then shot Lane, striking him in his left wrist. Davis shot Lane a second time, and Lane twisted around and fell to the floor. Shively then heard a third and fourth shot but did not know who fired them.

Davis, pointing his pistol at Shively, ordered her to get down on the floor "you dirty fuckin bitch, or I'm going to kill you, too." Shively fell to the floor and began crawling towards the back office. Davis kept repeating, "Crawl back there." Hood remained silent during all of these events. After hearing defendants leave, Shively called 911 and began performing CPR on Lane. Shively positively identified defendants.

A pathologist testified that Lane had three distinct gunshot wounds. One passed through his left wrist and lodged in the left chest wall. A second entered the front shoulder and exited through the back of the shoulder. A third entered the right chest and passed through the body, with the bullet causing damage to both lungs, the diaphragm, liver, and aorta. Cause of death was massive hemorrhaging secondary to the gunshot wound through the chest.

A crime scene analyst with the Buncombe County Sheriff's Department, Michael Wright, observed the victim Lane lying on the floor behind the counter in the pawn shop with a stainless steel revolver near his right hand; five unspent cartridges were found in the gun. The bullet that had been fired from the pistol was removed from the ceiling, and an exit bullet hole was found in the top of the counter top. Hand wipings from the victim indicated that the victim "could have fired a gun."

Defendants were arrested near the Georgia-South Carolina state line, where they had wrecked their Ford Fairmont following a high-speed chase. Following waiver of their constitutional rights, both defendants gave separate, written statements which were substantially similar. According to Davis' statement, defendants went to the pawn shop, and Davis told Lane that they had two "hot" pistols and a shotgun for sale. Lane said he would buy them. Davis said that he laid the shotgun on the counter and then reached to pull the pistol out. The victim then "reached back like—like this and pulled out some sort—some little automatic. I guess it was a .25 or something. I don't know, and he shot, and I shot back in self defense."

Hood's statement was similar. He said the victim reached behind him, pulled out a gun, and started firing. Davis returned fire and the victim fell. Hood did not think the victim had been hit. The victim "was firing up at me, so I reached over and shot."

Statements by both defendants were later given to Charles E. Calloway, a Buncombe County detective with the Sheriff's Department. There were some inconsistencies in the statements of the two defendants on this occasion. The inconsistencies were as follows: Hood intimated that both he and Davis had pistols with them during their third visit to the pawn shop. Davis said that Hood's pistol was in the car and that Hood had gone to retrieve it before selling it.

Detective Calloway also testified that his investigation did not reveal a .25 automatic anywhere near the victim's body. He testified on cross-examination that Shively made no reference to a robbery or an attempted robbery and said that Davis was carrying the shotgun "not like they were going to fire it, just carrying it like they were going to sell it." Investigation revealed that nothing was missing from the pawn shop's safe, and neither defendant was observed going into the back room or anywhere near the safe. Both money and jewelry were removed from the victim's body prior to autopsy by investigators.

Defendants did not testify or offer any evidence during the guilt phase of the trial.

During the sentencing phase, the State offered evidence that Davis had been convicted of murder in Ohio in 1976. Defendants did not testify but offered evidence from family members and professionals regarding their family histories and personal traits.

Additional evidence introduced during the trial will be discussed where pertinent to the issues raised by defendants.

Issues Raised by Defendants Davis and Hood

I.

[1] First, both defendants assign error to the trial court's reasonable doubt instruction. On 12 August 1994, this Court allowed defendant Hood's motion to adopt defendant Davis' brief as to this issue. Defendants contend that the trial court instructed the jury on reasonable doubt using language which recent decisions of both this Court and the United States Supreme Court condemn as unconstitutionally lowering the State's burden of proof. Defendants rely on *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993) (*Bryant I*), in which we found error in the reasonable doubt instruction based on *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1991). However, the Supreme Court of the United States vacated the judgment and remanded *Bryant I* to this Court for further consideration in light of *Victor v. Nebraska*, 511 U.S. —, 127 L. Ed. 2d 583 (1994). *North Carolina v. Bryant*, — U.S. —, 128 L. Ed. 2d 42 (1994). On remand, we held that there was no *Cage* error entitling defendant to a new trial. *State v. Bryant*, 337 N.C. 298, 446 S.E.2d 71 (1994) (*Bryant II*). The instruction in *Bryant* was essentially identical to the instruction in this case; therefore, we reject this assignment of error on the basis of our opinion in *Bryant II*.

II.

[2] Next, defendants contend that the trial court erred when it refused to dismiss their charges of attempted armed robbery. As the basis for their contention, defendants claim that the State failed to present sufficient evidence of each of the elements of the crime charged. Specifically, defendants argue that there was insufficient evidence of intent.

The motion to dismiss must be allowed unless the State presents substantial evidence of each element of the crime charged. *State v.*

McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991). "Substantial evidence" means " 'that the evidence must be existing and real, not just seeming or imaginary.' " *State v. Clark*, 325 N.C. 677, 682, 386 S.E.2d 191, 194 (1989) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). In evaluating a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988).

Defendants were charged with attempted robbery with a dangerous weapon in violation of N.C.G.S. § 14-87. The two elements of attempted robbery with a dangerous weapon are: (1) an intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense. *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980). Thus, "[a]n attempted 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).

The State's evidence, based on the testimony of eyewitness Kathy Shively, showed that defendants Davis and Hood were in the pawn shop three times on the day of the murder. The first two times, other customers and employees were in the store. The final time was right before closing. During this third visit, a brief discussion ensued over the sale of a shotgun. Defendants then drew their pistols, and Davis stated to the victim, Mark Lane, "Buddy, don't even try it. Buddy, don't even try it." Davis then immediately shot Lane twice. Lane returned fire once after falling to the floor. Hood then shot Lane. Davis then ordered Kathy Shively into the back room at gunpoint. After that, both defendants fled the scene. No money or property was taken from the pawn shop.

Both defendants contend that this evidence was insufficient to show that they intended to commit robbery because they neither demanded money prior to nor took any money or valuables after shooting Lane. In *State v. Smith*, as in this case, defendant did not demand money, and this Court upheld the attempted armed robbery conviction. The defendant in *Smith* pulled a gun on the store owner and said: "Don't move. . . . Don't put your hands under that counter." 300 N.C. at 77, 265 S.E.2d at 169. A passerby interrupted the defendant's act, and he fled the store. This Court, relying on *State v. Powell*,

277 N.C. 672, 178 S.E.2d 417 (1971), held that, even though the defendant did not demand money, his actions were substantial evidence of each essential element of attempted armed robbery. *Smith*, 300 N.C. at 80, 265 S.E.2d at 170.

The defendants here and the defendant in *Smith* went much further in their display and use of a firearm than the defendant in *Powell*. In *Powell*, the defendant was restrained from any action when a store clerk grabbed his wrist and seized the gun before he was able to withdraw it from a purse the defendant was carrying. At no time did the defendant in *Powell* point the weapon at anybody, nor did he make any verbal demands other than those incident to the act of purchasing. This Court held in *Powell* that the crime of attempted armed robbery was complete when the defendant placed his hand on the pistol and began to withdraw it with the intent of completing the substantive offense of armed robbery through its use. *State v. Powell*, 277 N.C. at 678-79, 178 S.E.2d at 421.

Defendant Hood's reliance upon the case of *State v. Jacobs*, 31 N.C. App. 582, 230 S.E.2d 500 (1976), is misplaced. In *Jacobs*, the State's evidence tended to show that the defendant was in a hardware store near closing time with a pistol in his belt. A store employee was at the cash register counting the day's receipts. The defendant made no gesture indicating an intent to touch, withdraw, or otherwise threaten the use of the pistol. Furthermore, the defendant did not make any demand, express or implied, for money or any other property. The Court of Appeals held that this evidence was insufficient to support a conviction of attempted armed robbery. The facts in this case are distinguishable from the facts in *Jacobs*. Here, defendants drew their pistols, and Davis told the victim, "Buddy, don't even try it." Such actions have been held to be sufficient evidence of attempted armed robbery even without a demand for money or property.

[3] Furthermore, the State offered and the trial court admitted evidence of a prior similar crime to show defendants' intent to commit the attempted armed robbery of the Leicester Pawn Shop. Defendants also assign error to the admissibility of this evidence. The North Carolina Rules of Evidence provide that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other

> purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1993).

The State offered evidence that defendants robbed a McDonald's restaurant in Canton, North Carolina, on 9 August 1991. A victim of this robbery, the assistant manager of McDonald's, testified that defendants came into the restaurant near closing time, ordered food, ate, and continued to sit at the table while it was being cleaned up. The assistant manager, Charlene Donaldson, testified that she went to clean one of the bathrooms and came back out into the lobby. Hood was not there. When she passed Davis' table, he stood up behind her, cocked a pistol, put the pistol behind her back, and said, "keep walking." Hood then came in with a shotgun and pumped it. Davis then forced her and the manager on duty to open the safe and fill a bag with approximately $1,900. Davis told them to "stay in the office and don't leave for like five minutes." Hood did not speak at all while he and Davis were in the restaurant. Hood pled guilty to the McDonald's armed robbery. Davis was tried before a jury and found guilty.

The State contends, and we agree, that evidence of the McDonald's robbery committed one week prior to the attempted robbery in this case was sufficiently similar to show intent. In both incidents, the defendants entered the premises armed and waited until near closing time, when no other customers were present, to commit the crime. Defendants initially carried on as though they were on the premises to conduct legitimate business. Moreover, defendant Hood did not speak during either crime.

Defendants argue that even if the evidence of the McDonald's robbery were properly admissible, it should have been excluded under the balancing test required by Rule 403. Rule 403 allows the exclusion of otherwise admissible evidence if its "probative value is substantially outweighed by the danger of unfair prejudice." *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986). "[T]he ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). We find that there was no abuse of discretion by the trial court in refusing to exclude this evidence since the McDonald's robbery was sufficiently similar and occurred only one

week prior to the attempted robbery in this case. Furthermore, the trial court gave a limiting instruction that the evidence of the prior crime was being admitted solely for the purpose of showing intent.

We find that all of this evidence, when viewed in the light most favorable to the State, was sufficient to submit the attempted armed robbery charge to the jury.

III.

Finally, defendants Davis and Hood contend that the trial court erred by submitting their first-degree murder charges to the jury. Defendants were found guilty of murder on the theories of malice, premeditation and deliberation, and felony murder. Defendants argue that there was insufficient evidence to support the commission of the underlying felony of attempted armed robbery and therefore insufficient evidence to support their convictions under the felony murder theory. For the reasons set forth in Issue II above, we find that the evidence of the underlying felony of attempted armed robbery was sufficient. This argument has no merit.

[4] Defendants further argue that there was insufficient evidence of malice and premeditation and deliberation necessary to support their convictions of first-degree murder. Malice may be implied from the use of a pistol, a deadly weapon. *State v. Porter*, 326 N.C. 489, 505, 391 S.E.2d 144, 155 (1990). Thus, the State only needed to show sufficient evidence of premeditation and deliberation. In defining premeditation and deliberation, this Court has stated:

> "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. . . . 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. . . ."
>
> "Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. . . . Instead, they usually must be proved by circumstantial evidence. Among other circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the

killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner."

State v. Small, 328 N.C. 175, 181-82, 400 S.E.2d 413, 416 (1991) (quoting *State v. Brown*, 315 N.C. 40, 58-59, 337 S.E.2d 808, 822-23 (1985) (citations omitted), *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)).

Defendant Davis contends that the evidence could have been interpreted to suggest that there was "a mutual misperception by three armed men result[ing] in the volley of gunshots that left Mark Lane dead"; therefore, there was insufficient evidence of premeditation and deliberation. However, if there is substantial evidence to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury, and the motion to dismiss should be denied. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). The fact that Davis drew his pistol, pointed it at the victim, and then told him, "Don't even try it," prior to shooting him is sufficient evidence of premeditation and deliberation to support a charge of first-degree murder. Furthermore, defendant killed the victim without just cause or legal provocation and after ordering him not to move while he was standing on his own premises.

Defendant Hood contends that he became "involved and embroiled in this whole ordeal when and only when Lane shot up through the counter narrowly missing [him]." In response, Hood contends that he reflexively and instinctively shot back; therefore, there was insufficient evidence of premeditation and deliberation. The fact that Hood drew his pistol and pointed it over the counter at the victim who was lying wounded on the floor, prior to shooting him, is some evidence of premeditation and deliberation. There was no evidence of provocation by the victim. The victim had been felled by the two shots fired by Davis, and Hood then shot him a third time. In addition, the question of self-defense was not even submitted to the jury, and defendant Hood does not assign this as error.

Therefore, we find that there was sufficient evidence of premeditation and deliberation to support defendants' convictions of first-degree murder and reject their assignments of error on this ground.

Issues Raised by Defendant Davis

IV.

[5] Defendant Davis contends that the trial court abused its discretion by precluding him from rehabilitating prospective juror Elliot during *voir dire* on death penalty views. This issue was recently addressed in *State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993), where we held that a judge erred when he refused rehabilitation on the ground that he had no authority to do so. We determined that such a ruling was within the trial court's discretionary power and that if a juror's responses to questions put by the State were equivocal and unclear, then the trial court should exercise its discretion in favor of rehabilitation by defendant.

The State properly points out that unlike *Brogden*, there was no blanket prohibition against rehabilitation here. Instead, the trial court acted on a juror-by-juror basis. Thus, *Brogden* does not control this case on its facts. We must still, however, determine whether prospective juror Elliot gave clear and unequivocal answers so that no rehabilitation was required. During the *voir dire* of Ms. Elliot, the following transpired:

> MR. MOORE: How about you, Ms. Elliot?
>
> JUROR: I don't think I could put anybody to death. I don't think.
>
> MR. MOORE: Again, it's hard to hear.
>
> JUROR: I don't think it's my right to put anybody to death.
>
> MR. MOORE: Again, now is the only time that the lawyers get to chat with you and find out. It's very important that you be honest and candid with us, and you're the only one who knows. Again, I'll have to ask you the same question as I asked Mr. Lukowicz. Are your beliefs—again, I won't ask you what they are, but are there some philosophical, moral or religious beliefs that you have that are against the death penalty?
>
> JUROR: Well, it's not anything with religion or anything like that.
>
> MR. MOORE: I'm not asking which one it is. I'm just saying do you have some kind of internal belief, whether it's philosophical or moral?

JUROR: I just don't know if I can, you know, give somebody the death penalty.

MR. MOORE: Okay. Well, you have opinions against the death penalty personally.

JUROR: Yeah.

MR. MOORE: All right. And the issue is, would that attitude prevent you in this particular case from sitting here and listening to the witnesses and the evidence and the law as the judge gives it to you and being able to consider the death penalty as an option in this case?

JUROR: No.

MR. MOORE: You could consider the death penalty?

JUROR: Well, according to what I hear and to the case.

MR. MOORE: Okay. Well, —

JUROR: But I don't believe in the death penalty, no.

MR. MOORE: Well, Okay. Maybe I'm not phrasing my question right. I'm not understanding. What I understand you to say is you don't believe in the death penalty.

JUROR: No.

MR. MOORE: And does that mean in this case, regardless of what you hear, you couldn't come back in here with the death penalty?

JUROR: No.

MR. MOORE: You could come back in with the death penalty?

JUROR: No, I can't.

MR. MOORE: Okay. I may not be asking my question very artfully, but so—and again, let me try again because I have to ask these questions a certain way.

JUROR: Okay.

MR. MOORE: So in the event that you were back in the jury room after having convicted one or—one or both of these defendants of first degree murder, and regardless of what evidence had been presented to you, and regardless of what the judge told you

the law was, because of your personally held beliefs, again, whatever the source of those beliefs—

JUROR: Uh-huh.

MR. MOORE:—Are you saying that you could not consider the death penalty as an option?

JUROR: Right.

MR. MOORE: You are saying that?

JUROR: That's what I'm saying.

MR. MOORE: Okay. I'd submit Ms. Elliot and Mr. Lukowicz for cause, your Honor.

MR. KELLEY: I would object and ask to voir dire at this point.

MR. MOORE: Object to them both.

THE COURT: Voir dire denied. Objection is overruled. Ms. Elliot and Mr. Lukowicz, you can step aside.

Defendant argues that Ms. Elliot's initial responses were equivocal, and she answered that she "could not consider" capital punishment as an option only after a series of leading questions by the State. Defendant further argues that the equivocal nature of Ms. Elliot's initial responses suggests a strong likelihood that additional questioning by defendant would have clarified her later responses and shown that Ms. Elliot was qualified to sit as a juror under the *Witherspoon-Witt* standard.

This Court has repeatedly found no abuse of the trial court's discretion where challenges for cause are supported by prospective jurors' answers to questions propounded by the State and the defense has failed to show that further questioning would likely have produced different answers. *See Brogden*, 334 N.C. at 44-45, 430 S.E.2d at 908-09 (citing *State v. Taylor*, 332 N.C. 372, 420 S.E.2d 414 (1992)); *see also State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992), *cert. denied*, —— U.S. ——, 122 L. Ed. 2d 684 (1993); *State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991); *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987); *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986). Here, we believe that prospective juror Elliot's answers, which formed the basis for her excusal for cause, were clear and unequivocal. In addition, there was no indication that she would have changed her position in response to questioning by defendant. Therefore, the trial

court did not abuse its discretion in denying defendant's request to rehabilitate her.

V.

[6] In his next assignment of error, defendant Davis contends that the trial court abused its discretion in denying his request for individual *voir dire* of potential jurors. Defendant argues that this case attracted extraordinary publicity. Furthermore, billboards were posted along a major thoroughfare in Buncombe County, and there was a hotline for case information.

North Carolina statutory law provides: "In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." N.C.G.S. § 15A-1214(j) (1993). " 'The decision of whether to grant sequestration and individual voir dire of prospective jurors rests in the sound discretion of the trial court, and its ruling will not be disturbed absent a showing of an abuse of discretion.' " *State v. Murphy*, 321 N.C. 738, 740, 365 S.E.2d 615, 617 (1988) (quoting *State v. Barts*, 316 N.C. 666, 678-79, 343 S.E.2d 828, 837 (1986)).

Defendant has not shown, nor can we find, any abuse of discretion by the trial court in this case. The record reflects that potential jurors were questioned as a group and individually, by both the State and defendant, regarding their knowledge of the case, whether they had read newspaper articles or seen television broadcasts regarding the trial, whether they had discussed this case in their community, and whether they had formed any opinion as to defendant's guilt or innocence. Those potential jurors living in northwestern Buncombe County near the Leicester community, where the billboards lined the Leicester Highway, were asked more specific questions and were frequently questioned regarding the billboards. Prior to the selection of alternate jurors, defendant had used thirteen of his fourteen peremptory challenges, and he was given three additional challenges, one for each of the three alternates. Thus, this assignment of error is rejected.

VI.

[7] In his next assignment of error, defendant Davis contends that the trial court erred in allowing the State to challenge prospective jurors Stroup and Thompson for cause because of their feelings about the death penalty. The standard for determining when a prospective juror

may be excluded because of 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) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)).

After stating that he did not know if he could vote for the death penalty, prospective juror Stroup responded to the following questions:

> Q: Well, again, only you can answer those questions. And in North Carolina the law is such that if you could not under any circumstances vote for the death penalty, then it has to be an option you could consider to be able to sit on the jury. So the issue is, could you consider voting for the death penalty in this case?
>
> A: No.
>
> Q: So you can't conceive of any circumstances or evidence you might hear that would allow you to impose the death penalty?
>
> A: No, I don't think so.

Similarly, prospective juror Thompson expressed mixed emotions about her ability to vote for the death penalty before answering the following questions:

> Q: So you can't conceive of any circumstances that would allow you to vote for death in this case?
>
> A: If I could sit here and tell you that I knew already—
>
> Q: No, I understand that, ma'am. I'm not trying to argue with you.
>
> A: I'm saying that according to the law, I know that I could, but I have moral convictions that tell me very strongly no.
>
> Q: That's fine.
>
> A: So I say no.
>
> Q: That's why I'm trying to make sure we're both clear on what we're talking about. I'm not trying to put words in your mouth, but I understand you to say that you have some moral—
>
> A: Religious.
>
> Q: —or religious beliefs that would prevent you from considering the death penalty as a punishment in this case, is that right?

A: Right.

Although somewhat uncertain initially, potential jurors Stroup and Thompson both ultimately answered unequivocally that they had feelings about the death penalty that would impair their ability to perform their duties as jurors in accordance with the trial court's instructions. Therefore, we conclude the trial court properly excused prospective jurors Stroup and Thompson for cause.

[8] Defendant Davis also contends that the trial court impermissibly limited his *voir dire* of prospective jurors on three separate occasions. First, defendant argues that he was erroneously prevented from asking the following:

> Q: Do you think, ladies and gentlemen, that life imprisonment means that a person is committed to prison for the balance of their natural life?
>
> MR. MOORE: Objection.
>
> COURT: Sustained.

Defendant argues that juror misconceptions about the possibility of early parole for a defendant sentenced to life imprisonment increase the likelihood that the jury will recommend death. Thus, this Court should allow limited inquiry into a prospective juror's views on the meaning of a life sentence. We addressed this exact issue in *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989), *sentence vacated on other grounds*, 494 U.S. 1050, 108 L. Ed. 2d 756, *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991). In *McNeil*, we stated that "[b]ecause parole eligibility is irrelevant to the issues at trial and is not a proper matter for the jury to consider in recommending punishment, we hold that the court properly refused to allow defense counsel to question potential jurors as to their knowledge about parole eligibility." *Id.* at 44, 375 S.E.2d at 916. We see no reason to depart from our holding in *McNeil*; therefore, we reject this assignment of error.

[9] Second, defendant maintains that he was impermissibly restricted from asking the following:

> Q: How do you men and women of the jury feel about the death penalty as a deterrent to crime?
>
> MR. MOORE: Objection.
>
> COURT: Sustained.

"Although wide latitude is given counsel in voir dire examination of jurors, the form and extent of the inquiry rests within the sound discretion of the court." *State v. Johnson*, 317 N.C. 343, 382, 346 S.E.2d 596, 618 (1986). We have repeatedly upheld a trial court's refusal to allow the defense to ask questions that were overly broad, incomplete, hypothetical, or that attempted to "stake-out" a potential juror. *See State v. Reese*, 319 N.C. 110, 121, 353 S.E.2d 352, 358 (1987); *State v. Taylor*, 304 N.C. 249, 265-66, 283 S.E.2d 761, 772 (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); *State v. Vinson*, 287 N.C. 326, 336-37, 215 S.E.2d 60, 68-69 (1975), *death sentence vacated on other grounds*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976). We find no abuse of the trial court's discretion here.

[10] Finally, defendant argues that he was impermissibly prevented from asking the following:

> Q: There's an old cliche that is referred to commonly in cases of this sort, "an eye for an eye, and a tooth for a tooth." Are there any one of you men or women on the jury who feel that way?"
>
> MR. MOORE: Objection.
>
> COURT: Sustained. I'll let you ask that question if it has more clarity to it.

Counsel for defendant made no attempt at this time to clarify or rephrase the question. This Court has held that "hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed." *Vinson*, 287 N.C. at 336, 215 S.E.2d at 68. The trial court was willing to allow the question if defendant had provided more clarity. Defendant chose instead to abandon the question. Accordingly, we find no error or abuse of discretion in the trial court's decision to sustain the prosecutor's objection.

VII.

[11] Defendant Davis next contends that the trial court erred in denying his motion to dismiss the second-degree kidnapping charge. Defendant was indicted for kidnapping Kathleen Shively "by unlawfully confining her and restraining her without her consent for the purpose of terrorizing her." The applicable statute provides in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint, or removal is for the purpose of:
>
> . . . .
>
> (3) . . . terrorizing the person so confined, restrained or removed . . . .

N.C.G.S. § 14-39(a) (1993).

Defendant claims that his motive for taking Shively into the back room was not to terrorize her. Instead, his words and conduct toward Shively were simply part of the chain of events surrounding the fatal shooting of Mark Lane and were therefore insufficient to support the offense of second-degree kidnapping. In support of his argument, defendant relies on this Court's decision in *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981). In *Irwin*, the defendant was charged with attempted armed robbery and second-degree kidnapping. The evidence tended to show that defendant forced the victim to the back of the store in order to force her to open the safe. The kidnapping indictment charged the defendant with removing the victim for the purpose of "facilitating the commission of any felony." We concluded in *Irwin* that the restraint or removal of the victim was a necessary part of the attempted armed robbery and therefore could not support a kidnapping conviction. *Id.* at 103, 282 S.E.2d at 446.

Irwin is factually distinguishable from this case. Here, unlike *Irwin*, the defendant was not charged with kidnapping for the purpose of "facilitating the commission of any felony," and the restraint or removal of Shively was not "an inherent and integral part" of any other felony. *Id.* Defendant in the instant case was charged with kidnapping for the purpose of terrorizing Shively. In determining the sufficiency of the evidence, "the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize" the victim. *State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 405 (1986). We believe the evidence in this case, when viewed in the light most favorable to the State, was sufficient to support the kidnapping charge.

Terrorizing is defined as "more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension." *Id.* In this case, the evidence showed

that, after shooting Lane, defendant Davis pointed his gun at Shively and ordered her to get down on the floor "you dirty fuckin bitch, or I'm going to kill you, too." Shively fell to the floor and began crawling towards the back room. She testified that defendant Davis' voice sounded as if it were right behind her, and he kept repeating the words, "Crawl back there." A jury could reasonably infer from this evidence that defendant Davis intended to terrorize Shively. Therefore, we find no error in the trial court's denial of defendant's motion to dismiss the kidnapping charge.

VIII.

[12] In his next assignment of error, defendant Davis contends that the trial court erred in sustaining the State's objections to questions propounded to defendant's mental health expert, Dr. Faye Sultan. During the course of Dr. Sultan's testimony, the following exchange took place:

> Q. There was an episode, I believe, that appeared during the conduct of an interview with Jeanine King when she was up there in the jail. Do you recall that?
>
> A. Yes, sir, I do.
>
> MR. MOORE: Objection. She wasn't there.
>
> COURT: Sustained.
>
> Q. Is that episode reflected in your clinical notes?
>
> A. That episode is reflected in Ms. King's notes to me, yes.
>
> Q. What did that episode—What did Ms. King tell you about that episode?
>
> MR. MOORE: Objection.
>
> COURT: Sustained.

Under Rule 703, an expert may give his opinion based on facts not otherwise admissible in evidence, provided that the information considered by the expert is of the type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject. N.C.G.S. § 8C-1, Rule 703 (1993); *State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988). Undisputed earlier testimony established that Ms. King was part of a medical group charged with evaluating Davis' mental health status and that Dr. Sultan relied upon Ms. King's information in formulating her final diagnosis. Therefore, we believe that

this evidence should have been admitted for the purpose of showing the basis for Dr. Sultan's expert opinion testimony under Rule 703 of the North Carolina Rules of Evidence.

Now we need to determine whether this error was prejudicial. The test is whether there is a reasonable possibility that had the error not occurred, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1993). Defendant argues that the trial court's ruling prevented him from fully presenting his mitigation evidence to the jury that ultimately condemned him to death. We disagree.

Defendant failed to offer any proof as to what answer the doctor would have given. Moreover, Dr. Sultan's testimony concerning her diagnosis of Davis and the basis for that diagnosis was very comprehensive, even in the absence of the exchange in question. Dr. Sultan had conducted interviews with the defendant and administered a battery of psychological tests. She testified that Davis manifested symptoms of child abuse. She further testified to specific instances of "self-mutilating behavior" by defendant and stated that he exhibited a strong urge to harm himself. She described various instances where Davis' father had verbally abused him. Dr. Sultan ultimately diagnosed Davis as suffering from major depression, post-traumatic stress disorder, and a schizoid personality disorder. He suffered from serious mental illness and viewed the world as a "place of constant danger." He was also hypervigilant. The jury heard all of this testimony. We therefore conclude that the exclusion of the testimony in question was harmless error, as it is not likely that it affected the result of the trial. This assignment of error is rejected.

IX.

In his final assignment of error, defendant Davis contends that the trial court erred in submitting the aggravating circumstance that the murder was committed during an attempt to commit armed robbery. N.C.G.S. § 15A-2000(e)(5) (Supp. 1994). At the sentencing phase, two aggravating circumstances were submitted to the jury:

> (1) Has the Defendant been previously convicted of a felony involving the use and/or threat of violence to the person?
>
> (2) Was this murder committed by the Defendant while the Defendant was engaged in an attempt to commit robbery with a dangerous weapon?

The jury answered in the affirmative as to both aggravating circumstances.

Defendant first argues that because there was insufficient evidence to submit the attempted armed robbery charge at the guilt phase, its use as an aggravator at sentencing was erroneous. We have already determined that there was sufficient evidence to submit the attempted armed robbery charge; therefore, this argument has no merit.

[13] Next, defendant argues that the submission of both of these circumstances was impermissibly duplicitous. Defendant concedes that they would not be duplicitous if as to number one, the jury considered only the McDonald's robbery and the Ohio murder. If as to number one, however, the jury also considered the attempted armed robbery of the Leicester Pawn Shop, it would have constituted "double counting" barred by the holdings of this Court in cases such as *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), and *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 288, 401 S.E.2d 632 (1991). We have carefully reviewed the trial court's instructions to the jury on these aggravating circumstances and find that they would not permit the duplicity for which defendant argues.

[14] Finally, defendant argues that the attempted armed robbery aggravating circumstance should not have been submitted since he was convicted under a felony murder theory. Where the jury convicts a defendant of first-degree murder based solely on the felony murder rule, it is error for the court to submit the underlying felony as one of the aggravating circumstances defined by N.C.G.S. § 15A-2000(e)(5). *State v. Silhan*, 302 N.C. 223, 262, 275 S.E.2d 450, 478 (1981). "However, when a defendant is convicted of first degree murder based on both premeditation and deliberation and the felony murder rule, and both theories are supported by the evidence, the underlying felony may be submitted as an aggravating circumstance." *State v. McNeil*, 324 N.C. at 57, 375 S.E.2d at 923. We have held that the evidence in this case is sufficient to support defendant's first-degree murder conviction based on felony murder and premeditation and deliberation. Therefore, the court did not err in submitting the attempted armed robbery aggravating circumstance.

Preservation Issues

X.

Defendant Davis raises three additional issues which he concedes have been decided against him by this Court: (1) the trial court erred

in instructing the jury that it had a duty to recommend death if it answered the balancing issues favorably to the State, (2) the trial court erred in placing the burden on defendant to establish the existence of mitigating circumstances, and (3) the trial court erred in allowing the State to "death qualify" prospective jurors.

We have considered these issues and find no compelling reason to depart from our prior holdings. Therefore, we reject these assignments of error.

Proportionality

XI.

[15] Having found no error in the guilt and sentencing phases of defendant Davis' trial, 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); *State v. Sexton*, 336 N.C. 321, 376, 444 S.E.2d 879, 910, *cert. denied*, — U.S. —, 130 L. Ed. 2d 429 (1994); *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. —, 130 L. Ed. 2d 532 (1994).

In this case, the jury found the following two aggravating circumstances: (i) that defendant had been previously convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3); and (ii) that the murder was committed while defendant was attempting to commit robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5). We conclude that the evidence supports the jury's finding of each of these aggravating circumstances. After thoroughly reviewing the record, transcripts, and briefs submitted by the parties, we further conclude that there is nothing to suggest that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Our final statutory duty of proportionality review is to determine whether the punishment of death in this case 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).

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

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

State v. 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 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). In *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994), this Court clarified the composition of the pool so that it accounts for postconviction 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 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. This Court has also resolved timing issues relating to postconviction relief: "[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.

While only cases found to be free of error in both phases of the trial 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. 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).

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 murders committed during armed robbery: *State v. Benson*, *State v. Stokes*, and *State v. Young*. However, none of these cases is similar to the present case.

In *Benson*, the defendant was convicted of first-degree murder solely on the theory of felony murder. The victim died of a cardiac arrest after being robbed and shot in the legs by the defendant. The only aggravating circumstance found by the jury was that the crime was committed for pecuniary gain. Finally, this Court determined that the death sentence was disproportionate based in part on the fact that it appeared defendant was simply attempting to rob the victim, 323 N.C. at 329, 372 S.E.2d at 523, and defendant "pleaded guilty during the trial and acknowledged his wrongdoing before the jury," *id.* at 328, 372 S.E.2d at 523. In this case, unlike *Benson*, defendant was convicted on both theories of felony murder and premeditation and deliberation. Also, the jury here found two aggravating circumstances.

In *Stokes*, the defendant was one of four individuals who was involved in the beating death of a robbery victim. Defendant was found guilty of first-degree murder solely on the theory of felony murder, and only one aggravating circumstance was found, that the crime was especially heinous, atrocious, or cruel. This Court took notice of the fact that none of the defendant's accomplices were sentenced to death, although they "committed the same crime in the same manner." 319 N.C. at 27, 352 S.E.2d at 667. Here, defendant was convicted on both theories of felony murder and premeditation and deliberation. Moreover, the jury in this case found two aggravating circumstances.

In *Young*, the defendant and two other men went to the victim's home, where they robbed and murdered him. The jury found as aggravating circumstances that the murder was committed for pecuniary gain and during the course of a robbery or burglary. This case is distinguishable from *Young*. First, the defendant in *Young* was only nineteen years old at the time of the crime; defendant here was thirty-four. Second, defendant here had a history of violent crimes, including another murder for which he pled guilty, unlike the defendant in *Young*.

We conclude that this case is not similar to any of the above cases, where the death penalty was found to be disproportionate. Defendant here was convicted of first-degree murder under the theories of felony murder and premeditation and deliberation. The jury found the following two aggravating circumstances: (i) that defendant had been previously convicted of a felony involving the use of violence to the person, and (ii) that the murder was committed while defendant was attempting to commit robbery with a dangerous weapon. The jury also considered twenty-two mitigating circumstances and found only four. Of these four, only one was a statutory mitigating circumstance, that the capital felony was committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2).

Having reviewed all the cases in the proportionality pool, we find that no case is factually identical to the present case. This case is not a typical robbery-murder case in that defendant Davis had been previously convicted of murder in another state several years earlier and of armed robbery committed one week prior to this murder. This Court has found that a death sentence was not disproportionate where the jury found the single aggravating circumstance that the defendant had been previously convicted of a violent felony. *See, e.g., State v. Keel*, 337 N.C. 469, 447 S.E.2d 748 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 147, 63 U.S.L.W. 3643 (1995); *State v. Reeves*, 337 N.C. 700, 448 S.E.2d 802 (1994); *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). Further, the evidence of Davis' guilt was clear. Davis shot an innocent businessman in cold blood before an eyewitness, Kathy Shively. Davis then threatened Shively's life and forced her to crawl at gunpoint into the back room of the store. 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, 341, 384 S.E.2d 470, 506 (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). Moreover, the jury found that Davis' codefendant, Hood, who was only nineteen years old, played a lesser role in the murder and attempted robbery. The jury found that Hood committed the present offenses while under the influence of Davis, and but for Hood's union with Davis, he would not have committed the crimes.

Therefore, considering both the crime and the defendant, we are unable to say that the death sentence for defendant Davis is excessive or disproportionate. N.C.G.S. § 15A-2000(d)(2).

In conclusion, having carefully reviewed the record and each of defendants' assignments of error, we hold that defendants received a fair trial, free of prejudicial error.

NO ERROR.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. CLINTON LAWRENCE JOHNSON

No. 84A94

(Filed 7 April 1995)

1. Homicide § 372 (NCI4th)— first-degree murder—accessory before the fact—evidence that principal murdered victim—sufficient

The trial court did not err by denying defendant's motion to dismiss charges of being an accessory before the fact where defendant contended that the State failed to produce evidence that the principal actually committed the murder, but sufficient evidence existed from which a jury could find that the principal was the one who burned the victims' home and thus murdered them.

Am Jur 2d, Homicide § 445.

2. Evidence and Witnesses § 1235 (NCI4th)— accessory to first-degree murder—inculpatory statement—not a custodial interrogation

The trial court did not err in a prosecution for being an accessory to first-degree murder by denying defendant's pre-trial

motion to suppress an inculpatory statement made to police officers the day after the fire in which the victims died where defendant contended that the statement was obtained as the result of a custodial interrogation without *Miranda* warnings, but the court found that two deputies arrived at defendant's residence at about 7:15 a.m. the morning after the fire and asked defendant if he would go to the jail to talk with them; defendant indicated that he would and went to the jail with the officers after changing clothes; defendant was advised prior to leaving his residence that he was not under arrest and was allowed to drive his vehicle; defendant was advised upon arriving at the jail that he was free to leave and that he was not under arrest; defendant wrote out a statement; a deputy indicated that defendant needed to talk to a lieutenant and defendant agreed to stay in the breathalyzer room, where he had written his statement; defendant was provided with coffee at his request during the initial interview and remained in the breathalyzer room by himself while the deputy talked to the lieutenant; defendant agreed to wait to talk with the lieutenant, eventually moving to another room because of cleaning in the breathalyzer room; he was again advised that he was free to leave and that he was not under arrest; he was provided with lunch and any other requests; he did not attempt or request to leave the jail; he was not threatened, harassed, or induced to give any statements, nor promised anything in return for his statements; and defendant was allowed to return to his own home at about 4:00 p.m. in his own vehicle.

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. Appeal and Error § 155 (NCI4th)— inculpatory statements—only one objected to as hearsay—issue not preserved as to unobjected statements

The question of whether all but one of defendant's inculpatory statements contained inadmissible hearsay was not preserved for appeal in a murder prosecution where defendant objected to only one of the statements. His motion to suppress the entire statement was based solely on alleged *Miranda* violations and does not preserve the issue.

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

4. Evidence and Witnesses § 1113 (NCI4th)— conspiracy and accessory to murder—statement that coconspirator brought up killing victims—hearsay—admissible as party admission

A statement in a prosecution for conspiracy and accessory to murder that the coconspirator brought up the discussions about killing the victims was hearsay, but was admissible under N.C.G.S. § 8C-1, Rule 801(a) as a party admission.

Am Jur 2d, Evidence §§ 760 et seq.

5. Evidence and Witnesses § 2511 (NCI4th)— conspiracy to murder—statement made to officer not testifying—other officers not allowed to testify

The trial court did not err in a prosecution for conspiracy and accessory to murder where defendant was not allowed to ask two officers about a statement defendant gave to another deputy. The evidence shows that neither of the officers questioned had personal knowledge of the statement made by defendant to the other officer. There was also no error in excluding questions concerning the knowledge of the officers of the statement because defendant was allowed to ask the officers essentially the same questions of which he now complains and because defendant failed to show the relevance of these particular questions.

Am Jur 2d, Witnesses §§ 75, 76.

6. Evidence and Witnesses § 694 (NCI4th)— conspiracy and accessory to murder—questions as to setting fire—no offer of proof

Defendant in a prosecution for conspiracy and accessory to murder failed to preserve the issue of whether the trial court erred by not allowing an SBI agent to answer defendant's questions concerning the fire which killed the victims by failing to make the required offer of proof.

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

7. Homicide § 582 (NCI4th)— accessory to murder—instructions—sufficient

The trial court did not err in its instruction regarding first-degree murder by being an accessory before the fact where defendant contended that the court should have instructed the

jury that it had to find that the particular person involved, "April Barber," committed the offense rather than "another person" or "that other person." The trial court properly instructed the jury on the elements of first-degree murder by being an accessory and, because all of the evidence presented showed that April Barber was the person defendant allegedly advised, counseled, encouraged, procured, or aided, and there was no evidence that he aided any other person, the charge makes clear that the jury had to find the murders were committed by April Barber in order to convict defendant.

Am Jur 2d, Homicide § 507.

8. Criminal Law § 1170 (NCI4th)— conspiracy to murder and conspiracy to commit arson—aggravating factors—involved a person under sixteen

The trial court did not err when sentencing defendant for conspiracy to commit murder and arson by finding the aggravating factor that defendant involved a person under sixteen where the undisputed evidence shows that April Barber was fifteen years old; defendant discussed with her different ways to kill Mr. and Mrs. Barber and suggested insecticide for poisoning them; and defendant left gasoline in April's carport and told her the night of the fire that "tonight is as good as any. . . ." N.C.G.S. § 15A-1340.4(a)(1)(l).

Am Jur 2d, Criminal Law §§ 598, 599.

9. Criminal Law § 1185 (NCI4th)— conspiracy to murder and conspiracy to commit arson—aggravating factors—prior convictions—driving while impaired

The trial court did not err when sentencing defendant for conspiracy to commit murder and arson by finding the aggravating factor that defendant had prior convictions punishable by more than sixty days' confinement based on a certified copy of defendant's criminal record which showed that defendant was convicted of driving while impaired. N.C.G.S. § 15A-1340.4(e).

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.

STATE v. JOHNSON

[340 N.C. 32 (1995)]

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of life imprisonment entered by Beaty, J., at the 17 November 1992 Criminal Session of Superior Court, Wilkes 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 conspiracy to commit first-degree murder and conspiracy to commit first-degree arson was allowed 25 February 1994. Heard in the Supreme Court 12 January 1995.

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

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

ORR, Justice.

On 16 September 1991, defendant was indicted for conspiracy to commit first-degree murder, conspiracy to commit first-degree arson, and two counts of first-degree murder by being an accessory before the fact. On 9 November 1992, defendant was also indicted for accessory before the fact to first-degree arson. Defendant was tried before a jury, and on 24 November 1992, the jury found defendant guilty of all charges. Following a capital sentencing proceeding, the jury recommended life sentences for the murder convictions. In accordance with the jury's recommendation, the trial court entered judgments sentencing defendant to two consecutive terms of life imprisonment for the murder convictions, followed by ten years' imprisonment for conspiracy to commit first-degree arson and twenty years' imprisonment for conspiracy to commit first-degree murder. The trial court arrested judgment on the arson conviction as the underlying felony which served as the basis for application of the felony murder rule.

On appeal, defendant brings forward numerous assignments of error. After a thorough review of the transcript of the proceedings, the record on appeal, the briefs, and oral arguments, we conclude that defendant received a fair trial free from prejudicial error, and, for the reasons set forth below, we therefore affirm his convictions and sentences.

At trial, the State's evidence tended to show the following: Martha Howell testified that in September 1991, her aunt and uncle, Lillie and Aaron Barber, lived in a brick house in Wilkes County, North Carolina, and that the Barbers' granddaughter, April Barber, lived with them. At

this time, Aaron Barber was eighty-three years old, Lillie Barber was seventy-seven years old, and April Barber was fifteen years old.

Howard Laney, a coroner affiliated with the Mulberry Fair Plains Fire Department, testified that on the night of 4 September 1991 he responded to a call concerning a fire at the Barbers' residence. Laney testified that when he arrived at the Barbers' residence, he found a woman lying face down approximately ten to twelve feet from the house. The injured woman was later identified as Lillie Barber. Laney testified that Mrs. Barber was "crying, saying she was hurting, and [that] her husband and granddaughter [were] in the house." Danny Gamble, chief of the Mulberry Fair Plains Fire Department, arrived on the scene shortly thereafter, and Laney informed him that there were two people in the house.

Chief Gamble testified that he and another fireman entered the house through the carport and that the house was filled with smoke and intense heat. Chief Gamble testified that during their search of the house, he and the other fireman found the body of a man lying face down in a bedroom. After carrying the man outside, Chief Gamble was able to identify him as Aaron Barber. Chief Gamble testified that although he knew that Mr. Barber "was black in color," "his whole body was white, like his whole body was blistered." Mr. Barber was taken to the hospital where he was pronounced dead in the emergency room. The firemen continued to search the house but never found any other bodies.

Chief Gamble also testified that after the fire was over, he observed April Barber standing "in an arm and arm position" with defendant outside the house next to the highway and that April did not look like she had been in the fire. Chief Gamble testified that he questioned April and that "as a result of the questions [he] asked her, [he] felt like something was wrong."

Mrs. Barber was admitted to Baptist Hospital on 5 September 1991. Dr. Meredith, the director of the Baptist Hospital Burn Unit, testified that Mrs. Barber arrived at the burn unit at approximately 1:30 a.m. Dr. Meredith observed that Mrs. Barber had second-degree burns on her arms, hands, chest, upper back, face, and one leg. Dr. Meredith testified that Mrs. Barber also sustained inhalation injury, an injury that occurs in the lungs from breathing smoke. Dr. Meredith further testified that this lung injury "reduces the ability of the lungs to transmit oxygen and carbon dioxide" and that the injury also "encourages infection in the lungs." Mrs. Barber died on 11 September 1991.

Patrick Langz, a Forsyth County medical examiner and pathologist, testified that in his opinion, based on the autopsy of Mr. Barber, Mr. Barber died of smoke and soot inhalation. Mr. Langz also testified as to the autopsy of Mrs. Barber. Mr. Langz testified that the autopsy revealed that Mrs. Barber "had a very severe pneumonia with areas of tissue destruction of the actual lung tissue caused by a specific type of bacteria" and that this pneumonia was a direct result of her burn injuries. Subsequently, Mr. Langz testified that in his opinion, "Mrs. Barber died of complications of her thermal injuries."

Agent Steve Cabe of the North Carolina State Bureau of Investigation ("SBI") talked with defendant at the Wilkes County Sheriff's Department on the morning of 5 September 1991, the day after the fire. At trial, Agent Cabe testified that defendant told him that he had met April Barber fourteen to fifteen months earlier at Wilkes Central High School and that he started dating April at this time. Agent Cabe testified that defendant told him that he and April started having sex approximately two months after they first began seeing each other and that April was fourteen years old then. Agent Cabe further testified that defendant stated

> [t]hat there were some problems at April's home with her grandparents, and these problems became worse after April's mother Sheila Barber went to prison.
>
> He stated that he became more aware of what was going on at the Barber residence, and that someone within the Barber family, or his family, was telling Mr. and Mrs. Barber about he and April seeing each other. That as [sic] it was as if everything they did was reported to Mr. and Mrs. Barber. That there were instances in which he and April went somewhere and did something and the Barber's [sic] seemed to find out about it in a very short length of time. . . .
>
> That approximately six months ago [was] the first time that there was any discussion between he and April Barber about the Barber's [sic] being out of the picture. This discussion seemed to crop up out of the blue, so to speak. The discussion centered around the fact that he and April would be better off if the Barber's [sic] were out of the way. [Defendant] stated that April . . . [was] the one who brought up this discussion.

Subsequently, Agent Cabe testified that defendant told him that approximately three months prior to the fire, he and April discussed

a plan to shoot Mr. and Mrs. Barber. Defendant told Agent Cabe that April "got a gun which belonged to Mr. Barber and gave it to [defendant]." Defendant kept the gun for approximately two weeks. Defendant told Agent Cabe that the plan was for him to go over to the Barbers' residence to shoot them and that he did in fact go over to their residence and was going to shoot the Barbers but the Barbers were not at home. Defendant told Agent Cabe that when he discovered the Barbers were not home, he left the gun in April's purse. Defendant also told Agent Cabe that April was going to be at the residence but was not going to take part in the shooting.

Agent Cabe further testified that defendant told him that approximately one month after he left the gun in April's purse, April suggested to him poisoning Mr. and Mrs. Barber and that defendant told April "in a half joking manner" that he had seen some type of insecticide a few days earlier. Defendant also told Agent Cabe that after this discussion with April, "there was nothing left except for him to bring [April] the insecticide." When defendant brought the insecticide to April, they discovered it had a strong odor, and based on the fact the insecticide had a strong odor, defendant "figured that would be the end of that."

Agent Cabe further testified that defendant stated:

> Approximately two weeks or so after this incident is when Mr. and Mrs. Barber began suspecting that April may be pregnant. A few days later there was some discussion about this and pressure being placed on April was getting to be intense. Mrs. Barber was talking to April about being pregnant by that white S.O.B.
>
> [Defendant] stated that on Sunday night, September 1, 1991, there was a very bad argument between the Barbers and April about her being pregnant. April had told him that Mr. and Mrs. Barber were trying to get her to have an abortion. April refused to have an abortion. Mr. and Mrs. Barber then told her that when the baby was born they would kill it. [Defendant] stated that this must have been a very heated argument according to what April had told him. [Defendant] stated after the first time that the Barbers confronted April about being pregnant is when she mentioned burning the house. Stated that April was always fishing for an idea or some way of getting them off her back. [Defendant] stated that his ideas were to talk with a counselor or a minister. Stated he was just trying to get April's mind off of these other ideas. Stated that every time they tried to do something along the

counseling route or some similar discussion, it was as if they ran into a dead end.

Subsequently, Agent Cabe testified that defendant told him that approximately two weeks before the fire, he took a jug of gasoline to April's house. Defendant stated that he and April had discussed burning the house and that April told defendant to bring the gasoline over to the house at a certain time in the morning, which defendant did. Defendant told Agent Cabe that he took the gasoline over to April's house in a plastic milk jug at approximately 2:00 a.m. April was supposed to meet defendant at 2:30 a.m., but she did not. Defendant told Agent Cabe that he left the jug of gas in the carport at the Barbers' residence. The next day, April told defendant that she could not get out of the house the night before because her grandparents were watching her all night.

Agent Cabe further testified that defendant told him that he had spoken to April the afternoon and night of the fire. Defendant stated that "[t]here was some mention by April about burning the house" that night and that he "said to April that tonight is as good as any." Defendant told Agent Cabe that he did not think anything more about his discussion with April. Agent Cabe testified:

> [Defendant stated] that at some point in time [the night of the fire] April called him on the phone and told him that the house was on fire. [Defendant] stated he could not believe what he was hearing. Stated that he and April had talked about burning the house prior to [the night of the fire]. Stated they had talked about she was going to pour the gas and he was going to light it. Stated that this discussion had been held between he and April on more than one occasion. Stated he talked with April three times on the telephone [the night of the fire]. April did not really mention burning the house but on one occasion [that] night. [On] [t]his occasion [defendant] stated he told her that tonight is as good as any. [Defendant] stated that at no time did April tell him that she had burned the house . . . .
>
> . . . [Defendant] said, "I did every dumb thing in the world, and someone got hurt". [Defendant] said, "I realize what happened and what has happened".

Finally, Agent Cabe testified that on 5 September 1991, defendant was thirty years old.

Fire Marshall Kenneth Walters also testified at trial. Walters testified that he arrived at the Barbers' residence the night of the fire at 11:28 p.m. Upon entering the residence, Walters testified that he smelled gasoline. Walters observed a "pour pattern" on the carpet "where a liquid accelerant had been poured" and found a plastic container under the arm of the couch that smelled of gasoline. Walters testified that in his opinion, the fire had been intentionally set.

SBI Special Agent Rasmussen also investigated the fire at the Barbers' residence. Agent Rasmussen testified that he arrived at the residence on 5 September 1991 at about 2:15 p.m. Agent Rasmussen testified that he smelled gasoline in the living room and observed a "pour pattern" like Fire Marshall Walters had described. Agent Rasmussen testified that in his opinion, the fire was deliberately set by using a flammable liquid. Agent Rasmussen also sent carpet and linoleum samples from the house to the SBI laboratory for examination. SBI Forensic Chemist Larry Ford examined these samples and testified that he found residual gasoline on both the carpet and linoleum samples. Ford also testified that an accelerant "is anything that would increase or accelerate the burning of another material" and that common accelerants are petroleum products like gasoline, kerosene, fuel oil, and paint thinner.

Defendant presented no evidence.

I.

[1] First, defendant contends that the trial court erred in denying his motion to dismiss the charges of murder by being an accessory before the fact. We find no error.

In *State v. Davis*, 319 N.C. 620, 356 S.E.2d 340 (1987), this Court set forth the elements of accessory before the fact to murder as follows:

> 1) Defendant must have counseled, procured, commanded, encouraged, or aided the principal to murder the victim;
>
> 2) the principal must have murdered the victim; and
>
> 3) defendant must not have been present when the murder was committed.

Id. at 624, 356 S.E.2d at 342 (citing *State v. Sams*, 317 N.C. 230, 237, 345 S.E.2d 179, 184 (1986)) (other citations omitted). On appeal, defendant contends that the State failed to produce sufficient evi-

dence on the second prong, that the principal, April Barber, actually committed the murder. Defendant contends that although the State's evidence raises a strong suspicion of April Barber's guilt, "the State failed to offer substantial evidence that she was the one who burned the house."

"In determining whether evidence is sufficient to survive a motion to dismiss, the evidence is considered in the light most favorable to the State." *State v. Gray*, 337 N.C. 772, 777, 448 S.E.2d 794, 798 (1994) (citing *State v. Mason*, 336 N.C. 595, 597, 444 S.E.2d 169, 169 (1994)). "The test of the sufficiency of the evidence in a criminal case is whether there is substantial evidence of all elements of the offense charged so any rational trier of fact could find beyond a reasonable doubt that defendant committed the offense." *State v. Thompson*, 306 N.C. 526, 532, 294 S.E.2d 314, 318 (1982). " 'Substantial evidence' simply means 'that the evidence must be existing and real, not just seeming or imaginary.' " *State v. Sexton*, 336 N.C. 321, 361, 444 S.E.2d 879, 902 (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429 (1994).

> The test of the sufficiency is the same whether the evidence is circumstantial or direct, or both: the evidence is sufficient to withstand a motion to dismiss and to take the case to the jury if there is "evidence [which tends] to prove the fact [or facts] in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture." *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930).

State v. Jones, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981) (alterations in original). Further, "[w]hether the evidence presented constitutes substantial evidence is a question of law for the trial court." *Sexton*, 336 N.C. at 361, 444 S.E.2d at 902.

In the present case, the evidence, viewed in the light most favorable to the State, tends to show that defendant and April Barber were involved in an intimate relationship to which April's grandparents, Lillie and Aaron Barber, were opposed. Subsequently, April and defendant discussed getting rid of the Barbers and how things would be better for them with the Barbers out of the way.

The evidence further tends to show that defendant and April planned to kill the Barbers by shooting them, that April procured a gun for defendant in order to shoot the Barbers, that defendant went

to the Barbers' residence to shoot Mr. and Mrs. Barber, and that defendant did not shoot them because they were not home at that time. After the failed attempt to shoot the Barbers, the evidence tends to show that April and defendant discussed poisoning them. Defendant delivered some insecticide to April for the purpose of poisoning Mr. and Mrs. Barber, but because of the insecticide's strong odor, defendant and April abandoned that plan.

Thereafter, Mr. and Mrs. Barber discovered that April might be pregnant and threatened to kill the child if April did not have an abortion. Following this discussion with her grandparents, the evidence tends to show that April suggested to defendant that they burn down the Barbers' residence in order to get rid of the Barbers. Defendant and April discussed burning down the Barbers' residence on more than one occasion, including a discussion that April would pour the gasoline and defendant would light it. In accordance with these discussions, the evidence further tends to show that defendant purchased some gasoline in a plastic container and two weeks prior to the fire, went to meet April at the Barbers' residence at 2:00 a.m. When April did not appear, defendant left the gasoline in the plastic container in the Barbers' carport.

The night of the fire, the evidence tends to show that April told defendant on the telephone that she "might as well burn the house down," and defendant responded, "tonight is as good as any." After the fire, investigators found a melted plastic jug smelling of gasoline under the arm of the couch in the living room and a pattern in the carpet where a liquid accelerant had been poured. The expert witnesses agreed that the fire had been intentionally set, and evidence from the autopsy revealed that Mr. and Mrs. Barber both died as a result of injuries from this fire. Based on our review of this evidence, we conclude sufficient evidence existed from which a jury could find that April Barber was the one who burned down the Barbers' home and thus murdered the victims. Defendant's first assignment of error is, therefore, without merit.

II.

[2] Defendant next assigns as error the trial court's denial of his pretrial motion to suppress an inculpatory statement he made to police officers the day after the fire. In support of his contention, defendant asserts that his statement was obtained as a result of a custodial interrogation when defendant was not advised of his *Miranda* rights. We disagree.

"The rule of *Miranda* requiring that suspects be informed of their constitutional rights before being questioned by the police only applies to custodial interrogation." *State v. Brooks*, 337 N.C. 132, 143, 446 S.E.2d 579, 586 (1994) (citing *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966)). "Ordinarily, when a suspect is not in custody at the time he is questioned, any admissions or confessions made by him are admissible so long as they are made knowingly and voluntarily." *Id.* The test to determine whether a suspect is in custody is " 'an objective test of whether a reasonable person in the suspect's position would believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant way or, to the contrary, would believe that he was free to go at will.' " *State v. Lane*, 334 N.C. 148, 154, 431 S.E.2d 7, 10 (1993) (quoting *State v. Phipps*, 331 N.C. 427, 442, 418 S.E.2d 178, 185 (1992)).

In the present case, the trial court held a *voir dire* and made extensive findings of fact concerning the interview in question. The trial court found that the morning after the fire, at approximately 7:15 a.m., Deputy Benfield and Deputy Wright of the Wilkes County Sheriff's Department arrived at defendant's residence and asked defendant if he would go to the jail to talk with them concerning the events in this case and that defendant "indicated that he would; that after he changed clothes, the [d]efendant came to the jail with the officers." The trial court found that prior to leaving his residence, defendant was advised that he was not under arrest for anything and that defendant was allowed to drive his vehicle to the jail.

Upon their arrival at the Wilkes County jail, defendant was taken to the breathalyzer room. The trial court found that at this time, defendant was advised that he was free to leave and again that he was not under arrest for anything. Thereafter, defendant proceeded to write out a statement concerning his knowledge of the events involved in this case. The trial court found that Deputy Benfield indicated that he needed to talk to Deputy Walsh, a lieutenant with the Wilkes County Sheriff's Department, and that defendant agreed to stay in the breathalyzer room.

During the initial interview, the trial court found that defendant was provided coffee at his request and that while the officer was gone to talk to Deputy Walsh, defendant remained in the breathalyzer room by himself. The trial court found that when Deputy Benfield returned, defendant was asked to talk with Deputy Walsh and that defendant indicated that he would talk with him and remain at the jail until

Deputy Walsh returned. At approximately 10:30 or 11:00 a.m., Deputy Walsh came in and indicated to defendant that he had talked with April Barber and that he still needed to talk to her further and asked defendant to stay.

Defendant stayed at the jail, eventually moving from the breathalyzer room into a separate room because of the cleaning that was going on in the breathalyzer room. The trial court found that the second time Deputy Walsh came back to talk with defendant, defendant was again advised that he was free to leave and that he was not under arrest. Additionally, the trial court found that later in the afternoon, when Deputy Walsh and SBI Agent Cabe talked with defendant, the officers again advised defendant that he was free to leave. Subsequently, the trial court found that defendant was provided some lunch "and any other requests that he might have had."

The trial court found that defendant did not attempt to leave, nor had he requested to leave the jail at any time prior to making a statement. The trial court also found that defendant indicated that he talked with Deputy Walsh and Agent Cabe and

> that during the course of the interviews from 7:30 until approximately four o'clock in the afternoon, the [d]efendant was not threatened or harrassed [sic], or induced in any manner to give any oral statements that he might have made, nor was he promised anything in exchange for his statements.
>
> The [d]efendant at all times was provided anything that he requested, and was reminded on several occasions that he was free to leave; that at approximately four o'clock the interview was completed, or concluded; that the [d]efendant, at that time, was not placed under arrest; that he was allowed to return to his home in his own vehicle; that no arrest was made at that time. The [d]efendant, later in the evening, around 7:30, was visited by Deputy Walsh and SBI Agent Cabe, and at that time, was arrested for the . . . charges presently against him.
>
> That the [d]efendant left unassisted at this time and returned to his residence . . . . The [c]ourt will find that the [d]efendant, at all times[] during the interview process from 7:30 to four o'clock had not been placed under arrest, nor had his freedom of movement or action been restricted in any manner; that on several occasions, while either Deputy Benfield . . . or Agent Cabe, and Deputy Walsh left the room, the [d]efendant was left unattended,

and had freedom of movement within the jail facility; the doors were not closed and left open.

Based on these findings, the trial court concluded that a reasonable person in defendant's position "would have felt that he was free to leave at will," that defendant's freedom was not restricted in any manner, and that defendant was not in custody at the time of his pre-arrest statements to law enforcement officers.

"The trial court's findings of fact following a *voir dire* hearing are binding on this [C]ourt when supported by competent evidence." *Lane*, 334 N.C. at 154, 431 S.E.2d at 10 (citing *State v. Mahaley*, 332 N.C. 583, 592, 423 S.E.2d 58, 64 (1992), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 649 (1995)). The trial court's conclusions of law based upon its findings are, however, fully reviewable on appeal. *Id.*

Our review of the evidence shows that the trial court's findings were supported by competent evidence. Further, the trial court's conclusion that under these facts defendant did not undergo *custodial* interrogation for *Miranda* purposes during the interview in question was correct. *See Lane*, 334 N.C. 148, 431 S.E.2d 7 (defendant was not in custody when defendant was told he was free to leave on several occasions during the interview, defendant did not ask to leave and did not request an attorney, and defendant was not placed under arrest but was taken home by the SBI investigators); *Phipps*, 331 N.C. 427, 418 S.E.2d 178 (defendant not in custody when upon request he went to the police station on his own several times and answered questions, defendant was not placed under arrest but was permitted to return home, and defendant later agreed to take a polygraph test); *State v. Martin*, 294 N.C. 702, 242 S.E.2d 762 (1978) (defendant not in custody when he voluntarily went to the police station and made a statement while he was not under arrest and his freedom was not restricted, and police officers returned him to his home afterwards). Accordingly, we find no error.

III.

[3] Defendant also assigns as error the admission of specific statements contained in defendant's statement to Agent Cabe and Deputy Walsh based on his contention that these statements constitute inadmissible hearsay. Our review of the record shows, however, that defendant failed to object to the admission of all but one of these statements at trial.

As discussed above, defendant filed a pretrial motion to suppress his entire statement to Agent Cabe and Deputy Walsh on the basis that defendant's statement was a product of a custodial interrogation in violation of *Miranda*, which motion the trial court denied based on its sole conclusion that "*Miranda* warnings were not required." Defendant objected and took exception to the trial court's ruling, and when asked by the trial court if there were anything further, defendant did not respond. At trial, Agent Cabe read defendant's statement into evidence.

On appeal, defendant assigns as error the admission of numerous statements contained in defendant's statement as inadmissible hearsay. Our review of the transcript shows, however, that defendant objected to the admission of only one statement contained in defendant's statement. Because defendant failed to object at trial to the admission of the remaining statements as inadmissible hearsay, the issue of whether these statements constituted inadmissible hearsay is not properly before us. N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, *stating the specific grounds for the ruling the party desired the court to make . . . .*") (emphasis added).

Further, because defendant's motion to suppress defendant's entire statement was based solely on alleged *Miranda* violations and the trial court's denial of defendant's motion to suppress defendant's entire statement was based solely on its finding of no *Miranda* violation, defendant's objection to the trial court's ruling does not preserve for appellate review the question of whether these statements constitute inadmissible hearsay. *See State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) ("This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal.").

[4] Thus, the sole question before us in this assignment of error is whether the one statement to which defendant objected at trial constitutes inadmissible hearsay. Without objection, Agent Cabe read from defendant's statement that defendant and April discussed the Barbers "being out of the picture" approximately six months prior to the fire, that the discussion seemed to "crop up out of the blue," and that the discussion centered on the fact that April and defendant would be better off if the Barbers were out of the way. Defendant timely objected to Agent Cabe's next statement that defendant stated "that April [was] the one who brought up this discussion."

Rule 801 of the North Carolina Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1992). Under N.C.G.S. § 8C-1, Rule 801(a), "[a] 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." We conclude that defendant's statement that April was the one who brought up the discussions about killing the Barbers constitutes hearsay under N.C.G.S. § 8C-1, Rule 801(a), (c). We also conclude, however, that this statement was admissible under N.C.G.S. § 8C-1, Rule 801(d) as a party admission. Defendant's assignment of error is overruled.

IV.

[5] Next, defendant contends that the trial court erred by not allowing defendant to ask Agent Cabe and Deputy Walsh about a statement defendant gave to Deputy Benfield at approximately 7:30 a.m. on 5 September 1991. Because the evidence shows that neither Agent Cabe nor Deputy Walsh had personal knowledge of the statement made by defendant to Deputy Benfield, we find no error.

It is well settled 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." N.C.G.S. § 8C-1, Rule 602 (1992); *see State v. Hester*, 330 N.C. 547, 552, 411 S.E.2d 610, 613 (1992); *State v. Hunt*, 324 N.C. 343, 352, 378 S.E.2d 754, 759 (1989).

In the present case, it is undisputed that neither Agent Cabe nor Deputy Walsh was present when defendant was interviewed by Deputy Benfield. Further, on cross-examination when defendant attempted to question Agent Cabe and Deputy Walsh about the written statement given by defendant to Deputy Benfield, Agent Cabe testified that he had not seen the written statement previously, and Deputy Walsh testified that he could not identify the written statement. Accordingly, we conclude that the trial court properly excluded testimony by Agent Cabe and Deputy Walsh concerning defendant's statement to Deputy Benfield of which Agent Cabe and Deputy Walsh had no personal knowledge. Instead, we note that Deputy Benfield would have been the proper witness to testify concerning the statement defendant gave to him; defendant did not, however, call Deputy Benfield as a witness.

Defendant additionally argues that he should have been allowed to ask Agent Cabe if he were aware that the statement existed or if he knew that defendant had spoken to Deputy Benfield and to ask Deputy Walsh if he were present when Deputy Benfield testified at the suppression hearing and whether Deputy Benfield told Deputy Walsh defendant had given him a statement. Our review of the transcript shows, however, that defendant was in fact permitted to ask Agent Cabe if he "later became aware of the fact that before [defendant] talked to [Agent Cabe] he talked to [Deputy] Benfield" and whether before defendant started talking to Agent Cabe, defendant told Agent Cabe that he had already given Deputy Benfield his statement. Further, on re-cross, defendant was permitted to ask Deputy Walsh if he were present at pretrial motions when Deputy Benfield testified concerning the statement in question.

Thus, defendant was allowed to ask Agent Cabe and Deputy Walsh essentially the same questions of which he now complains. In light of this fact and in light of our holding that Agent Cabe and Deputy Walsh could not testify to the substance of the statement given to Deputy Benfield, defendant has failed to show the relevance of these particular questions or any error in their exclusion. N.C.G.S. § 8C-1, Rules 401, 402 (1992). Accordingly, we find no error.

V.

[6] Defendant also contends that the trial court erred by not allowing SBI Agent Rasmussen to answer defendant's questions as to whether the fire could have been set by one person. Defendant has failed, however, to preserve this issue for appellate review.

"It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) (citing *State v. Cheek*, 307 N.C. 552, 299 S.E.2d 633 (1983)). "[I]n order for a party to 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." *Id.* at 370, 334 S.E.2d at 60 (citing *Currence v. Hardin*, 296 N.C. 95, 249 S.E.2d 387 (1978)).

In the present case, Agent Rasmussen testified as an expert in the field of fire investigation. On direct examination, Agent Rasmussen testified that in his opinion the fire was deliberately set. On cross-

examination, the trial court sustained the State's objections to defendant's attempts to ask Agent Rasmussen if in his opinion it would have been possible for this fire to be deliberately set by one person. On appeal, defendant contends the trial court erred in sustaining the State's objections because "[t]his deprived defendant of evidence which may have raised a reasonable doubt as to April Barber's guilt, or [defendant's] complicity." Defendant failed, however, to make the required offer of proof to show what Agent Rasmussen's testimony would have been if he had been allowed to answer defendant's questions. We are, therefore, unable to determine whether the exclusion of this testimony was prejudicial. *See id.* at 371, 334 S.E.2d at 61. Defendant's assignment of error is overruled.

VI.

[7] Defendant's next assignment of error relates to the trial court's jury instruction regarding first-degree murder by being an accessory before the fact. The pertinent portion of the charge states:

> So, finally as to the charge of first degree murder . . . I instruct you as follows as it applies to the theory of aiding and abetting, counseling, advising, encouraging or procuring another that if you find from the evidence beyond a reasonable doubt that on or about September 4, 1991, some person other than the [d]efendant committed the crime of first degree murder, that is that the other person committed first degree murder on the basis of either malice, premeditation and deliberation, or on the basis of the felony—first degree felony murder rule, and if you find from the evidence beyond a reasonable doubt that the [d]efendant knowingly advised, counseled, encouraged, procured or aided the other person to commit the crime of first degree murder on either the basis of malice, premeditation and deliberation, or on the basis of the theory of first degree felony murder, and that in doing so the [d]efendant's actions or statements caused or contributed to the commission of the crime of first degree murder involving the—or first degree murder as to either Aaron Barber or Lillie Barber by the other person, it would be your duty to return a verdict of guilty of first degree murder.

On appeal, defendant contends that the trial court erred in denying his motion at the end of the charge to instruct the jury that it had to find that "April Barber" committed the offense instead of using the terms "another person" or "that other person." Defendant cites no support for his contention but argues that "since the court only

instructed [the jury] that they had to find that 'another person' did the burning, they might well have convicted defendant despite harboring a reasonable doubt as to April Barber's complicity." We find no merit in defendant's argument.

The trial court properly instructed the jury on the elements of first-degree murder by being an accessory before the fact. *See* N.C.P.I.—Crim. 202.20A (1989); *see also Davis*, 319 N.C. at 624, 356 S.E.2d at 342 (listing elements for murder by being an accessory before the fact). "The trial court is not required to instruct the jury 'with any greater particularity than is necessary to enable the jury to understand and apply the law to the evidence bearing upon the elements of the crime charged.' " *State v. Barton*, 335 N.C. 696, 707, 441 S.E.2d 295, 300-01 (1994) (quoting *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991), *cert. denied*, —— U.S. ——, 124 L. Ed. 2d 283 (1993)).

Further, the charge in the present case makes clear that the person who committed the murder had to be the same person defendant "knowingly advised, counseled, encouraged, procured or aided." Thus, because all of the evidence presented showed that April Barber was the person defendant allegedly advised, counseled, encouraged, procured, or aided and because there was no evidence that defendant advised, counseled, encouraged, procured, or aided any other person, the charge makes clear that the jury had to find the murders were committed by April Barber in order to convict defendant. We find no error.

VII.

[8] Finally, defendant contends that the trial court erred in finding two aggravating factors when sentencing defendant on the noncapital felonies of conspiracy to commit murder and conspiracy to commit arson. Because we find the evidence was sufficient to support the trial court's findings as to both aggravating factors, we find no error.

"The Fair Sentencing Act did not remove all discretion from our trial judges. It is necessary that trial judges be permitted great latitude in ascertaining the true existence of aggravating and mitigating circumstances." *State v. Graham*, 309 N.C. 587, 592, 308 S.E.2d 311, 315 (1983). In the present case, the trial court found as factors in aggravation that defendant involved a person under the age of sixteen in the commission of the crime and that defendant had a prior con-

viction or convictions for criminal offenses punishable by more than sixty days' confinement.

The undisputed evidence shows that at the time the crimes were committed, April Barber was fifteen years old. Further, the evidence tends to show that defendant discussed with April different ways to kill Mr. and Mrs. Barber and even suggested insecticide to April for poisoning them. The evidence also tends to show that defendant left gasoline in April's carport for her and told her the night of the fire, "tonight is as good as any [to burn down the Barbers' home.]" We find this evidence sufficient to support a finding as a factor in aggravation that defendant involved a person under the age of sixteen in the commission of the crime. *See* N.C.G.S. § 15A-1340.4(a)(1)(l) (1988) (repealed effective 1 October 1994).

[9] Additionally, we find sufficient evidence to support the finding that defendant had prior criminal convictions punishable by more than sixty days' confinement. At the sentencing hearing, Agent Cabe identified and read into evidence a certified copy of defendant's criminal record which showed that on 18 March 1989, defendant was convicted of driving while impaired. Certified copies of court records are a proper method for proving prior convictions. N.C.G.S. § 15A-1340.4(e). Further, "a conviction of driving while impaired under G.S. 20-138.1, irrespective of the level of punishment imposed, constitutes a prior conviction of an offense punishable by more than sixty days' imprisonment for purposes of sentencing under the Fair Sentencing Act." *State v. Santon*, 101 N.C. App. 710, 712, 401 S.E.2d 117, 118 (1991). Accordingly, we find no error.

NO ERROR.

STATE OF NORTH CAROLINA v. JOHN RYAN TAYLOR, JR.

No. 483A93

(Filed 7 April 1995)

1. Criminal Law § 762 (NCI4th)— instructions on reasonable doubt—no due process violation

The trial court's use of the terms "moral certainty" and "honest, substantial misgiving" in its charge on reasonable doubt did not overstate the degree of doubt required for acquittal in viola-

tion of due process where several alternative definitions of reasonable doubt were provided to the jury, and the jury was instructed to base its conclusions on the evidence in the case. Nor did the court's reasonable doubt instructions violate due process because they failed to include "hesitate to act" and "strong enough to exclude any doubt" as alternative definitions and used the phrase "abiding faith" in conjunction with "moral certainty."

Am Jur 2d, Trial § 1385.

2. Criminal Law § 427 (NCI4th)— prosecutor's jury argument—no comment on defendant's failure to testify

Where defense counsel argued to the jury in a murder and armed robbery trial that testimony by a prosecution witness created an iron-clad alibi for defendant for all but one and one-half hours between the time the victim was seen alive and the time her body was found and that the State, after producing no evidence as to the time of death, would have the jury believe that because the defendant had "no alibi for an hour, that's the time of death," and the prosecutor argued that the jurors had heard no evidence as to defendant's whereabouts between ten o'clock and eleven-thirty the night before the victim's body was found, the prosecutor's questions "Where is his alibi?" and "Where was he?" did not constitute an impermissible comment on defendant's failure to testify since they were directed solely toward defendant's failure to offer evidence to rebut the State's case, and were in response to defense counsel's jury argument. Therefore, the trial court did not abuse its discretion in the denial of defendant's motion for a mistrial based on the prosecutor's remarks. N.C.G.S. § 15A-1061.

Am Jur 2d, Trial §§ 577 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.

3. Criminal Law § 113 (NCI4th)— failure to comply with discovery order—absence of prejudice

Although the trial court ordered the State to make any exculpatory evidence in its possession available to defendant at least twenty days prior to defendant's trial for murder and armed rob-

bery, defendant was not prejudiced by the State's nondisclosure, prior to trial, of specific information tending to implicate another person as the perpetrator of the crimes where all of this information was ultimately provided to defendant at trial; defendant was allowed to fully explore at trial the theory that the other person murdered the victim; defendant's attorneys competently and zealously argued this theory before the jury; and the State presented overwhelming evidence of defendant's guilt, including evidence that defendant admitted his involvement in the robbery and murder to two witnesses, that a shirt identified as belonging to defendant and stained with blood of the victim's type was found near the victim's residence, and that defendant's fingerprint was found in blood on a piece of wood in the victim's apartment.

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

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution. 7 ALR3d 8.

Prosecutor's duty, under due process clause of Federal Constitution, to disclose evidence favorable to accused—Supreme Court cases. 87 L. Ed. 2d 802.

4. Evidence and Witnesses § 748 (NCI4th)— opinion testimony—murder not committed by another—curative instruction

A defendant on trial for murder was not prejudiced by the testimony of law officers that the murder was not committed by another suspect who defendant contended was the perpetrator where the trial court complied with defendant's request that a curative instruction be given to the jurors to strike that testimony from their minds, and after receiving a lengthy instruction, each juror indicated that he or she understood and would follow the court's instruction.

Am Jur 2d, Appeal and Error § 807.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Phillips, J., at the 20 November 1991 Criminal Session of Superior Court, Craven County, upon a jury verdict of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for robbery with a dangerous weapon was allowed 1 December 1993. Heard in the Supreme Court 11 January 1995.

Michael F. Easley, Attorney General, by Mary D. Winstead, Associate Attorney General, for the State.

Thomas H. Eagen for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 13 November 1990 for the offenses of robbery with a dangerous weapon and the first-degree murder of Janie Gaskins. The defendant was tried capitally, and the jury found defendant guilty as charged of robbery with a dangerous weapon and of first-degree murder on theories of both premeditation and deliberation and felony murder. Following a capital sentencing hearing, the jury recommended a sentence of life imprisonment for the murder conviction. Judge Phillips sentenced the defendant to consecutive terms of life imprisonment for the murder and forty years' imprisonment for the robbery with a dangerous weapon.

At trial, the State presented evidence tending to show that Janie Gaskins died sometime during the late evening hours of 20 October 1990 or the early morning hours of 21 October 1990 as a result of multiple stab wounds to the chest.

Lamm Lovett, a good friend of Ms. Gaskins, visited the victim almost every day of the year. Mr. Lovett described Ms. Gaskins' home as completely fenced in, with a front door, back door and screen door which she locked every night. The front door opened into the living room which contained a couch and a marble-top coffee table in which Ms. Gaskins kept a folding pocketknife. There was also a bedroom, kitchen and small bathroom in Ms. Gaskins' home.

Mr. Lovett testified that he had visited Ms. Gaskins on the evening of 20 October 1990. He noticed that the marble-top coffee table was intact and that the bed in the bedroom was made and undisturbed. Mr. Lovett stated that he paid Ms. Gaskins twenty dollars which he owed her and noticed that she placed the money in one of two small purses she kept tucked in her bra. Ms. Gaskins was also wearing a watch on a gold chain around her neck. At Ms. Gaskins' request, Mr. Lovett went to the garden with Ms. Gaskins and moved a small chair off the porch into the yard beside the fence. At that time, the bathroom window was closed.

The following morning, Mr. Lovett returned to Ms. Gaskins' house but could not get Ms. Gaskins to answer the door. Mr. Lovett and a neighbor then went to the back of the house. They noticed that the

chair Mr. Lovett had placed near the fence the night before was underneath the bathroom window and that the window was now open. Mr. Lovett called the police.

Officer Thomas Mills of the New Bern Police Department was the first officer to arrive at the scene. Officer Mills observed the chair under the partially open bathroom window and noted that the screen door and back door were locked. He gained entry into Ms. Gaskins' house by climbing through the open bathroom window. Once inside, Officer Mills noticed that the top drawer of a bedroom chest was open and that personal items had been thrown on the floor. He also noticed that the covers had been forcefully pulled from the bed. Upon entering the living room, Officer Mills discovered Ms. Gaskins lying on the floor in a pool of blood. On his way out of the house, Officer Mills discovered a sock on the floor of the storage room.

Rosa Crawford Bennett, an investigator with the New Bern Police Department, assisted in the investigation of Ms. Gaskins' death. At some point during her investigation, Ms. Bennett was called by other officers to remove a stained shirt from a trash can at Cedar Grove Cemetery. The stains on the shirt were determined to be bloodstains which matched the blood type of the victim. Investigators at the scene also discovered defendant's latent fingerprint on a bloody piece of wood.

Dr. Charles Garrett, a board certified forensic pathologist, performed an autopsy on the victim. He noted a total of sixty-three stab wounds and numerous blunt force injuries to Ms. Gaskins' body. He observed eleven defensive wounds on the hands and left forearm. In Dr. Garrett's opinion, Ms. Gaskins was conscious at the time she received the defensive wounds to the arm and hands. Dr. Garrett further opined that Ms. Gaskins died as a result of stab wounds to the chest which caused internal bleeding.

The State's evidence further showed that the defendant and Ms. Darcelene Cabbagestalk met and began dating during the summer of 1989 and dated on and off until October of 1990. Ms. Cabbagestalk testified that on 20 October 1990, she and the defendant were together until about ten o'clock in the evening. When the defendant left, he stated he was going home for the night. At that time, defendant had no money and was wearing dark blue jeans, Rockport shoes and a long-sleeve dress shirt. The shirt was white with thick gray stripes and had a flat chest pocket with a button and a red design. The shirt

pocket and cuff were not torn, and there were no stains on the defendant's shirt.

About two hours after leaving, the defendant returned to Ms. Cabbagestalk's house. Upon his return, the defendant was wearing gray pants and a shirt that Ms. Cabbagestalk had never seen before. Defendant was also in possession of approximately one hundred dollars worth of cocaine and a substantial amount of money. Later in the evening, the defendant said he was going to get some more money and then went into the yard beside Cedar Grove Cemetery. The defendant returned with one hundred and sixty dollars. Ms. Cabbagestalk testified that when she asked the defendant where he got the money, he stated that he had broken into a house with a white picket fence around it. At that time, the defendant was also in possession of some jewelry and a pocketknife.

Ms. Cabbagestalk further testified that on 23 October 1990, the defendant told her that he killed a woman. According to Ms. Cabbagestalk, the defendant stated that he entered the victim's house by climbing through a bathroom window. When the defendant entered the house, the victim woke up and came after him with a knife. Defendant then obtained a knife and stabbed her as she came after him. The defendant told Ms. Cabbagestalk that his clothes were either in somebody's trash or at the city dump. Ms. Cabbagestalk identified the shirt recovered from the cemetery trash can as being the defendant's or one just like it.

Tony Chapman grew up with the defendant and saw the defendant about three or four days after he heard about Ms. Gaskins' murder. The defendant told Mr. Chapman that he was the one who killed Ms. Gaskins but that he did not mean to stab her. According to Mr. Chapman, defendant stated that the victim picked up a knife and they scuffled and that he grabbed the knife from her and began stabbing her. Mr. Chapman inquired whether the defendant had left any fingerprints, and defendant said he had not because he had socks on his hands.

I.

[1] In his first assignment of error, the defendant contends that the trial court erred by giving a reasonable doubt instruction that reduced the State's burden of proof below the standard mandated by the Due Process Clause of the United States Constitution. We disagree.

The trial court instructed the jury in pertinent part as follows:

> The State must prove to you that the Defendant is guilty beyond a reasonable doubt. And a reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that's been presented or the lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the Defendant's guilt. A reasonable doubt is not a vane [sic], imaginary or fanciful doubt, but it's a sane, rational doubt. When it is said that the jury must be satisfied of the Defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced, or satisfied to a *moral certainty* 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 that 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 justice, is an *honest, substantial misgiving* generated by the insufficiency of the proof. An insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused. It is not a doubt generated by the ingenuity of counsel or by your own ingenuity not legitimately warranted by the testimony or one borne of a merciful inclination or disposition to permit the Defendant to escape the penalty of the law, or one prompted by a sympathy for him or those connected with him.

(Emphasis added.)

First, we note the defendant here is contending error with respect to the very portion of the charge on reasonable doubt which he specifically requested. The defendant, through his counsel at the charge conference, requested the inclusion of the "moral certainty" language, contending this term more fully defines reasonable doubt than the generally used pattern charge. The defendant requested that paragraph from *State v. Hammonds*, 241 N.C. 226, 85 S.E.2d 133 (1954), which for decades has been the standard, staple terminology used to further explain the meaning of "reasonable doubt" to our juries. More recently, in *State v. Watson*, 294 N.C. 159, 240 S.E.2d 440 (1978), where the defendant requested reasonable doubt be defined as possessing "an abiding faith *to a moral certainty* in the defendant's guilt," this Court stated: "Additionally, the words 'to a moral cer-

tainty' are synonymous with beyond a reasonable doubt." 294 N.C. at 167, 240 S.E.2d at 446 (citing *Rhinehart v. State*, 175 Ark. 1170, 299 S.W. 755 (1927)).

Now, the defendant, relying on *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990), *State v. Montgomery*, 331 N.C. 559, 417 S.E.2d 742 (1992) and *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993) (*Bryant I*), *judgment vacated*, — U.S. —, 128 L. Ed. 2d 42, *on remand*, 337 N.C. 298, 446 S.E.2d 71 (1994), argues that the trial court's use of the terms "moral certainty" and "honest, substantial misgiving" in its charge to the jury violated the Due Process Clause of the United States Constitution.

In *Cage*, the United States Supreme Court held that the use of the terms "grave uncertainty," "actual substantial doubt" and "moral certainty" when defining reasonable doubt created a reasonable likelihood that the jury unconstitutionally found the defendant guilty on a degree of proof less than a reasonable doubt. *Cage*, 498 U.S. at 41, 112 L. Ed. 2d at 342. In *Bryant I*, with the application of *Cage*, a new trial was awarded for an instruction similar to the instruction given the jury in this case.

This Court has recently reexamined *Bryant* in light of *Victor v. Nebraska*, — U.S. —, 127 L. Ed. 2d 583 (1994). In *Victor*, the United States Supreme Court held that no particular formation of words is necessary to properly define reasonable doubt, but rather, the instructions, in their totality, must not indicate that the State's burden is lower than "beyond a reasonable doubt." Applying *Victor*, this Court, in *State v. Bryant*, 337 N.C. 298, 446 S.E.2d 71 (1994) (*Bryant II*), reconsidered its earlier holding (*Bryant I*) and found no error in a reasonable doubt instruction that was nearly identical to the instruction in the instant case. In *Bryant II*, the jury was instructed, in pertinent part, as follows:

> A reasonable doubt is not a mere possible doubt, for most things that relate to human affairs are open to some possible or imaginary doubt.
>
> A reasonable doubt is not a vain, imaginary or fanciful doubt, but it is a sane, rational doubt arising out of the evidence or lack of evidence or from its deficiency.
>
> When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a *moral certainty* of the truth of the charge.

> If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a *moral certainty* in the defendant's guilt, then they have a reasonable doubt; otherwise not.
>
> A reasonable doubt, as that term is employed in the administration of criminal law, is *an honest substantial misgiving* generated by the insufficiency of the proof. An insufficiency which fails to convince your judgment and confidence and satisfy your reasons as to the guilt of the defendant.

Bryant II, 337 N.C. at 302, 446 S.E.2d at 73. We held that when read in context and considered as a whole, the jury would not have interpreted the instruction to have overstated the level of doubt required for acquittal. *Id.* at 306, 446 S.E.2d at 75.

In *Bryant II*, we noted that a single reference to "substantial doubt" or "substantial misgiving," when qualified by alternative definitions of reasonable doubt or other language in the instruction, does not overstate the amount of doubt necessary to acquit. *Id.* at 306, 446 S.E.2d at 75-76. In the present case, as in *Bryant II*, the jury was given several alternative definitions of reasonable doubt. The jury was instructed that a reasonable doubt is "not a vane [sic], imaginary or fanciful doubt," that it "is not a doubt suggested by the ingenuity of counsel or by your own ingenuity not legitimately warranted by the testimony" and that "reasonable doubt is a doubt based on reason and common sense arising out of . . . the evidence." Furthermore, in the case at bar, as in *Bryant II*, the reference was to an "honest, substantial misgiving generated by the insufficiency of the proof." The qualifying phrase "generated by the insufficiency of the proof" properly directed the jury to the evidence. The term "substantial" when so qualified refers to the "existence rather than the magnitude of the doubt." *Id.* Therefore, it is unlikely its use would have been interpreted to overstate the degree of doubt required for acquittal.

Additionally, defendant now contends the trial court's use of the phrase "moral certainty" would allow the jury to return a verdict based on faith or moral truth rather than reason or evidence presented. In *Bryant II*, we held that this argument was without merit so long as the jury was instructed to base its conclusions on the evidence in the case. *Id.* at 306, 446 S.E.2d at 76. In *Bryant II*, the jurors were instructed that they were to consider, compare and weigh all the evidence to determine if reasonable doubt existed. *Id.* Likewise, in the present case, the jurors were instructed that they were to "con-

sider, compare and weigh all the evidence" to determine if reasonable doubt exists, that a reasonable doubt "is a doubt based on reason and common sense arising out of some or all of the evidence that's been presented or the lack or insufficiency of the evidence as the case may be" and that it is "an honest, substantial misgiving generated by the insufficiency of the proof." This language clearly directs the jury to base its decision on the evidence. We therefore conclude, as in *Bryant II*, that there is no reasonable likelihood that the jury would have understood the term "moral certainty" to be disassociated from the evidence.

The defendant also argues that the instruction is constitutionally deficient because it lacks two alternative definitions of reasonable doubt found in *Victor v. Nebraska* and further uses the phrase "abiding faith" in conjunction with "moral certainty."

As to these arguments, defendant contends that in order to be constitutionally firm, the instruction should have defined reasonable doubt as "a doubt that would cause a reasonable person to pause and hesitate before acting thereon" and should have instructed that the probabilities of guilt must be "strong enough to exclude any doubt." As noted above, several alternative definitions of reasonable doubt were provided to the jury. There is no requirement that the "hesitate to act" and "strong enough to exclude any doubt" definitions be used. We also note that this Court has upheld jury instructions stating, contrary to the defendant's argument, that reasonable doubt "*does not* mean that you [the jury] must be satisfied beyond *any* doubt or all doubt." *Watson*, 294 N.C. at 166-67, 240 S.E.2d at 445-46 (emphasis added). Finally, the instruction in this case is identical to the instruction upheld in *State v. Moseley*, 336 N.C. 710, 445 S.E.2d 906 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 802 (1995), in which we recognized that the "use of the terms 'fully satisfied or entirely convinced' and 'abiding faith' in conjunction with 'moral certainty' made it clear to the jury that the State's burden of proof was not less than the constitutional standard." *Id.* at 717, 445 S.E.2d at 910. Accordingly, this assignment of error is overruled.

II.

[2] Defendant next assigns error to the trial court's denial of his motion for mistrial based on the contention that the prosecutor, during closing argument, improperly commented on defendant's failure to testify.

Section 15A-1061 of the North Carolina General Statutes states that "[t]he judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1988). "The decision to grant or deny a mistrial rests with the sound discretion of the trial court." *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). Consequently, the trial court's decision will not be disturbed on appeal absent a clear showing that the trial court abused its discretion. *Id.* In this case, we find no such abuse of discretion in the trial judge's denial of defendant's motion for mistrial.

The defendant asserts that the prosecutor made a direct comment on his failure to testify. The defendant contends that after the prosecutor argued to the jurors that they had heard no testimony or evidence as to the defendant's whereabouts between ten o'clock and eleven-thirty the night before the victim's body was found, the prosecutor directly commented on the defendant's silence by asking: "Where is his alibi? . . . Where was he—." The defendant argues that the prosecutor's assertion that he needed an alibi was improper, in that the prosecutor's question to the jury, "[w]here was he—," directly invited the jurors to consider that the defendant, by not testifying, failed to tell them where he was at the time of the crime.

This Court has, on numerous occasions, considered and rejected the contention that statements by the prosecutor in closing argument questioning the failure of the defendant to produce an alibi witness amount to impermissible comments on the defendant's failure to testify. *See State v. Young*, 317 N.C. 396, 346 S.E.2d 626 (1986); *State v. Mason*, 317 N.C. 283, 345 S.E.2d 195 (1986); *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982). In the present case, the defendant asked for and received an alibi instruction over the State's objection. The defendant in his closing argument also contended that Ms. Cabbagestalk's testimony created an "iron-clad alibi" for defendant for all but one and one-half hours between the time the victim was last seen alive and the time her body was found. Defense counsel then argued to the jury that the State, after producing no evidence as to time of death, would have the jury believe that because the defendant had "no alibi for an hour, that's the time of death." The defendant then objected when the prosecutor, in response to this argument, questioned the defendant's alibi and whereabouts.

Based on these facts, we conclude that the prosecutor's remarks were directed solely toward the defendant's failure to offer evidence to rebut the State's case, were in response to the defendant's jury argument and were not an impermissible comment on the defendant's failure to testify. As such, we can find no abuse of discretion by the trial judge in denying the defendant's motion for mistrial.

The defendant further contends that several comments in the State's closing argument, in which the prosecutor argued that certain evidence was uncontradicted, were impermissible. It is well settled that the State may properly draw the jury's attention to the failure of the defendant to produce exculpatory evidence or evidence to contradict the State's case. *State v. Erlewine*, 328 N.C. 626, 633, 403 S.E.2d 280, 284 (1991); *see also State v. Eason*, 328 N.C. 409, 402 S.E.2d 809 (1991); *State v. Tilley*, 292 N.C. 132, 232 S.E.2d 433 (1977). This assignment of error is overruled.

III.

The defendant next assigns error to the trial court's denial of his motion to dismiss based on the State's failure to timely provide discovery and divulge exculpatory information, thereby violating his constitutional rights to a fair trial, due process and effective assistance of counsel.

In this case, the defendant filed separate motions for voluntary discovery and for exculpatory information. The trial judge heard these discovery motions and ordered the State to preserve any exculpatory information in the State's possession and make it available to the defendant at least twenty days prior to trial. The State was also ordered to provide all other information subject to discovery at least twenty days prior to trial. Defendant contends that the State should have provided him with five specific pieces of exculpatory information, prior to trial, which tended to implicate Shade Mashburn as the perpetrator of the crime and not the defendant. Each piece of information was ultimately provided to the defendant at trial. However, the defendant argues that the untimely disclosure of this information compromised defense counsel's ability to digest the material and present effective cross-examinations.

In *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976), the Supreme Court of the United States rejected the notion that every nondisclosure constitutes automatic error. *State v. Howard*, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993) (citing *United States v. Agurs*,

427 U.S. at 108, 49 L. Ed. 2d at 354). Instead, the Court held that "prejudicial error must be determined by examining the materiality of the evidence." *Id.* " 'In determining whether the suppression of certain information was violative of the defendant's right to due process, the focus should not be on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, but rather should be on the effect of the nondisclosure on the outcome of the trial.' " *State v. Smith*, 337 N.C. 658, 662, 447 S.E.2d 376, 378 (1994) (quoting *State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983)).

The defendant ultimately received the requested information at trial and was allowed to fully explore his theory that Shade Mashburn murdered Ms. Gaskins. The record reflects that the defendant's attorneys competently and zealously argued this theory before the jury. However, the evidence of the defendant's guilt was overwhelming. The defendant admitted his involvement in the robbery and murder of Ms. Gaskins to two witnesses. A shirt identified as belonging to the defendant, blood stained with the victim's blood type, was found near the victim's residence, and the defendant's fingerprint was found in blood on a piece of wood in the victim's residence. The jury was given the opportunity to consider the defendant's theory that Shade Mashburn committed the murder and was simply unpersuaded. The burden is on the defendant to show that the evidence not disclosed was material and affected the outcome of the trial. *Id.* We find that the defendant has failed to show he was prejudiced by the nondisclosure, prior to trial, of specific information relating to Shade Mashburn's possible involvement in the murder of Ms. Gaskins.

[4] In a related argument, the defendant asserts that he was prejudiced by the admission of testimony by law enforcement officers that Shade Mashburn had not committed the murder. The defendant argues that this error affected the outcome of the case, as the officers' testimony overcame any tendency the jurors may have had to believe that Shade Mashburn may have committed the murder. We do not agree that the admission of the officers' testimony affected the outcome of the defendant's trial. Defense counsel moved that the jurors receive a curative instruction to strike that testimony from their minds. The trial judge complied with defense counsel's request. After receiving the lengthy instruction, each member of the jury indicated that he or she understood and would follow the court's instruction. Jurors are presumed to follow a trial judge's instructions. *State v. Rouse*, 339 N.C. 59, 92, 451 S.E.2d 543, 561 (1994). We find no prejudice to the defendant, as the trial judge properly cured any potential error.

We therefore conclude that there is no reasonable probability that earlier disclosure by the State would have affected the outcome of the defendant's trial. This assignment of error is overruled.

IV.

By further assignment of error, defendant asserts the trial court erred in denying his motion to dismiss at the close of the State's evidence and at the close of all the evidence based on insufficiency of the evidence. Defendant has elected not to bring forward this assignment of error. It is therefore deemed abandoned pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure.

V.

Lastly, defendant assigns as error the trial court's denial of his motion for mistrial on the grounds that: (1) testimony that the defendant's fingerprint was made in blood was admitted into evidence, and (2) testimony that Shade Mashburn was not the perpetrator of these crimes was admitted into evidence. The defendant has elected not to bring forward this assignment of error except as it relates to the above-referenced testimony regarding Shade Mashburn. Therefore, this assignment of error, as it relates to evidence of the fingerprint, is deemed abandoned pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure. This assignment of error, with respect to testimony regarding Shade Mashburn as the perpetrator of these crimes, is overruled for the reasons set forth above.

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

NO ERROR.

STATE OF NORTH CAROLINA v. AARON WILLETTE BAITY

No. 403A93

(Filed 7 April 1995)

11. Evidence and Witnesses § 3169 (NCI4th)— first-degree murder—prior statement of witness admissible—corroborative

The trial court did not err in a first-degree murder prosecution by admitting a prior statement by a witness where defendant

argued that the prior statement was inconsistent with his testimony on direct examination at trial in that the witness did not testify on direct examination that the victim was carrying a gun when he arrived on the scene and the statement said that the victim was carrying a gun when he appeared in the parking lot. Nothing in his testimony about the gun on direct examination contradicted his previous statement; any variations between the statement and the trial testimony were slight and reflect on the credibility, not the admissibility, of the evidence. Moreover, on cross-examination, the witness testified that the victim was carrying a gun when he arrived in the parking lot; a witness's testimony during cross-examination is a part of a witness's trial testimony and a witness's prior consistent statements may be admitted to corroborate the witness's trial testimony. This statement tended to add weight or credibility to the witness's trial testimony and was admissible to strengthen and confirm the witness's testimony at trial.

Am Jur 2d, Witnesses §§ 641 et seq.

2. Evidence and Witnesses § 2203 (NCI4th)— first-degree murder—fingerprint card—admissible

The trial court did not err in a first-degree murder prosecution by admitting evidence concerning fingerprints taken from defendant in 1989 where the prosecutor deleted any reference to the date when the fingerprints were taken after defendant objected. The fingerprint card as admitted contained no evidence of any prior criminal arrests, indictments, or convictions. Moreover, there was no prejudicial error in the manner in which the card was admitted, even though defendant contended that there was prejudice in attempting to admit the card with the date, then whiting out the date in the jury's presence.

Am Jur 2d, Evidence § 569.

Fingerprints, palm prints, or bare footprints as evidence. 28 ALR2d 1115.

3. Homicide § 244 (NCI4th)— first-degree murder—evidence of premeditation and deliberation—sufficient

There was sufficient evidence of premeditation and deliberation in a first-degree murder prosecution where, taken in the light most favorable to the State, the evidence established that defendant was walking alongside Cameron Waugh while the victim and

Darren Waugh were walking behind defendant and Cameron; they were going to talk to the police about money defendant had stolen; they had been walking for some time when defendant pulled a pistol, turned around, and shot the victim in the chest; nothing suggests any action on the part of the victim or the Waugh brothers to provoke defendant to start shooting; defendant fled the scene, shooting at the Waugh brothers as he ran; and defendant disposed of the weapon and the clothes he was wearing.

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 entered by Cornelius, J., at the 24 May 1993 Criminal Session of Superior Court, Forsyth County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 13 February 1995.

Michael F. Easley, Attorney General, by John G. Barnwell, Assistant Attorney General, for the State.

Lisa S. Costner for defendant-appellant.

PARKER, Justice.

Defendant was charged in a bill of indictment proper in form with the first-degree murder of Jerry Martin Evans, Jr. (victim) in violation of N.C.G.S. § 14-17. Defendant was tried capitally and convicted as charged. In accordance with the jury's recommendation after a capital sentencing proceeding, the trial court entered judgment sentencing defendant to life imprisonment.

At trial the evidence tended to show that on 11 August 1992, defendant, Aaron Baity, was in the Stratford Oaks shopping center in Winston-Salem. Around 12:15 p.m., defendant entered Decorative Accents, a store in Stratford Oaks. Cathy Disher saw defendant in her office at Decorative Accents and asked if she could help him. Defendant picked up a fabric sample book and began looking through it and asking about green carpet. Not finding what he wanted, defendant left the store. Shortly before 1:00 p.m. on that same day, defendant entered the office of Hines Shoes, another store in Stratford Oaks.

Defendant took money from the safe in the office at Hines Shoes and then left the store. The theft was discovered almost immediately by Darren Waugh, a Hines Shoes' employee. Darren and his brother, Cameron Waugh, who also worked at the store, began pursuing defendant.

The victim worked at a jewelry store located directly across from Hines Shoes in the Stratford Oaks shopping center. The victim heard about the theft and also gave chase.

Darren and Cameron caught up with defendant, and Cameron began to talk to defendant while Darren went to call Hines Shoes and let them know where Darren, Cameron, and defendant were. Cameron remained with defendant as they crossed Stratford Road and went into a Best parking lot. Cameron was trying to persuade defendant to return the stolen money and talk to the police.

Darren and the victim joined Cameron and defendant in the Best parking lot. The victim was carrying a gun. Defendant eventually handed the money he had stolen to Cameron, who gave it to the victim. Cameron, defendant, the victim, and Darren then began walking back towards Stratford Road. Cameron told defendant he would have to talk to the police. Cameron was walking next to defendant; the victim and Darren were walking behind defendant and Cameron. Suddenly, defendant turned around and shot the victim two times in the chest with a nine-millimeter pistol. The victim fell to the ground, and Darren and Cameron both ran for cover. Defendant continued to shoot as he ran away. Darren went back to the victim and got his gun, and Darren and Cameron again began chasing defendant. At some point, Darren threw the gun to Cameron. Neither Darren nor Cameron shot at defendant, and defendant escaped. The police arrived at the scene and questioned Darren, Cameron, and other witnesses about the shooting.

Defendant was arrested later that day by the Special Enforcement Team of the Winston-Salem Police Department. When questioned, defendant claimed he was not at the scene of the shooting and knew nothing about it. The gun used to shoot the victim and the clothes worn by defendant at the time of the murder were never recovered.

The victim died from two gunshot wounds to his chest. An expert in pathology testified at trial that either of the two gunshot wounds alone would have been fatal.

Defendant elected to testify and presented evidence that he was arrested and sent to prison in 1989 and had been released on 7 January 1992. Defendant testified that on the day of the shooting, he was carrying a nine-millimeter pistol in his pants. Defendant saw the victim in the parking lot at Best; the victim was walking with his hand behind his back. Defendant testified that he turned around to look at the victim and saw the victim "pull a gun from behind his back[,] [r]aise it and hold it with both hands[,] and say I don't think so." Defendant shot the victim because defendant thought the victim would shoot him in the head if he did not shoot the victim first.

Additional facts will be presented as necessary to the understanding of a particular issue.

[1] Defendant first argues that the trial court erred in admitting a prior statement made by witness Cameron Waugh to Officer B.G. Rodden of the Winston-Salem Police Department. Defendant argues that Cameron Waugh's prior statement was inconsistent with, rather than corroborative of, his testimony on direct examination at trial. Specifically, the witness did not testify on direct examination that the victim was carrying a gun when he arrived on the scene; whereas, the witness' statement read into evidence stated that when the victim appeared in the parking lot, he was carrying a gun.

This Court has elaborated on the admissibility of prior consistent statements for corroboration as follows:

> In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. *State v. Riddle*, 316 N.C. 152, 156-57, 340 S.E.2d 75, 77-78 (1986); *State v. Higgenbottom*, 312 N.C. 760, 768-69, 324 S.E.2d 834, 840 (1985); *State v. Burns*, 307 N.C. 224, 231, 297 S.E.2d 384, 388 (1982). *See State v. Ollis*, 318 N.C. 370, 348 S.E.2d 777 (1986). Our prior statements are disapproved to the extent that they indicate that additional or "new" information, contained in the witness's prior statement but not referred to in his trial testimony, may never be admitted as corroborative evidence. *Eg.*, *State v. Moore*, 301 N.C. 262, 274, 271 S.E.2d 242, 249-50 (1980); *State v. Brooks*, 260 N.C. 186, 189, 132 S.E.2d 354, 357 (1963). However, the witness's prior statements as to facts not referred to in his trial testimony *and not tending to add weight or credibility* to it are not admissible as corroborative evidence.

> Additionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony.

State v. Ramey, 318 N.C. 457, 469, 349 S.E.2d 566, 573-74 (1986).

Applying this analysis, we conclude that the statement at issue in this case tended to add weight or credibility to the trial testimony given by Cameron Waugh and was admissible. The only evidence in Cameron Waugh's statement that defendant argues was inconsistent with Cameron's trial testimony was that portion stating that the victim was carrying a gun. Although Cameron Waugh did not testify during direct examination that the victim was carrying a gun, Cameron never testified on direct examination that the victim was not carrying a gun. On direct examination Cameron testified that his brother, Darren, had a gun that he threw to Cameron after the shooting; but Cameron never testified on direct examination whose gun Darren threw to him. Hence, nothing in Cameron's testimony about the victim's gun on direct examination contradicted his previous statement to Officer Rodden. Moreover, on cross-examination by defendant, Cameron did testify that when the victim arrived in the parking lot, he was carrying a gun in his right hand. Thus, the only inconsistency that defendant argues between Cameron's testimony and his prior statement was in fact part of Cameron's trial testimony.

Defendant argues that Cameron's testimony on cross-examination, that the victim was carrying a gun, only served to confuse the jury. Defendant seems to imply, without citing any authority, that a witness' testimony on cross-examination should not be considered when determining whether a prior statement is consistent with a witness' testimony. We have held that a witness' prior consistent statements may be admitted to corroborate the witness' "trial" testimony. *See State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 212 (1991) (admitting a prior statement which strengthens "trial testimony"); *State v. Ramey*, 318 N.C. at 469, 349 S.E.2d at 573 (holding prior statements admissible when they add credibility to "witness's testimony at trial"). A witness' testimony during cross-examination is part of a witness' "trial" testimony. *See State v. Adams*, 331 N.C. 317, 329, 416 S.E.2d 380, 386 (1992) (considering witness' testimony on direct and cross-examination when determining if prior statement was admissible as corroborative evidence).

Based on our review of Cameron Waugh's testimony at trial and his previous statement that was read into evidence by Officer Rodden, we conclude that the statement tended to add weight or

credibility to Cameron's trial testimony and was admissible to strengthen and confirm the witness' testimony at trial. Any variations between the statement to Officer Rodden and Cameron's trial testimony were slight and reflect on the credibility, not the admissibility, of the evidence. The jury was specifically instructed that the evidence was "offered for the purpose of corroborating the testimony of an earlier witness." Accordingly, we find no error in the admission of the statement.

[2] Next, defendant argues that the trial court erred by admitting evidence concerning fingerprints taken from defendant in 1989. Defendant had been fingerprinted in 1989 in connection with a previous arrest. On 11 August 1992, a fingerprint had been lifted from a fabric book at Decorative Accents. When compared with the fingerprint on the 1989 fingerprint card, the lifted fingerprint was identified as defendant's. The prosecutor attempted to admit into evidence the fingerprint card from 1989. Defendant objected. After the prosecutor deleted any reference to the date when the fingerprints were taken, the trial court allowed the card to be admitted.

This Court addressed the admissibility of fingerprint cards made during previous arrests in *State v. Jackson*, 284 N.C. 321, 200 S.E.2d 626 (1973). In *Jackson*, the defendant argued that the trial court erred by admitting into evidence a fingerprint card made in 1962, ten years before the crime at issue had taken place. *Id.* at 331, 200 S.E.2d at 632. The exhibit was introduced for the purpose of identifying a latent fingerprint lifted from the victim's apartment at the time of the crime for which defendant was on trial. *Id.* The defendant argued admission of the fingerprint from 1962 was prejudicial because it was evidence that he had committed an earlier crime. *Id.* at 331, 200 S.E.2d at 632-33.

In *Jackson*, this Court concluded that the fingerprint card as altered prior to its introduction did not disclose the defendant's criminal record and was admissible. *Id.* at 333, 200 S.E.2d at 634. The card as altered did not list a single arrest, indictment, or conviction. *Id.* The Court concluded that the admission of the card did not "prejudicially influence the jury in [its] consideration of the question of defendant's innocence or guilt." *Id.*

Since this Court's decision in *Jackson*, fingerprint cards made pursuant to prior, unrelated arrests have been held admissible. *See State v. McKnight*, 87 N.C. App. 458, 461, 361 S.E.2d 429, 431 (1987), *cert. denied*, 321 N.C. 477, 364 S.E.2d 663 (1988); *State v. Scober*, 74

N.C. App. 469, 472, 328 S.E.2d 590, 591-92 (1985); *State v. Gainey*, 32 N.C. App. 682, 687, 233 S.E.2d 671, 674, *cert. denied*, 292 N.C. 732, 235 S.E.2d 786 (1977).

In the present case, the fingerprint card as admitted contained no evidence of any prior criminal arrests, indictments, or convictions. The card as admitted did not even indicate on what date the fingerprints were taken. While there was testimony that the card was made in 1989, that testimony was objected to, and the jury was specifically instructed to "disregard any testimony of any fingerprints or any incident in 1989." "[T]he law presumes the jury followed the judge's instructions." *State v. Long*, 280 N.C. 633, 641, 187 S.E.2d 47, 52 (1972).

Defendant also argues that prejudicial error occurred when the prosecutor attempted to admit the card into evidence with the date on it and then attempted to remedy the situation by "whiting out" the date, while the jury was present in the courtroom. Defendant objected "to the big show of whiting it [the date] out while we were objecting to it." The discussion and "whiting out" of the date took place during a conference at the bench which the court reporter noted was "out of the hearing of the jury." In response to defendant's objection, the trial court stated that "[t]he jury doesn't know what was whited out. They weren't even watching what you were doing." The prosecutor was instructed by the trial court to delete all reference to the date. The trial court then conducted a *voir dire* of Officer Carl Schulte of the Winston-Salem Police Department, an expert in the field of identification. The trial court made findings of fact that the exhibit contained no information about any prior arrest, indictment, or conviction. The only thing on the card was defendant's fingerprints without a date as to when they were taken. The card was then admitted into evidence.

On this record, we conclude no error occurred in the admission of the card into evidence or in the manner in which the date on the card was deleted from the card.

[3] Finally, defendant argues that the trial court erred by denying defendant's motion to dismiss the first-degree murder charge because there was insufficient evidence to show that the killing was premeditated and deliberate.

We have previously set forth the standard for determining a motion to dismiss thusly:

> When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Whether evidence presented constitutes substantial evidence is a question of law for the court. *Id.* at 66, 296 S.E.2d at 652. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). The term "substantial evidence" simply means "that the evidence must be existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

State v. Vause, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). In passing upon a defendant's motion to dismiss, the court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. *Id.* at 237, 400 S.E.2d at 61.

Premeditation means that "defendant contemplated killing for some period of time, however short, before he acted." *State v. Williams*, 334 N.C. 440, 447, 434 S.E.2d 588, 592 (1993). Deliberation means that "defendant acted 'in a cool state of blood,' free from any 'violent passion suddenly aroused by some lawful or just cause or legal provocation.' " *Id.* (quoting *State v. Fields*, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985)). "Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence." *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 822-23 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *rev'd on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

> Among the circumstances which may be considered as tending to show premeditation and deliberation are: (1) the want of provocation on the part of the victim, (2) the defendant's conduct and statements before and after the killing, (3) threats made against the victim by the defendant, (4) ill will or previous difficulty between the parties, (5) evidence that the killing was done in a brutal manner. *See State v. Calloway*, [305 N.C. 747, 751, 291 S.E.2d 622, 625-26 (1982)]; *State v. Potter*, 295 N.C. 126, [130,] 244 S.E.2d 397[, 401] (1978); *State v. Thomas*, 294 N.C. 105, [119,] 240 S.E.2d 426[, 436] (1978). The nature and number of the victim's wounds is also a circumstance from which an inference of pre-

meditation and deliberation may be drawn, *State v. Brown*, 306 N.C. 151, [174,] 293 S.E.2d 569, [584,] *cert. denied*, 459 U.S. 1080, 103 S.Ct. 503, 74 L.Ed.2d 642 (1982).

State v. Myers, 309 N.C. 78, 84, 305 S.E.2d 506, 510 (1983).

In this case, the evidence is sufficient to support a finding of premeditation and deliberation. Taken in the light most favorable to the State, the evidence established that defendant was walking alongside Cameron Waugh while the victim and Darren Waugh were walking behind defendant and Cameron. Cameron, Darren, and the victim were walking with defendant to take him to talk to the police about the money he had stolen. The four men had been walking together for "some length of time" when defendant pulled out his nine-millimeter pistol, turned around, and shot the victim two times in the chest. Nothing in the State's evidence suggests any action on the part of the victim or the Waugh brothers to provoke defendant to start shooting. Defendant then fled the scene, shooting at Cameron and Darren as he ran. Defendant disposed of the weapon he used to kill the victim and the clothes he was wearing when the victim was shot. The clothes and weapon were never recovered. The victim died from the two gunshot wounds to the chest. From this evidence a reasonable jury could find beyond a reasonable doubt that defendant shot the victim with premeditation and deliberation and is guilty of first-degree murder.

Having reviewed the trial transcript and defendant's assignments of error, we conclude that defendant received a fair trial free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. CHARLES TATE BUNNELL

No. 500A93

(Filed 7 April 1995)

1. Homicide § 244 (NCI4th)— first-degree murder—premeditation and deliberation—evidence sufficient

There was sufficient evidence of premeditation and deliberation in a first-degree murder prosecution where the State's evidence tended to show that the fourteen-year-old defendant and his girlfriend talked about running away; defendant said that he

would kill his abusive stepfather if his stepfather gave him any trouble; defendant entered the house, had a brief discussion with his stepfather, and went into the bedroom to get a wrench; defendant calmly picked up a .30-.30 rifle while in the bedroom, loaded it, raised it to his shoulder, and shot his stepfather in the back of the head; his girlfriend testified that there was no change in defendant's countenance after the killing; defendant did not appear to be angry or upset; he returned to the house to remove his stepfather's wallet and pocketknife and had enough composure to check the time of the shooting; he subsequently bought a can of deodorizer to remove the smell of the shooting from the truck; and he later disposed of the gun, wallet, pocketknife, and washed the blood off his hands at a Welcome Center.

Am Jur 2d, Homicide §§ 437 et seq.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.

2. Evidence and Witnesses § 1305 (NCI4th)— first-degree murder—statement by youthful defendant—voluntariness

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress a statement he had given to SBI agent Murphy where defendant placed great emphasis on his age and on his testimony that the warnings concerning his constitutional rights did not mean anything to him when he waived them, but the trial court found that defendant wanted to talk to agent Murphy, that he told Murphy that he understood each right he was waiving, that the agent had applied no pressure or coercion to defendant, the physical surroundings were not coercive, there was no evidence of a display of weapons, officers took defendant and his girlfriend to Burger King; officers carefully went over the juvenile rights form with defendant; defendant had failed three grades in school, but had made them up during summer school and could read at a ninth grade level; there was no showing of subnormal intelligence; defendant had an opportunity to sleep and eat before he was questioned; and defendant recited his constitutional rights when Florida officers began to read them to him.

Am Jur 2d, Evidence § 745.

Voluntariness and admissibility of minor's confession. 87 ALR2d 624.

Validity and efficacy of minor's waiver of right to counsel—modern cases. 25 ALR4th 1072.

3. **Evidence and Witnesses § 1227 (NCI4th)— first-degree murder—defendant's statement—earlier unlawful statement**

The trial court did not err in a first-degree murder prosecution by not excluding defendant's statement, which defendant claimed was tainted by an earlier statement which was excluded due to a violation of the juvenile code. A subsequent, valid waiver of rights is not tainted by an earlier, voluntary but improper waiver of these rights.

Am Jur 2d, Evidence § 730.

4. **Appeal and Error § 150 (NCI4th)— first-degree murder—statement by defendant—right to counsel—first raised on appeal**

A first-degree murder defendant's contention that his statement was obtained in violation of the Sixth Amendment of the United States Constitution and Article I, Section 23 of the North Carolina Constitution was rejected because defendant raised it for the first time on appeal.

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

5. **Homicide § 558 (NCI4th)— first-degree murder—refusal to submit voluntary manslaughter—conviction for first-degree murder**

There was no prejudicial error in a first-degree murder prosecution where the court refused to submit a voluntary manslaughter instruction to the jury but the jury was instructed on first and second degree murder and convicted defendant of first-degree murder.

Am Jur 2d, Homicide §§ 525 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 Hobgood, J., at the 28 June 1993 Criminal Session of Superior Court, Bladen 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 the unauthorized use of a conveyance was allowed 8 March 1994. Heard in the Supreme Court 15 February 1995.

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

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

MITCHELL, Chief Justice.

Defendant, a fourteen-year-old, was charged with first-degree murder and robbery with a dangerous weapon. After a finding of probable cause, he was bound over to the Superior Court. Defendant was tried noncapitally to a jury and found guilty of first-degree murder on the basis of premeditation and deliberation, but was adjudged not guilty under the theory of felony murder. Defendant was found not guilty of robbery with a dangerous weapon but guilty of unauthorized use of a conveyance. Judge Hobgood sentenced defendant to life imprisonment for the first-degree murder conviction and not less than one year nor more than two years for the unauthorized use of a conveyance conviction, the sentences to run concurrently.

The State's evidence tended to show that fourteen-year-old defendant, Charles Bunnell, lived with his mother Freda and his stepfather, Douglas Evers. Evers worked twelve hours a day in a textile mill. When he was not at work, he drank heavily and then abused the family members. As a result of Evers' drinking, Freda moved out of the house and into an apartment.

On 22 April 1992, Freda picked up Evers at work at 6:00 p.m., drove him to a convenience store where he bought a case of beer, and then took him to his house. There she fixed everyone dinner and left the house for her apartment at 8:00 p.m. with defendant and defendant's fifteen-year-old girlfriend, Jamie Carter. Defendant and Jamie were outside the apartment until 9:30 p.m. During this time, they discussed taking Evers' truck and running away. At trial, Jamie testified that defendant said he would kill Evers if he gave defendant any trouble.

Defendant and Jamie returned to Evers' house at 9:40 p.m. to get some clothes for defendant. Evers began to yell at defendant because defendant had not returned by 9:30 p.m. Defendant told Evers he had said he would be home by 10:00 p.m., and Evers called defendant a

liar. Defendant then asked Evers if he could borrow a wrench to tighten the wheels on his skateboard. Evers asked if he would put it back, and defendant said he would. Evers again called defendant a liar.

Defendant went into Evers' bedroom, where the tools were kept. Evers had a number of rifles and a shotgun in the corner of his bedroom. Defendant picked up a .30-.30 rifle, loaded one bullet into the chamber, raised the rifle to his shoulder, and shot Evers in the back of the head. Defendant put the empty shell casing in his pocket and took the rifle out to the truck. Jamie asked what had happened, and defendant answered that he had just scared Evers. Jamie then asked defendant whether he had killed Evers, and defendant told her he had. Defendant reentered the house; took Evers' wallet, pocketknife, and truck keys; and packed some clothes. He and Jamie got into the truck and drove south. Defendant noted the time when he shot Evers because defendant knew he would be caught and "they" would want to know the time. It was 10:24 p.m.

During their escape, defendant disposed of the rifle, the spent shell casing and Evers' wallet and pocketknife at the South Carolina Welcome Center. Defendant and Jamie eventually decided to go to Daytona Beach, Florida. After reaching Daytona, defendant got into an accident which led to his arrest. During an interview with Florida and North Carolina law enforcement officers, defendant said he did not know he was going to shoot Evers until he actually did so. Defendant also helped police locate the evidence hidden at the Welcome Center.

Additional evidence introduced at trial will be discussed as necessary to an understanding of the issues.

[1] By his first assignment of error, defendant contends that there was insufficient evidence of intent to kill, premeditation, and deliberation to support his conviction for first-degree murder. Therefore, he contends that the trial court erred in denying his motion to dismiss that charge.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense charged. *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991). The trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence presented. *State v. Davis*, 325 N.C. 693, 386

S.E.2d 187 (1989). Evidence favorable to the State is to be considered as a whole, and the test of sufficiency to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial, or both. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982).

"Murder in the first degree is the unlawful killing of another human being with malice and with premeditation and deliberation." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). That the killing was unlawful and done with malice may be presumed from the use of a deadly weapon. *State v. Porter*, 326 N.C. 489, 391 S.E.2d 144 (1990). "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. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). "Deliberation means . . . an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design . . . or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation." *State v. Sanders*, 276 N.C. 598, 615, 174 S.E.2d 487, 499 (1970), *death sentence reversed*, 403 U.S. 948, 29 L. Ed. 2d 860, *on remand*, 279 N.C. 389, 183 S.E.2d 107 (1971).

There is sufficient evidence of premeditation and deliberation in the present case to support defendant's first-degree murder conviction. The State's evidence tended to show that defendant and Jamie talked about running away together, and defendant said he would kill Evers if Evers gave him any trouble. The actions of defendant before and after the killing also provide evidence of premeditation and deliberation. Defendant entered the house, had a brief discussion with Evers, and then went into the bedroom to get a wrench. While in the bedroom, defendant calmly picked up a .30-.30 rifle, loaded it, raised the rifle to his shoulder, and shot Evers in the back of the head.

Jamie testified that there was no change in defendant's countenance after the killing. He did not appear to be angry or upset. Instead, defendant put the gun in the truck and returned to the house to remove Evers' wallet and pocketknife from his person. In fact, defendant had enough composure to check the exact time of the shooting. Afterwards, defendant bought a can of deodorizer to remove the smell of the shooting from the truck. Defendant later disposed of the gun, wallet, and pocketknife and washed the blood off his hands at the Welcome Center.

All of this evidence, when viewed in the light most favorable to the State, was clearly sufficient to support a finding of first-degree murder based on premeditation and deliberation. Accordingly, we overrule this assignment of error.

[2] By his second assignment of error, defendant contends that the trial court erred in denying his motion to suppress his 25 April 1992 statement to SBI Agent Neil Murphy. Defendant maintains the statement was not knowingly and voluntarily given and, therefore, was taken in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 23 of the North Carolina Constitution.

Voluntariness must be determined by looking to the totality of the circumstances surrounding the statement. *State v. Mlo*, 335 N.C. 353, 440 S.E.2d 98, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 841 (1994); *State v. Hicks*, 333 N.C. 467, 428 S.E.2d 167 (1993). Some important factors to be considered include (1) whether defendant was in custody, (2) defendant's mental capacity, (3) the physical environment of the interrogation, and (4) the manner of the interrogation. *State v. Hicks*, 333 N.C. at 482-83, 428 S.E.2d at 176. The State bears the burden of proving that a defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary. *State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994).

Defendant places great emphasis on his age and on his testimony that the warnings concerning his constitutional rights did not mean anything to him when he waived them on 25 April 1992. However, the trial court found defendant wanted to talk to Agent Murphy, defendant told Agent Murphy that he understood each right he was waiving, and Agent Murphy had applied no pressure or coercion to defendant. The physical surroundings in which the interrogation took place were not coercive. Defendant was questioned in an office where pilots waited at the airport and while the officers and defendant waited to fly back to North Carolina. There was no evidence of any display of weapons. Prior to going to the airport, the officers took defendant and Jamie to Burger King. At the airport, the officers carefully went over the juvenile rights form with defendant.

Defendant had failed three grades in school; yet he had made them up during summer school and could read at a ninth grade level. There was no showing of subnormal intelligence. Defendant had an opportunity to sleep and eat before he was questioned. In addition, defendant seemed familiar with the *Miranda* warnings and recited

his constitutional rights when the Florida officers began to read them to him. The trial court did not err in its findings or in its conclusion that on the totality of the circumstances, the defendant's 25 April 1992 confession was voluntary.

[3] Defendant further argues that the statement taken on 25 April was tainted by an earlier unlawful statement taken on 23 April. The trial court excluded defendant's 23 April statement to Florida officers because of a technical violation of the Juvenile Code. N.C.G.S. § 7A-595(a)(3) requires any juvenile in custody to be advised prior to questioning of the "right to have a parent, guardian or custodian present during questioning." Because the Florida officers only warned defendant that he had the right to have a parent or guardian present and failed to add that he had the right to have a custodian present, the trial court concluded that he could not have knowingly and understandingly waived that right. Defendant's natural mother was only his custodian, since he had been legally adopted by his grandmother. Pursuant to the United States Constitution and the North Carolina Constitution, a subsequent, valid waiver of rights is not tainted by an earlier, voluntary but improper waiver of these rights. *Oregon v. Elstad*, 470 U.S. 298, 306-09, 84 L. Ed. 2d 222, 230-32 (1985); *State v. Hicks*, 333 N.C. at 481-82, 428 S.E.2d at 175-76. Therefore, this argument has no merit.

[4] Defendant also argues that the 25 April statement was inadmissible because it was obtained in violation of the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution. We note at the outset that defendant did not assert this issue in his motion to suppress the 23 April and 25 April statements. Rather, defendant raises it for the first time on appeal to this Court. Defendant contends that his right to counsel attached prior to the 25 April interrogation because sufficient adversary judicial proceedings had commenced in this case, he was already represented by counsel, and he did not validly waive his right to counsel. Having failed to attack the admissibility of his confession on this ground during the trial, defendant will not be allowed to attempt to do so for the first time on appeal to this Court. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). We specifically reject defendant's contention for this reason.

[5] By his final assignment of error, defendant contends that the trial court erred in refusing to submit a voluntary manslaughter instruction to the jury. Defendant argues that the following evidence presented at trial supported the submission of voluntary manslaughter

based on a heat of passion theory. Evers subjected defendant to twenty-two months of totally unjustified physical and mental abuse. Evers got drunk all the time and repeatedly physically assaulted defendant. Evers regularly yelled and cursed at defendant, saying that he "didn't have the brains God gave a monkey." Evers also repeatedly abused defendant's mother, his half-sister, and his half-sister's baby in front of defendant. On the night of the shooting, Evers "started fussing" at defendant and called him a liar. Defendant testified that he intended only to quietly run away, but then he completely lost control of reason and saw the rifle as he was picking up a wrench in Evers' bedroom. Seconds later, defendant dropped the wrench, picked up the rifle, and shot Evers. Defendant testified that he did not know he was going to shoot until the moment he did so and that he "couldn't face being put down any more."

Even assuming *arguendo* that, taken in the light most favorable to defendant, there was some evidence to support an instruction on voluntary manslaughter, the trial court's failure to give it was harmless error. In *State v. Shoemaker*, 334 N.C. 252, 432 S.E.2d 314 (1993), the trial court instructed the jury on first-degree and second-degree murder, and the jury returned a verdict of guilty of first-degree murder. The defendant argued that it was error for the trial court to refuse to instruct the jury on voluntary manslaughter. This Court stated:

> "A verdict of murder in the first degree shows clearly that the jurors were not coerced, for they had the right to convict in the second degree. That they did not indicates their certainty of [defendant's] guilt of the greater offense. The failure to instruct them that they could convict of manslaughter therefore could not have harmed the defendant."

Id. at 271, 432 S.E.2d at 324 (quoting *State v. Freeman*, 275 N.C. 662, 668, 170 S.E.2d 461, 465 (1969)). In this case, the jury was instructed that it could find defendant guilty of first-degree murder, second-degree murder, or not guilty. The jury returned a verdict of guilty of first-degree murder. Therefore, any error in the trial court's failure to instruct the jury on voluntary manslaughter was harmless and entitles defendant to no relief. This assignment of error is overruled.

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

No error.

GEORGE B. CLAY, PETITIONER v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENT

No. 480PA93

(Filed 2 June 1995)

Public Officers and Employees § 63 (NCI4th)— discrimination in state hiring—statute of limitations

Petitioner's case was not time barred where he was an intermittent employee of the Employment Security Commission who was considered for the permanent position of Disabled Veterans' Outreach Specialist in October of 1985; he was not selected for the position, although he was a disabled veteran of the Vietnam era and met the minimum requirements; he filed a grievance alleging discrimination based on age and veteran's preference; the chair of the ESC concluded that no evidence of discrimination existed and informed petitioner of the decision by letter on 24 March 1986; and petitioner filed an appeal with the Personnel Commission and requested a contested case hearing on 3 April 1986. The applicable statute of limitations is N.C.G.S. § 1-52(2), which provides that an action created by statute must be commenced within three years unless the statute provides a different limitation. An applicant for state employment commences a discrimination claim by filing an appeal with the Personnel Commission requesting a contested case hearing in the Office of Administrative Hearings, which effectively constitutes commencement of litigation even though the action is technically an appeal of an adverse employment decision. The employment decision giving rise to petitioner's appeal occurred in October of 1985 and Petitioner filed an appeal with the Personnel Commission on 3 April 1986, within 3 years of the date of the allegedly discriminatory employment decision. N.C.G.S. § 150B-23 has now been amended to provide a 60 day default time limitation, which applies to people in petitioner's position whose claims arose on or after the effective date of the statute.

Am Jur 2d, Public Officers and Employees § 38.

Rights of state and municipal public employees in grievance proceedings. 46 ALR4th 912.

Justice ORR did not take part 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, 111 N.C. App. 599, 432 S.E.2d 873 (1993), reversing a judgment entered 5 February 1992 by Brewer, J., in Superior Court, Wake County. Heard in the Supreme Court 14 February 1995; opinion filed 7 April 1995; said opinion superseded by this opinion

filed 2 June 1995 upon the allowance of respondent's petition for rehearing.

Voerman & Carroll, P.A., by David P. Voerman, for petitioner-appellant.

T.S. Whitaker, Chief Counsel, and C. Coleman Billingsley, Jr., Staff Attorney, for respondent-appellee.

WHICHARD, Justice.

Petitioner was an intermittent employee of the Employment Security Commission (ESC) when the ESC considered him for the permanent position of Disabled Veterans' Outreach Specialist (DVOS) in October 1985. The ESC did not select petitioner for the position, though he met the minimum requirements and was a disabled veteran of the Vietnam era. Petitioner filed a grievance with the chairman of the ESC on 1 February 1986 alleging discrimination on the bases of age and veterans' preference. After an investigation the chairman concluded that no evidence of discrimination existed. He informed petitioner of his decision by letter dated 24 March 1986; the letter also informed petitioner he could appeal the chairman's decision to the State Personnel Commission within thirty days of petitioner's receipt of the letter. On 3 April 1986 petitioner filed an appeal with the Personnel Commission and requested a contested case hearing in the Office of Administrative Hearings (OAH).

The ESC moved to dismiss the matter for lack of jurisdiction on the ground that it was not timely filed. Administrative Law Judge Angela R. Bryant denied this motion on 3 November 1986. On 17 November 1989 Judge Bryant filed a recommended decision which included extensive findings of fact and conclusions of law. She concluded that the ESC had prejudiced petitioner's rights by failing to accord a preference to disabled Vietnam veterans when hiring a DVOS. She further concluded that the ESC had discriminated against petitioner on the basis of age. Judge Bryant recommended that the ESC place petitioner into the DVOS position effective 1 December 1985 with back and front pay, benefits and attorney's fees; she also denied the ESC's renewed motion to dismiss. On 8 March 1990 the ESC entered exceptions to the recommendation and filed another motion to dismiss.

The Personnel Commission dismissed petitioner's appeal with prejudice on 18 April 1990 "for lack of jurisdiction as it was untimely filed." On 16 May 1990 petitioner sought judicial review of the Commission's decision. Judge Brewer heard the case in Superior Court, Wake County, on 30 April 1991. He entered an order on 5 February 1992 reversing the Commission's decision and remanding the case to the Commission with instructions to adopt Judge Bryant's recommended decision, including all relief provided therein. The ESC appealed to the Court of Appeals, which reversed Judge Brewer's order.

The Court of Appeals, without passing on the merits of the discrimination claim, held that the trial court erred by reversing the Commission's decision and order which dismissed petitioner's appeal for lack of jurisdiction. The court concluded that chapter 126 of the North Carolina General Statutes governed petitioner's right to appeal the ESC's action and that the time limit contained in N.C.G.S. § 126-38 should apply to petitioner's case. Section 126-38 provides: "Any employee appealing any decision or action shall file a petition for a contested case with the Office of Administrative Hearings as provided in G.S. 150B-23(a) no later than 30 days after receipt of notice of the decision or action which triggers the right of appeal." Although intermittent employees like petitioner are not considered "employees" for purposes of chapter 126, the Court of Appeals did "not believe that the Legislature intended to treat prospective state employees more favorably than present state employees." *Clay v. Employment Security Comm.*, 111 N.C. App. 599, 605, 432 S.E.2d 873, 876 (1993). It thus determined that "legislative intent requires the application of the statute of limitations that is applicable to state employees found in G.S. § 126-38 to the present action." *Id.*

The Court of Appeals further concluded that petitioner's oral notice from the ESC on 22 November 1985 that he had not been selected for the DVOS position triggered his right to appeal. He filed his petition on 3 April 1986, more than thirty days after the oral notification. The Court of Appeals therefore concluded that the Commission had properly dismissed the case for lack of jurisdiction based on petitioner's failure to file his appeal within the time period prescribed by N.C.G.S. § 126-38.

We agree with the Court of Appeals' conclusion that petitioner had a right to appeal the ESC's action to the Personnel Commission. However, we hold that the court improperly created a new statute of limitations pertaining to such appeals by applicants for state employment when it applied N.C.G.S. § 126-38 to this case. We therefore reverse the Court of Appeals on that issue.

Petitioner's right to appeal to the Personnel Commission arises under N.C.G.S. § 126-36.1, which provides: "Any applicant for State employment who has reason to believe that employment was denied in violation of G.S. 126-16 shall have the right to appeal directly to the State Personnel Commission." N.C.G.S. § 126-16 provides:

> All State departments and agencies and all local political subdivisions of North Carolina shall give equal opportunity for employment and compensation, without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition . . . to all persons otherwise qualified, except where specific age, sex or physical requirements constitute bona fide occupational qualifications necessary to

> proper and efficient administration. This section with respect to equal opportunity as to age shall be limited to individuals who are at least 40 years of age.

Petitioner alleged a violation of this statute and thus had a right to appeal to the Commission.

The issue before us is the proper time limit for the filing of appeals under N.C.G.S. § 126-36.1. We agree with the Court of Appeals that no section of chapter 126 "specifically establishes the time limit for an appeal to the OAH by an individual who is not currently an employee of the state." *Clay*, 111 N.C. App. at 604, 432 S.E.2d at 876. We disagree, however, with the conclusion that N.C.G.S. § 126-38 should be construed to apply to petitioner's case in the face of such a void. Courts may apply a statute of limitation only to cases clearly within its provisions. *Ocean Hill Joint Venture v. N.C. Dept. of E.H.N.R.*, 333 N.C. 318, 322, 426 S.E.2d 274, 277 (1988); *Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 372, 163 S.E.2d 363, 370 (1968). Statutes of limitation " 'should not be extended by construction.' " *Fishing Pier*, 274 N.C. at 372, 163 S.E.2d at 370 (quoting 53 C.J.S. *Limitations of Actions* § 3, at 912 (1948)) (current version at 54 C.J.S. *Limitations of Actions* § 7, at 29 (1987)). These rules ensure that parties have notice of the time limits applicable to their cases.

Petitioner, an intermittent state employee, is not an "employee" for purposes of chapter 126 because article 8 of this chapter applies only to "career State employees." N.C.G.S. § 126-39 (1993). N.C.G.S. § 126-38, which establishes the time limit for appeals, applies only to employees, not to applicants for employment like petitioner.

The statute of limitations applicable to petitioner's case, therefore, is N.C.G.S. § 1-52(2), which provides that an action created by statute must be commenced within three years unless the statute provides a different time limitation. N.C.G.S. § 126-36.1 creates the claim of an applicant for state employment who alleges discrimination by the hiring agency. The applicant commences a discrimination claim by filling an appeal with the Personnel Commission requesting a contested case hearing in the OAH. Although the action is technically an appeal of an adverse employment decision, that appeal effectively constitutes the commencement of the litigation. Under N.C.G.S. § 1-52(2), therefore, a party like petitioner must file an appeal within three years of an allegedly discriminatory action. The employment decision giving rise to petitioner's appeal occurred in October 1985. Petitioner filed an appeal with the Personnel Commission and requested a contested case hearing on 3 April 1986. His claim, therefore, is not time-barred because he commenced his action within three years of the date of the allegedly discriminatory employment decision.

We note that in 1988 the General Assembly amended N.C.G.S. § 150B-23 by adding subsection (f) which provides a default time limitation of sixty days for claims like petitioner's. 1988 N.C. Sess. Laws ch. 1111, § 5. N.C.G.S. § 150B-23(f) provides:

> Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by [United States mail]. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition.

N.C.G.S. § 150B-23(f) (Supp. 1994). This provision applies to persons in petitioner's position whose discrimination claims arose on or after the effective date of the statute.

Accordingly, we reverse the decision of the Court of Appeals. The case is remanded to the Court of Appeals with instructions to consider the remaining issues presented in the parties' briefs to that court.

REVERSED AND REMANDED.

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

GEORGE B. CLAY)
v.) ORDER
EMPLOYMENT SECURITY COMMISSION)
OF NORTH CAROLINA)

No. 480PA93

(Filed 2 June 1995)

Upon consideration of the petition filed by Defendant in this matter for rehearing of the decision of this Court pursuant to Rule 31, N.C. Rules of Appellate Procedure, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> "The petition to rehear is allowed. The Court will not receive further briefs or hear additional arguments. The opinion filed 7 April 1995 is superseded by the opinion filed today.
>
> By order of the Court in conference, this the 2nd day of June, 1995.
>
> Lake, Jr., J.
> For the Court

CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, D/B/A CAROLINAS MEDICAL CENTER v. FIRST OF GEORGIA INSURANCE COMPANY, T. M. MAYFIELD & COMPANY, MATTHEW FULTZ, TAMMI BAUGHN AND MARK BAUGHN

No. 21PA94

(Filed 7 April 1995)

1. Liens § 4 (NCI4th)— personal injury—hospital's lien on settlement funds

Plaintiff hospital may enforce a lien under N.C.G.S. §§ 44-49 and 44-50 for medical services rendered to a person injured in an automobile accident against money held by an insurance company and its agents for the settlement of claims for the liability of a third person arising from the accident.

Am Jur 2d, Liens § 65.

2. Assignments § 2 (NCI4th)— hospital expenses—assignment of proceeds of claim against tortfeasor

While the assignment of a claim for personal injury is against public policy and void, a motorist injured in an automobile accident could validly assign the proceeds of his claim against the tortfeasor to plaintiff hospital to pay for medical services for injuries received in the accident. Furthermore, language in the assignment to plaintiff hospital required the tortfeasor's insurer and its agents to pay the assigned money to plaintiff hospital.

Am Jur 2d, Assignments §§ 7 et seq.

Assignability of proceeds of claim for personal injury or death. 33 ALR4th 82.

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 decision of the Court of Appeals, 112 N.C. App. 828, 436 S.E.2d 869 (1993), affirming a judgment dismissing the plaintiff's claims by Constangy, J., at the 19 October 1992 Civil Session of District Court, Mecklenburg County. Heard in the Supreme Court 11 October 1994.

This is an action against Mark Baughn and his wife Tammi Baughn for the recovery of money due for medical services. It is also an action against the other defendants to enforce a lien for the

amount due for medical services and to recover money damages for the failure of the other defendants to honor an assignment by Mark Baughn of the proceeds from a claim against a tort-feasor. The complaint contained allegations which may be summarized as follows.

Mark and Tammi Baughn were injured in an automobile accident and were treated by plaintiff. Tammi incurred a medical bill in the amount of $4,401.18 and Mark incurred such a bill for $2,997.77. First of Georgia Insurance Company was the liability insurance carrier for the driver of the automobile which was involved in the accident with the Baughns. T. M. Mayfield & Company adjusted losses for First of Georgia and Matthew Fultz was an agent of Mayfield.

The plaintiff notified Mayfield that it claimed a lien for medical services against any recovery the Baughns might have against the tort-feasor. The plaintiff also notified Mayfield of an assignment to it by Mark Baughn of the proceeds of any recovery he might have from the accident.

Mr. Fultz settled the Baughns' claims against the tort-feasor by paying $14,000 to Tammi Baughn and $8,500 to Mark Baughn. The Baughns were not represented by an attorney. The defendants ignored the lien claims and the assignment in making the payments.

The plaintiff prayed for money judgments against the Baughns and for judgments against the other defendants based on the alleged liens and assignment. The plaintiff was not able to get service of process on Tammi Baughn and took a voluntary dismissal as to her. Mark Baughn did not file an answer and a default judgment was taken against him. The Baughns are not involved in this appeal.

The district court granted a motion to dismiss the claims against the other defendants pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) and the Court of Appeals affirmed. The plaintiff has appealed to this Court.

Turner, Enochs & Lloyd, P.A., by Wendell H. Ott, Thomas E. Cone and Laurie S. Truesdell, for plaintiff-appellant.

Howard M. Widis for defendant-appellees First of Georgia Insurance Co., T. M. Mayfield & Co., and Matthew Fultz.

WEBB, Justice.

[1] The first question posed by this appeal is whether the plaintiff may enforce liens for money due for medical services rendered to

persons for injuries incurred in an automobile accident. The liens the plaintiff is seeking to enforce are against money held by an insurance company and its agents for the settlement of claims for the liability of a third person arising from the accident.

The resolution of this question depends on the interpretation of the following two sections of the General Statutes. N.C.G.S. § 44-49 provides in part:

> From and after March 26, 1935, there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State, the said lien in favor of any person, corporation, municipal corporation or county to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for drugs, medical supplies, ambulance services, and medical services rendered by any physician, dentist, trained nurse, or hospitalization, or hospital attention and/or services rendered in connection with the injury in compensation for which the said damages have been recovered.

N.C.G.S. § 44-49 (1991). N.C.G.S. § 44-50 provides in part:

> Such a lien as provided for in G.S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the said injuries, whether in litigation or otherwise; and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, ambulance service and medical attention and/or hospital service, after having received and accepted notice thereof.

N.C.G.S. § 49-50 (1991). The defendants, relying on the language of N.C.G.S. § 44-50 that the lien attaches "upon all funds paid to any person," argue that the lien did not attach until the Baughns were paid, at which time the defendants were not holding any money which was subject to the lien. We believe N.C.G.S. § 44-50 must be read in conjunction with N.C.G.S. § 44-49. N.C.G.S. § 44-50 provides that "[s]uch a lien as provided for in G.S. 44-49 shall also attach upon all funds paid to any person." A lien for which N.C.G.S. § 44-49 provides attaches when there is a recovery of damages. This would be before any money is paid. If the plaintiff under N.C.G.S. § 44-50 is to have a lien "[s]uch . . . as provided for in G.S. § 44-49" the lien should attach before the insurance company makes its payments and when the par-

ties agree upon a settlement. This being so, the plaintiff may enforce the lien against the money which is payable for the personal injury.

The defendants argue and the Court of Appeals held that language in *Insurance Co. v. Keith*, 283 N.C. 577, 582, 196 S.E.2d 731, 735 (1973), which says that N.C.G.S. § 44-49 and N.C.G.S. § 44-50 impose no obligation upon the tort-feasor means the sections impose no obligation on the tort-feasor's insurance carrier. *Keith* did not involve an interpretation of N.C.G.S. § 44-49 or N.C.G.S. § 44-50. It was an interpleader action by an insurance company to determine which of two parties was entitled to the proceeds of an insurance policy. Any statement we made as to the obligation of a tort-feasor was dictum. More importantly, we do not believe the General Assembly in enacting this statute would have necessarily made no distinction between the tort-feasor, who normally does not pay the claim, and the insurance company, which normally does pay the claim. *Keith* is not precedent for this case.

[2] The Court of Appeals also held that the assignment to the plaintiff of the proceeds payable by First of Georgia up to the amount of Mark Baughn's bill for medical services was void. The Court of Appeals relied on its opinion in *N.C. Baptist Hospitals, Inc. v. Mitchell*, 88 N.C. App. 263, 362 S.E.2d 841 (1987), *aff'd on other grounds*, 323 N.C. 528, 374 S.E.2d 844 (1988), which held that the assignment of the proceeds of a claim for personal injury is void for being against public policy.

There is a distinction between the assignment of a claim for personal injury and the assignment of the proceeds of such a claim. The assignment of a claim gives the assignee control of the claim and promotes champerty. Such a contract is against public policy and void. *Southern Railway Co. v. O'Boyle Tank Lines*, 70 N.C. App. 1, 318 S.E.2d 872 (1984). The assignment of the proceeds of a claim does not give the assignee control of the case and there is no reason it should not be valid.

The defendants contend that the language of the assignment is such that they had no obligation to deliver to the plaintiff any money. A part of the assignment provides:

> [T]he undersigned hereby assigns to the Hospital Authority and each of its facilities that provided services to the patient all right, title and interest in and to any compensation or payment in any

> form that the undersigned received or shall receive as a result of or arising out of the injuries sustained by the patient. . . .

The defendants contend that this language refers only to funds that Mark Baughn has received or shall receive. The defendants say it does not pertain to funds which were payable to him and they are not required by the assignment to pay anything to the plaintiff.

The assignment also contains the following language:

> [T]he undersigned hereby authorizes and directs any person or corporation having notice of this assignment to pay to the Hospital Authority directly the amount of the indebtedness owed to the Hospital Authority in connection with services rendered to the patient.

This provision should alleviate any doubt that the assignment required the defendants to pay the assigned money to the plaintiff.

There is also language in the assignment which says:

> This assignment . . . is made without prejudice to any rights that the patient, and the undersigned might have to compensation for injuries incurred by the patient, but the undersigned hereby authorizes and directs any person or corporation having notice of this assignment to pay to the Hospital Authority directly the amount of the indebtedness owed to the Hospital Authority in connection with services rendered to the patient.

The defendants say that this sentence is ambiguous and it may mean that the patient has reserved to himself a part of the payment for personal injury. We believe it is clear that this sentence means Mr. Baughn reserved the right to pursue his remedy against the tortfeasor without effect on the assignment.

We do not by this opinion intend to weaken our decision in *N.C. Baptist Hospitals, Inc. v. Mitchell*, 323 N.C. 528, 374 S.E.2d 844. It holds that when the payment in settlement of damages for a personal injury claim is made to a third party, the money must be distributed in accordance with the provisions of N.C.G.S. § 44-50. The payment was not made to a third party in this case.

For the reasons stated in this opinion, we reverse the holdings of the Court of Appeals and hold that based on the allegations in the complaint, the plaintiff may enforce liens on its claims for medical expenses and that the assignment of Mark Baughn is valid. This case

is remanded to the Court of Appeals for further remand to the District Court, Mecklenburg County, for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

IN THE MATTER OF: THE MOSES H. CONE MEMORIAL HOSPITAL & ROGER C. COTTEN

No. 148PA94

(Filed 7 April 1995)

Taxation § 30 (NCI4th)— hospital's child care center—exemption from ad valorem taxes

The decision of the Court of Appeals that a nonprofit hospital's child care center was actually and exclusively used for a charitable hospital purpose and was thus exempt from ad valorem taxation under N.C.G.S. § 105-278.8 is affirmed.

Am Jur 2d, State and Local Taxation §§ 362 et seq.

On Guilford County's petition for discretionary review pursuant to N.C.G.S. § 7A-31, and on taxpayer Roger C. Cotten's petition for writ of certiorari of constitutional issues pursuant to N.C.G.S. § 7A-32(b), from a decision of the Court of Appeals, 113 N.C. App. 562, 439 S.E.2d 778 (1994), vacating in part and reversing in part a Final Decision entered 24 November 1992 by the North Carolina Property Tax Commission. Heard in the Supreme Court 13 February 1995.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Urs R. Gsteiger, for taxpayer-appellee The Moses H. Cone Memorial Hospital.

Nichols, Caffrey, Hill & Evans, L.L.P., by Fred T. Hamlet and ToNola D. Brown, for taxpayer-appellant Roger C. Cotten.

Guilford County Attorney's Office, by Gregory L. Gorham and J. Edwin Pons, Deputy County Attorneys, for appellant Guilford County.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr. and Forrest W. Campbell, Jr., on behalf of The North Carolina Hospital Association, amicus curiae.

PER CURIAM.

Taxpayer-appellee, The Moses H. Cone Memorial Hospital ("the Hospital"), was assessed ad valorem taxes for its child care center by the Guilford County Tax Assessor for tax year 1990. The Hospital duly filed an application for exemption under the provisions of N.C.G.S. § 105-278.8. The Guilford County Board of Equalization and Review ("the Board") reversed the decision of the Guilford County Tax Assessor, Roger C. Cotten, and determined that the property was exempt from ad valorem taxation. This decision was appealed to the North Carolina Property Tax Commission ("the Commission") by Roger Cotten, in his individual capacity and in his own behalf as a property owner in Guilford County pursuant to N.C.G.S. § 105-290(b), because this statute has been interpreted to "conspicuously omit[] a right of appeal to the Commission by a county or any county official on behalf of a county." *In re Appeal of Forsyth County*, 104 N.C. App. 635, 637, 410 S.E.2d 533, 534 (1991), *disc. rev. denied*, 330 N.C. 851, 413 S.E.2d 551 (1992). N.C.G.S. § 105-290(b) provides that "[a]ny property owner of the county may except to an order of the county board of equalization and review or the board of county commissioners concerning the listing, appraisal, or assessment of property and appeal the order to the Property Tax Commission."

For 1991, the child care center was again assessed ad valorem taxes by the tax assessor. The Hospital filed another application for exemption to the new Board, which this time upheld the tax assessment and determined that the child care center was not entitled to exemption from ad valorem taxes under N.C.G.S. § 105-278.8. This decision was appealed to the Commission by the Hospital, which consolidated the appeal with Cotten's 1990 appeal. The Commission then affirmed the 1991 decision and reversed the 1990 decision, thus denying exemption to the child care center for both years.

On 22 December 1992, the Hospital filed written notice of appeal to the North Carolina Court of Appeals. On 15 February 1994, the Court of Appeals reversed the Commission on all issues, dismissing

Mr. Cotten's appeal and granting tax exemption to the child care facility for both 1990 and 1991. *In re Moses H. Cone Memorial Hospital*, 113 N.C. App. 562, 439 S.E.2d 778 (1994). On 16 June 1994, this Court granted Guilford County's petition for discretionary review and taxpayer Roger Cotten's petition for writ of certiorari.

After reviewing the briefs and record and listening to oral arguments, we conclude that taxpayer Cotten's petition for writ of certiorari as to whether he had standing to appeal the 1990 decision of the Board was improvidently allowed. For the reasons stated in *In re Moses H. Cone Memorial Hospital*, 113 N.C. App. 562, 439 S.E.2d 778, we conclude that the decision of the Court of Appeals should be affirmed as to the issue of whether the Hospital's child care center was actually and exclusively used for a charitable hospital purpose as required by N.C.G.S. § 105-278.8.

AFFIRMED IN PART.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED IN PART.

IN THE MATTER OF: DYLAN AUTRY

No. 341A94

(Filed 7 April 1995)

Infants or Minors § 126 (NCI4th)— Willie M. child—order of specific treatment program by Division of Mental Health—trial court's absence of authority

The decision of the Court of Appeals holding that the trial court lacked statutory authority to order the Division of Mental Health, Developmental Disabilities and Substance Abuse Services within the Department of Human Resources, to implement a specific treatment program for a dependent Willie M. child is affirmed. However, the language in the Court of Appeals opinion which appears to ground its holding in part upon the federal district court's "continuing jurisdiction over the question of the appropriate treatment of Willie M. children" is disavowed.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 49.

IN RE AUTRY

[340 N.C. 95 (1995)]

Appeal of right pursuant to N.C.G.S. § 7A-30(2) by the guardian ad litem for Dylan Autry, a minor and a dependent juvenile, from the decision of a divided panel of the Court of Appeals, 115 N.C. App. 263, 444 S.E.2d 239 (1994), reversing an order entered on 18 March 1993 by Tucker, J., in District Court, New Hanover County. Heard in the Supreme Court 15 March 1995.

William Norton Mason for the guardian ad litem, appellant.

Michael F. Easley, Attorney General, by Michelle B. McPherson, Special Deputy Attorney General, for the North Carolina Department of Human Resources, appellee.

J. Jerome Hartzell, Melinda Lawrence, Robert D. McDonnell, Sandra Johnson, and Carolina Legal Assistance, by Deborah Greenblatt and Christine O. Heinberg, for Willie M. Class Counsel, amicus curiae.

PER CURIAM.

The Court agrees with the holding of the majority opinion for the Court of Appeals that the trial court lacked statutory authority to enter the order at issue. For that reason, and that reason only, the opinion of the Court of Appeals reversing the order is affirmed.

We disavow the language in the Court of Appeals opinion which appears to ground its holding in part upon the federal district court's "continuing jurisdiction over the question of appropriate treatment of Willie M. children." *In re Autry*, 115 N.C. App. 263, 268, 444 S.E.2d 239, 242 (1994). Our affirmance rests solely on the absence of state statutory authority for the order; we expressly decline to pass upon any question as to whether the continuing jurisdiction of the federal district court ousts the state courts of jurisdiction over issues concerning appropriate treatment for Willie M. children.

AFFIRMED.

KENNETH R. POTTS v. SUSAN TUTTEROW (POTTS)

No. 257A94

(Filed 7 April 1995)

Divorce and Separation § 223 (NCI4th)— lump sum alimony—periodic payments—total not vested—termination by remarriage

Even though the trial court delineated the total amount of alimony due to defendant wife as a "lump sum" or a "fixed amount," where the payment methodology was not in a single payment but instead was in periodic payments, the total alimony award did not vest at the time of the court's order, and the wife's remarriage terminated the monthly alimony obligations not yet due and payable. N.C.G.S. § 50-16.9(b).

Am Jur 2d, Divorce and Separation §§ 630 et seq.

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 114 N.C. App. 360, 442 S.E.2d 90 (1994), affirming an order entered by Johnson (Robert W.), C.J., on 13 November 1992 in District Court, Davie County. Heard in the Supreme Court 14 March 1995.

Petree Stockton, L.L.P., by Lynn P. Burleson and Mark Conger, for plaintiff-appellee.

Morrow, Alexander, Tash & Long, by C. R. "Skip" Long, Jr. and Victor M. Lefkowitz, for defendant-appellant.

PER CURIAM.

The Court agrees with the holding of the majority opinion that the "lump sum" alimony award in the present case did not vest prior to defendant's remarriage. Thus, pursuant to N.C.G.S. § 50-16.9(b) (1987), defendant's subsequent remarriage terminated plaintiff's obligation to pay defendant alimony.

Under N.C.G.S. § 50-16.9, "[i]f a dependent spouse who is *receiving* alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate." N.C.G.S. § 50-16.9(b) (emphasis added). N.C.G.S. § 50-16.7 states, "Alimony or alimony pendente lite shall be paid by lump sum *payment*, [or] periodic *payments* . . . as the court may order." N.C.G.S. § 50-16.7(a) (emphasis added).

"Vested" or "accrued" alimony is defined as "[a]limony which is due but not yet paid." *Black's Law Dictionary* 21 (6th ed. 1990). Thus, if under N.C.G.S. § 50-16.7(a), the court has ordered alimony in a single lump sum payment and this lump sum has not been paid, such alimony has vested or accrued. Similarly, if under N.C.G.S. § 50-16.7(a), the court has ordered alimony in periodic payments and payments have come due but have not been paid, these payments have also vested or accrued. In either case, the dependent spouse's remarriage would not terminate the ordered amounts that had vested or accrued by virtue of being "due and payable."

In the present case, however, although the trial court delineated the alimony as a "lump sum," or as a "fixed amount," the payment methodology was not in a single payment but instead was in periodic payments. Therefore, the majority correctly determined that defendant's remarriage terminated the monthly alimony obligations not yet due and payable. Accordingly, we affirm the holding of the majority.

AFFIRMED.

LEAK v. HOLLAR

[340 N.C. 99 (1995)]

ANNIE LEAK AND RUFUS LEAK v. AUBRY DEAN HOLLAR

No. 214PA94

(Filed 7 April 1995)

Process and Service § 17 (NCI4th)— incorrect county on summons—correctable error

A decision of the Court of Appeals is reversed under the authority of *Hazelwood v. Bailey*, 339 N.C. 578, 453 S.E.2d 522 (1995) (designation of incorrect county on civil summons is not jurisdictional defect which renders summons void but is irregularity in form correctable by amending summons in accordance with Rule 4(i)).

Am Jur 2d, Process §§ 94 et seq.

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of the Court of Appeals, 113 N.C. App. 836, 441 S.E.2d 190 (1994), which affirmed the trial court's dismissal of plaintiffs' action based on the expiration of the statute of limitations. Heard in the Supreme Court 13 March 1995.

Cranfill, Sumner & Hartzog, L.L.P., by Susan K. Burkhart, and Bonfoey, Brown, Queen & Patten, P.A., by Frank G. Queen, for plaintiff-appellants.

Blue, Fellerath, Cloninger & Barbour, P.A., by Sheila Fellerath, for defendant-appellee.

PER CURIAM.

Under the authority of *Hazelwood v. Bailey*, 339 N.C. 578, 453 S.E.2d 522 (1995), the decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for remand to the trial court for reinstatement of the action.

REVERSED AND REMANDED.

HADLEY NEWGENT, ADMINISTRATOR OF THE ESTATE OF JOSEPH LEVI NEWGENT, DECEASED MINOR v. BUNCOMBE COUNTY BOARD OF EDUCATION

No. 249A94

(Filed 7 April 1995)

State § 53 (NCI4th)— death of child crossing road to catch school bus—negligent acts of bus driver—jurisdiction of Industrial Commission

For the reasons stated in the dissenting opinion in the Court of Appeals, the Supreme Court reverses a decision of the Court of Appeals affirming an order of the Industrial Commission dismissing for lack of jurisdiction plaintiff's tort claim to recover for the death of a child who was struck and killed when attempting to cross the highway to await the arrival of his school bus on the ground that the bus driver was not operating the bus in the course of her employment at the time of her alleged negligent acts, which included not reporting to the principal that the stop had limited visibility and that she could stop and pick up students on the other side of the highway, and failing to inform the principal or the child's parents that she had seen the child previously cross the highway by himself.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 577 et seq.

Tort liability of public schools and institutions of higher learning for accidents associated with transportation of students. 23 ALR5th 1.

Appeal by plaintiff 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. 407, 442 S.E.2d 158 (1994), affirming an Order of the North Carolina Industrial Commission, filed 12 April 1993, dismissing for lack of jurisdiction plaintiff's action under the State Tort Claims Act against defendant, Buncombe County Board of Education. Heard in the Supreme Court 14 March 1995.

Long, Parker & Payne, P.A., by Ronald K. Payne, for plaintiff-appellant.

Michael F. Easley, Attorney General, by Richard L. Griffin, Assistant Attorney General, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Orr (now Justice Orr), the decision of the Court of Appeals is reversed; and the action is remanded to the Court of Appeals for further remand to the Industrial Commission.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA v. PHILLIP MANNING CANNADA

No. 227A94

(Filed 7 April 1995)

Homicide § 299 (NCI4th)— second-degree murder—sufficient evidence

A decision of the Court of Appeals that the evidence was insufficient to support defendant's conviction of second-degree murder is reversed for the reasons stated in the dissenting opinion in the Court of Appeals.

Am Jur 2d, Homicide §§ 425 et seq.

Appeal by the State pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 114 N.C. App. 552, 442 S.E.2d 344 (1994) (Greene, J., dissenting), finding that the trial court erred by failing to dismiss this case at the close of the evidence because the evidence was insufficient, as a matter of law, to support defendant's conviction of second-degree murder. Heard in the Supreme Court 13 March 1995.

Michael F. Easley, Attorney General, by Francis W. Crawley, Special Deputy Attorney General, for the State-appellant.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in Judge Greene's dissenting opinion pertaining to the suffi-

ciency of the evidence. Therefore, the case is remanded to the Court of Appeals for consideration of any other issues properly raised in defendant's appeal to that court.

REVERSED AND REMANDED.

LIZZIE LITTLE v. GLENNIE M. MATTHEWSON, II, MATTHEWSON & DANIELS, P.A., AND GLENNIE M. MATTHEWSON, II, ADMINISTRATOR OF THE ESTATE OF JEANNE DANIELS MATTHEWSON

No. 278A94

(Filed 7 April 1995)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 114 N.C. App. 562, 442 S.E.2d 567 (1994), reversing a judgment entered 27 October 1992 by Fullwood, J., in Superior Court, Pitt County. Heard in the Supreme Court 15 March 1995.

Jeffrey L. Miller for plaintiff-appellee.

Albert L. Willis for defendant-appellants.

PER CURIAM.

AFFIRMED.

LEDWELL v. N.C. DEPT. OF HUMAN RESOURCES

[340 N.C. 103 (1995)]

SHEILA LEDWELL, PETITIONER/APPELLEE v. N.C. DEPARTMENT OF HUMAN RESOURCES, REPONDENT/APPELLANT.

No. 233PA94

(Filed 7 April 1995)

On discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 114 N.C. App. 626, 442 S.E.2d 367 (1994), affirming the order entered 23 February 1993 by Albright, J., in Superior Court, Guilford County. Heard in the Supreme Court on 14 March 1995.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for the petitioner-appellee.

Michael F. Easley, Attorney General, by Elizabeth L. Oxley, Associate Attorney General, for the respondent-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

COUNTY OF LENOIR CITY OF KINSTON v. WILLIAM H. MOORE, JR., ET AL

No. 216A94

(Filed 7 April 1995)

Appeal by defendant North Carolina Department of Revenue pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals, 114 N.C. App. 110, 441 S.E.2d 589 (1994), affirming the judgment allowing plaintiffs' motion for summary judgment entered by Exum, J., at the 8 September 1992 Civil Session of District Court, Lenoir County. Heard in the Supreme Court on 13 March 1995.

Griffin & Griffin, by Robert W. Griffin, for the plaintiff-appellees.

Michael F. Easley, Attorney General, by Christopher E. Allen, Assistant Attorney General, for the defendant-appellant North Carolina Department of Revenue.

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.

DELLINGER v. CITY OF CHARLOTTE

[340 N.C. 105 (1995)]

WILLIAM G. DELLINGER, PETITIONER v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION; THE CHARLOTTE-MECKLENBURG PLANNING COMMISSION; MARTIN R. CRAMPTON, JR., ANNE J. MCCLURE; SARA SPENCER AND JOHN H. TABOR, RESPONDENTS

No. 187PA94

(Filed 7 April 1995)

On discretionary review of an opinion of the Court of Appeals, 114 N.C. App. 146, 441 S.E.2d 626 (1994), affirming the order and judgment signed by Ferrell, J., in Superior Court, Mecklenburg County, on 29 March 1993. Heard in the Supreme Court 16 March 1995.

Horack, Talley, Pharr & Lowndes, P.A., by Neil C. Williams, for petitioner-appellee.

Office of the City Attorney, by David M. Smith, Senior Assistant City Attorney, for respondent-appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

POTTER v. BRETAN

[340 N.C. 106 (1995)]

DOROTHY L.M. POTTER v.. HERMAN I. BRETAN AND WILLIAM BRETAN

No. 184PA94

(Filed 7 April 1995)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 114 N.C. App. 266, 441 S.E.2d 703 (1994), finding no error in a trial conducted by John, J., at the 15 September 1992 Special Term of Superior Court, Yancey County, from which judgment was entered on 28 December 1992. Heard in the Supreme Court 16 March 1995.

Lindsay and True, by Stephen P. Lindsay, for plaintiff.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Michelle Rippon and W. Perry Fisher II, for defendants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

ROWE v. WALKER

[340 N.C. 107 (1995)]

CLYDE E. ROWE, JR., AND DONNA GRANT ROWE v. JOHN THOMAS WALKER, C. NORMAN WALKER and SHIRLEY WALKER KENNEDY

No. 181A94

(Filed 7 April 1995)

Appeal pursuant to N.C.G.S. § 7A-30(2) from a divided decision of the Court of Appeals, 114 N.C. App. 36, 441 S.E.2d 156 (1994), reversing a judgment of Hobgood (Robert H.), J., entered 26 March 1992 in Superior Court, Person County. Heard in the Supreme Court 17 March 1995.

Manning, Fulton & Skinner, P.A., by John I. Mabe, Jr. and Alison R. Cayton, for plaintiff-appellees.

Brown & Bunch, by Charles Gordon Brown and Scott D. Zimmerman, for defendant-appellants.

PER CURIAM.

AFFIRMED.

STATE v. INGLE

[340 N.C. 108 (1995)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
PHILLIP LEE INGLE	)	

No. 98A93
No. 5A95
(Filed 6 April 1995)

Upon consideration of defendant's letter to this Court, which for purposes of consideration will be deemed a motion for appropriate relief, the following order is entered:

As to the Gaston County conviction on appeal (No. 5A95) and currently pending in this Court, defendant may not preclude the mandatory review required by N.C.G.S. § 15A-2000(d)(1). Defendant's motion as to the Gaston County conviction, therefore, is denied.

As to the Rutherford County conviction which has been reviewed and affirmed by this Court, it appears that, pursuant to N.C.G.S. § 15-194, a hearing has been set in the Superior Court in the 29th Prosecutorial District for the purpose of setting an execution date as required by law. Accordingly, defendant's motion filed in this Court, as to the Rutherford County case, is dismissed.

By order of the Court in Conference, this 6th day of April, 1995.

Orr, J.
For the Court

ALLEN v. BEDDINGFIELD

No. 95P95

Case below: 118 N.C.App. 100

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

ATASSI v. ATASSI

No. 74P95

Case below: 117 N.C.App. 506

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

BOST v. VAN NORTWICK

No. 583A94

Case below: 117 N.C.App. 1

Motion by plaintiff to dismiss notice of appeal allowed 6 April 1995.

BUCHANAN TRUCKING CO. v. WEST FLORIDA TRUCK BROKERS

No. 77P95

Case below: 117 N.C.App. 462

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

CANNON v. N.C. STATE BD. OF EDUCATION

No. 48A95

Case below: 117 N.C.App. 399

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 6 April 1995.

CITY OF WINSTON-SALEM v. YARBROUGH

No. 43P95

Case below: 117 N.C.App. 340

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

COLE v. ETHERIDGE

No. 39P95

Case below: 117 N.C.App. 462

Motion by defendants to dismiss the appeal for lack of substantial constitutional question allowed 6 April 1995. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

COLLINS COIN MUSIC CO. v. N.C. ALCOHOLIC BEVERAGE CONTROL COMM.

No. 44P95

Case below: 116 N.C.App. 137

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

DALE v. TOWN OF LONG VIEW

No. 36P95

Case below: 117 N.C.App. 462

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

DAVIS v. FORSYTH COUNTY

No. 108P95

Case below: 117 N.C.App. 725

Petition by Respondent (Forsyth County) for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

EDWARD VALVES, INC. v. WAKE COUNTY

No. 34PA95

Case below: 117 N.C.App. 484
339 N.C. 611

Petition by defendants for writ of supersedeas allowed and temporary stay dissolved 6 April 1995. Motion by plaintiff to dismiss the appeal for lack of substantial constitutional question denied 6 April 1995. Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 6 April 1995.

FAIN v. STATE RESIDENCE COMMITTEE OF UNC

No. 71PA95

Case below: 117 N.C.App. 541
339 N.C. 611

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 April 1995. Petition by defendant for writ of supersedeas allowed and temporary stay dissolved 6 April 1995.

FORSYTH MEMORIAL HOSPITAL v. CHISHOLM

No. 60PA95

Case below: 117 N.C.App. 608

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 6 April 1995.

FROST v. FROST

No. 33A95

Case below: 117 N.C.App. 463

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 6 April 1995.

GRIMSLEY v. NELSON

No. 35A95

Case below: 117 N.C.App. 329

Petition by plaintiffs for writ of certiorari to review the decision of the Court of Appeals allowed 6 April 1995.

HAWKINS v. STATE OF NORTH CAROLINA

No. 99PA95

Case below: 117 N.C.App. 615

Petition by defendants for temporary stay allowed 10 March 1995 pending determination of defendants' petition for discretionary review. Petition by defendants for writ of supersedeas allowed and temporary stay dissolved 6 April 1995. Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 6 April 1995.

HENDERSON v. CLIFTON HICKS BUILDER, INC.

No. 114P95

Case below: 117 N.C.App. 731

Petition by defendant (Clifford Hicks Builder, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

HOFMANN v. McHUGH

No. 59P95

Case below: 117 N.C.App. 305

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

JOHNSON v. NATIONWIDE MUT. INS. CO.

No. 604P94

Case below: 116 N.C.App. 137

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 1995.

JONES v. SUMMERS

No. 41P95

Case below: 117 N.C.App. 415

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

KANE PLAZA ASSOC. v. CHADWICK

No. 72P95

Case below: 117 N.C.App. 613

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

LEE v. BIR

No. 27P95

Case below: 116 N.C.App. 584

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 March 1995.

LEONARD v. ENGLAND

No. 417PA94

Case below: 115 N.C. App. 800
337 N.C. 801
338 N.C. 518

Upon reconsideration by this Court ex mero motu, the order allowing the petition for discretionary review is vacated and the petition for discretionary review is denied 6 April 1995.

This order is entered without prejudice to the defendant's right to refile a petition for discretionary review with this Court, if plaintiff does not timely file a voluntary dismissal with prejudice in the Superior Court of Mecklenburg County within 30 days of the entry of this order.

LINER v. BROWN

No. 611PA94

Case below: 117 N.C.App 44
339 N.C. 614

Upon reconsideration by the Court ex mero motu, the order allowing the petition for discretionary review is vacated and the petition for discretionary review is denied 6 April 1995. Upon reconsideration by this Court ex mero motu, the order allowing the petition for certiorari is vacated and the petition for certiorari is denied 6 April 1995. Motion by defendants to withdraw petitions for discretionary review and writ of certiorari allowed 6 April 1995.

MARYLAND CASUALTY CO. v. SMITH

No. 79P95

Case below: 117 N.C.App. 593

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

McFARLAND v. CROMER

No. 86P95

Case below: 117 N.C.App. 678

Petition by plaintiff (Janette McFarland, Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 6 April. Petition by plaintiff (Janette McFarland, Pro Se) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 1995.

MEDFORD v. HAYWOOD COUNTY HOSPITAL

No. 40P95

Case below: 117 N.C.App. 463

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

MUSE v. CHARTER HOSPITAL OF WINSTON-SALEM

No. 73A95

Case below: 117 N.C.App. 468

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 6 April 1995.

NATIONWIDE MUTUAL INS. CO. v. ANDERSON

No. 100P95

Case below: 118 N.C.App. 92

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

PHILLIPS v. WINSTON-SALEM/FORSYTH COUNTY BD. OF EDUC.

No. 58P95

Case below: 117 N.C.App. 274

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

PINNER v. EAST CAROLINA BANK

No. 83P95

Case below: 117 N.C.App. 463

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 1995.

ROUNTREE v. N.C. MOBILE HOME CORP.

No. 45P95

Case below: 117 N.C.App. 464

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

STATE v. ANTOINE

No. 32P95

Case below: 117 N.C.App. 549

339 N.C. 616

Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 6 April 1995. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

STATE v. BROWN

No. 597A94

Case below: 117 N.C.App. 239

Petition by Attorney General for writ of certiorari to review the decision of the Court of Appeals denied 6 April 1995.

STATE v. CHAPPELL

No. 101P95

Case below: 118 N.C.App. 174

Petition by defendant for temporary stay allowed 10 March 1995 pending receipt and determination of a timely filed petition for discretionary review.

STATE v. CHRISTENBURY

No. 64P95

Case below: 117 N.C.App. 614

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

STATE v. FARRIOR

No. 2PA95

Case below: 117 N.C.App. 429

339 N.C. 617

Petition by Attorney General for writ of supersedeas dismissed and temporary stay dissolved 6 April 1995. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 6 April 1995 for the purpose of remand to the Court of Appeals for reconsideration in light of the decision in *State v. Cheek* filed 3 March 1995.

STATE v. KEASLING

No. 53P95

Case below: 117 N.C.App. 465

Petition by defendant (Pro Se) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 1995.

STATE v. LUNDQUIST

No. 61P95

Case below: 117 N.C.App. 465

Petition by defendant (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

STATE v. SHANNON

No. 80P95

Case below: 117 N.C.App. 718

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

STATE v. SMITH

No. 125A95

Case below: 118 N.C.App. 106

Petition by Attorney General for temporary stay allowed 22 March 1995.

STATE v. SOLOMON

No. 113P95

Case below: 117 N.C.App. 701

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

STATE v. SUMMERLIN

No. 117P95

Case below: 117 N.C.App. 733

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 1995.

STATE v. WEAVER

No. 568P94

Case below: 108 N.C.App. 789

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 1995.

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

STEWART v. KOPP

No. 129P95

Case below: 118 N.C.App. 160

Petition by plaintiff for temporary stay allowed 24 March 1995 pending determination of plaintiff's petition for discretionary review.

PETITIONS TO REHEAR

FOREMAN v. SHOLL

No. 86A94

Case below: 339 N.C. 593

Petition by plaintiffs to rehear pursuant to Rule 31 denied 6 April 1995.

RJR TECHNICAL CO. v. PRATT

No. 104PA94

Case below: 339 N.C. 588

Petition by plaintiff (RJR) to rehear pursuant to Rule 31 denied 6 April 1995.

STATE v. MILLER

No. 67A93

Case below: 339 N.C. 663

Motion by defendant for rehearing denied 23 March 1995.

STATE OF NORTH CAROLINA v. GEORGE DOUGLAS LARRIMORE

No. 241A93

(Filed 5 May 1995)

1. Constitutional Law § 338 (NCI4th); Jury § 248 (NCI4th)— first-degree murder and conspiracy to murder—jury selection—peremptory challenges—no violation of Sixth Amendment

A conspiracy and first-degree murder defendant's Sixth Amendment right to a trial by jury was not violated by the allowance of peremptory challenges by the State.

Am Jur 2d, Criminal Law §§ 672 et seq., 890 et seq.; Jury § 234.

2. Jury § 260 (NCI4th)— first-degree murder and conspiracy—jury selection—peremptory challenges—race neutral reasons

The trial court did not err in its findings and conclusions that the prosecutor's use of peremptory challenges was racially neutral in denying defendant's claim that his equal protection rights were violated by the use of peremptory challenges in a prosecution for conspiracy and first-degree murder where the prosecutor indicated in the record that the first of the two black jurors challenged was not a registered voter in Brunswick County, where the trial was held; the prosecutor perceived some reluctance in the juror's answer to a question regarding fairness; and the juror thought that he had seen defendant somewhere. As to the second prospective juror, she was single, she had never held a job, and she was close to the same age as the defendant's son, who was a potential witness for the defendant.

Am Jur 2d, Jury § 244.

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

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-*Batson* state cases. 20 ALR5th 398.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-*Batson* federal cases. 110 ALR Fed. 690.

3. Criminal Law § 836 (NCI4th)— conspiracy and first-degree murder—interested witness instruction—no plain error

There was no plain error in a prosecution for conspiracy and first-degree murder from an instruction given during jury selection on interested witnesses in explanation of a line of questions posed by the prosecution. The instruction correctly informed the jury that, should it determine that the evidence is believable, the evidence then takes on the same tenor as all other credible evidence before the jury and did not require the jury to assign a certain weight to the evidence.

Am Jur 2d, Trial § 1412.

4. Criminal Law § 411 (NCI4th)— conspiracy and first-degree murder—jury selection—statement by prosecutor—not an endorsement of witness's credibility

A prosecutor's comment during jury selection for a conspiracy and first-degree murder trial concerning the use of testimony by a witness who had received plea concessions in exchange for truthful testimony did not amount to a personal endorsement of the credibility of the witness where the remark was a single comment containing a direct quote from the language of the plea agreement.

Am Jur 2d, Trial § 566.

5. Constitutional Law § 342 (NCI4th)— conspiracy and first-degree murder—bench conferences—defendant not present—no error

The trial court did not err in a conspiracy and first-degree murder prosecution by conducting six unrecorded bench conferences not attended by defendant where, although a question was rephrased following one of the conferences, an examination of the entire line of questioning and events prior to and following the conference indicates that the outcome of the conference was beneficial to the defendant; while defendant contends that a conference pertaining to a State's rebuttal witness was prejudicial, there is no indication in the record that the conference in any way involved the testimony of that witness; and the other conferences cited by the defendant were clearly held for administrative pur-

poses and there was no showing that the defendant's presence was necessary.

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

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

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions. 23 ALR4th 955.

6. Criminal Law § 479 (NCI4th)— conspiracy and first-degree murder—jury instructions at recess

The trial court did not err in a prosecution for conspiracy and first-degree murder in the instructions it gave the jury at each recess where the instruction at the first recess omitted the media element, but the overall context made this a *de minimis* oversight; the instruction at the end of the first day of jury selection did not precisely follow the language of the statute but contained all of the elements in the statute and was sufficiently clear to fulfill the intent of the statute; the court gave a formal pretrial instruction to the full jury after the panel was seated and prior to the beginning of the trial; and from that instruction to the end of the trial the court consistently gave an abbreviated instruction which reminded the jurors to keep an open mind and not to discuss the case with anyone or to allow anyone to discuss it with them. N.C.G.S. § 15A-1236(a).

Am Jur 2d, Trial §§ 1562, 1564.

7. Evidence and Witnesses § 1694 (NCI4th)— conspiracy and first-degree murder—photograph of victim—admissible

The trial court did not err in a prosecution for conspiracy and first-degree murder by admitting a photograph of the victim where defendant contended that this photograph was excessively bloody and added no new information for the jury, but the photograph served to illustrate the coroner's testimony, specifically the visible wounds on the decedent's body. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Homicide §§ 417 et seq.

Admissibility in evidence of enlarged photographs or photostatic copies. 72 ALR2d 308.

8. Evidence and Witnesses § 1715 (NCI4th)— conspiracy and first-degree murder—photograph of weapon—like weapon used in crime

There was no error in a prosecution for conspiracy and first-degree murder in the admission of a photograph of a pistol purported to be identical to the pistol used in the murder. Although defendant asserted that the photograph constituted irrelevant evidence, the unique shape of certain unrecovered parts of the murder weapon made the jury's understanding of the weapon important to the State's case and testimony affirming that the weapon depicted in the photograph was similar to the one received from defendant was sufficient for introducing the photograph for illustrative purposes.

Am Jur 2d, Homicide § 416.

9. Evidence and Witnesses § 116 (NCI4th)— conspiracy and first-degree murder—guilt of another—evidence of motive only

The trial court did not err in a prosecution for conspiracy and first-degree murder by excluding evidence that decedent's estranged wife had a motive to kill her husband where the evidence offered by defendant pointed solely to motive and was not inconsistent with defendant's guilt, and defendant was able to present relevant evidence in support of his theory through the testimony of other witnesses.

Am Jur 2d, Evidence § 587.

10. Evidence and Witnesses § 3094 (NCI4th)— conspiracy and first-degree murder—impeachment of witness—testimony at prior trial

The trial court did not err and defendant's confrontation rights were not violated in a prosecution for conspiracy and murder where defendant utilized testimony to bolster his theory of someone else's involvement in the plot to kill the victim and the State used the witness's testimony from a prior trial in rebuttal. There can be little question that the evidence was material when it formed the very foundation of the defense and defendant knew of the existence of this statement and of the discrepancies between the prior testimony and the testimony at this trial.

Am Jur 2d, Witnesses § 941.

11. Evidence and Witnesses §§ 1113, 3090 (NCI4th)— conspiracy and first-degree murder—prior inconsistent statement within hearsay—admissible

The trial court did not err in a prosecution for conspiracy and first-degree murder by admitting a detective's testimony that another person, McPherson, had related defendant's statements concerning a truck used in the crime which may or may not have had a broken window. The testimony elicited from the detective as to what McPherson told him was admissible as a prior inconsistent statement to impeach McPherson, who had testified that a window in the truck had not been broken and the testimony as to what the defendant said in regard to the truck was admissible as an exception to the hearsay rule as an admission of a party. The fact that this hearsay statement by the defendant was contained within a hearsay statement by McPherson does not affect its admissibility because both statements were admissible. N.C.G.S. § 8C-1, Rule 801(d) (1992).

Am Jur 2d, Witnesses §§ 942 et seq.

12. Evidence and Witnesses § 665 (NCI4th)— conspiracy and first-degree murder—objection to testimony—withdrawn—not preserved for appeal

A defendant who abandoned a challenged question during a conspiracy and first-degree murder prosecution did not preserve the issue for appeal.

Am Jur 2d, Appeal and Error § 562.

13. Evidence and Witnesses § 3033 (NCI4th)— conspiracy and first-degree murder—cross-examination of defendant—affidavit of indigency—truthfulness

The trial court did not err in a prosecution for conspiracy and first-degree murder by allowing the State to cross-examine defendant regarding his affidavit of indigency. The trial court conducted a *voir dire* hearing, evaluated the evidence, limited the scope of the line of questioning, and then exercised its discretion in admitting a limited portion of the evidence. The limited nature of the questions permitted by the trial court fall within the parameters of N.C.G.S. § 8C-1, Rule 608(b). Regarding the balancing test found in N.C.G.S. § 8C-1, Rule 403, the trial court obviously weighed the risk of prejudice against the information already known to the jury and concluded that the probative value of the

limited questions outweighed the risk of prejudice to the defendant.

Am Jur 2d, Witnesses §§ 964-966.

14. Evidence and Witnesses § 2966 (NCI4th)— conspiracy and first-degree murder—State's witness—threat by boyfriend and defendant's former employee—admissible

The trial court did not err in a prosecution for conspiracy and first-degree murder by permitting a State's rebuttal witness to testify on redirect that she had been threatened by her boyfriend, a former employee of defendant, should she testify. The witness had presented an extremely flexible story that changed with each phase of the examination; once the witness's credibility was placed at issue, the State properly sought to provide an explanation for the changes and defendant has not shown that he was prejudiced.

Am Jur 2d, Witnesses § 884.

15. Evidence and Witnesses § 2973 (NCI4th)— conspiracy and first-degree murder—State's witness threatened— past assaults—admissible

The trial court did not err in a prosecution for conspiracy and first-degree murder by permitting limited evidence concerning past assaults upon a witness by her boyfriend, a former employee of defendant, where the witness testified that she had been threatened by her boyfriend should she testify. Where the witness has been the subject of past acts of violence and thereby has reason to fear another individual, those past acts are relevant to the issue of the witness's character for truthfulness or untruthfulness. Furthermore, defendant opened the door for this line of questioning by eliciting answers from the witness indicating a close and loving relationship between the witness and her boyfriend.

Am Jur 2d, Witnesses §§ 895 et seq.

16. Evidence and Witnesses § 981 (NCI4th)— conspiracy and first-degree murder—prior testimony of absent witnesses—instructions

There was no plain error in a prosecution for conspiracy and first-degree murder where the court instructed the jury prior to the reading into evidence of the prior testimony of two absent

elderly defense witnesses that this testimony should be treated no differently from other testimony. Although defendant contended that this was error because there was also accomplice and interested witness testimony which the jury was instructed to scrutinize, the jurors would have had no difficulty understanding from the instruction that they were to treat the testimony as they would the testimony of ordinary witnesses. This instruction benefitted the defendant because the jury otherwise would have a tendency to give less weight to the testimony in the absence of the witnesses.

Am Jur 2d, Evidence §§ 890 et seq.; Homicide § 393.

Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial. 38 ALR4th 378.

17. Criminal Law § 400 (NCI4th)— conspiracy and first-degree murder—absent witness—comment by judge—no plain error

There was no error and no plain error in a prosecution for conspiracy and first-degree murder in the trial court's comment made in the presence of the jury in reaction to a delay caused by the temporary absence of a defense witness. Although the comments of the judge were less than exemplary, the judge edited his own comments, the statements of the judge reflected his efforts to maintain progress and proper decorum, and defendant failed to show prejudice.

Am Jur 2d, Trial § 279.

18. Conspiracy § 31 (NCI4th)— conspiracy to murder—sufficiency of evidence—meeting of the minds

The trial court did not err in a prosecution for conspiracy to commit first-degree murder by denying defendant's motions to dismiss due to insufficient evidence where defendant contended that there was insufficient evidence of a meeting of the minds between the conspirators but defendant's coconspirator indicated that defendant proposed the conspiracy and that he agreed by his actions, and there was ample direct and circumstantial evidence through the testimony of the coconspirator, the corroborating testimony of others, and the physical evidence.

Am Jur 2d, Conspiracy § 29.

19. Conspiracy § 13 (NCI4th)— conspiracy to murder—Wharton's Rule—no application

Even if Wharton's Rule (which is used to determine whether a legislature intended to allow prosecution for conspiracy to commit a crime as well as for commission of the crime) were a part of the law of North Carolina, it would have no application in this case because murder does not require more than one person to commit and the immediate consequences of the crime do not fall only on the persons who commit it.

Am Jur 2d, Conspiracy §§ 1, 2.

20. Homicide § 372 (NCI4th)— accessory to first-degree murder—guilty plea by principal to second-degree murder

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder where defendant was tried as an accessory before the fact after the principal had pled guilty to second-degree murder. *State v. Arnold*, 329 N.C. 128, holds that an accessory before the fact may be tried for first-degree murder although the principal has pled guilty to second-degree murder.

Am Jur 2d, Homicide § 445.

21. Homicide § 552 (NCI4th)— first-degree murder—second-degree murder not submitted—no error

There was no error in a prosecution for first-degree murder in not submitting second-degree murder as a possible verdict where the State's evidence tended to establish each and every element of first-degree murder, including premeditation and deliberation; the defendant denied any involvement in the crime; the jury had to find the defendant guilty of first-degree murder if it believed the State's evidence, and had to find defendant not guilty if it believed the defendant's evidence; and the evidence of defendant's consumption of alcoholic beverages did not rise to such a level that the jury could find that defendant was incapable of premeditating and deliberating murder.

Am Jur 2d, Homicide §§ 525 et seq.

22. Criminal Law § 468 (NCI4th)— conspiracy and first-degree murder—prosecutor's argument—hyperbole—no error

There was no error and no gross impropriety in a prosecution for conspiracy and first-degree murder in the prosecutor's arguments which referred to a contention by defendant.

Am Jur 2d, Trial §§ 632 et seq.

23. Criminal Law § 447 (NCI4th)— conspiracy and first-degree murder—prosecutor's argument—position of body—not invoking sympathy for victim

There was no error in a prosecution for conspiracy and first-degree murder where defendant contended that the prosecutor's argument improperly sought to invoke sympathy for the victim but in context the prosecutor was arguing that the position of the body was explained by the circumstances in evidence and did not support the defense's theory of the case.

Am Jur 2d, Trial §§ 648 et seq.

24. Criminal Law § 439 (NCI4th)— conspiracy and first-degree murder—prosecutor's argument—interested and uninterested witnesses

There was no gross impropriety in a prosecution for conspiracy and first-degree murder where defendant contended that the prosecutor in his argument improperly attempted to entice certain jurors into identifying with certain prosecution witnesses, but, even though the prosecutor singled out certain jurors at times, he spoke to the jury collectively in making his point concerning the distinction between interested witnesses and noninterested witnesses.

Am Jur 2d, Trial §§ 692.

25. Criminal Law § 447 (NCI4th)— conspiracy and first-degree murder—prosecutor's argument—sympathy for victim's family

There was no error in a prosecution for conspiracy and first-degree murder in the prosecutor's reference in his argument to the victim's family.

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.

26. Criminal Law § 442 (NCI4th)— conspiracy and first-degree murder—prosecutor's argument—jury as conscience of the community

There was no error in a prosecution for conspiracy and first-degree murder in the prosecutor's argument that the jury is the conscience of the community.

Am Jur 2d, Trial §§ 567 et seq.

27. Criminal Law § 433 (NCI4th)— conspiracy and first-degree murder—prosecutor's argument—defendant as evil man

There was no gross impropriety in a prosecution for conspiracy and first-degree murder where the prosecutor in his closing argument described defendant as the quintessential evil and one of the most dangerous men in the state.

Am Jur 2d, Trial §§ 681, 682.

28. Criminal Law § 461 (NCI4th)— conspiracy and first-degree murder—prosecutor's argument—facts not in evidence

There was no error in a prosecution for conspiracy and first-degree murder where the prosecutor argued that defendant had been seen in possession of the murder weapon and defendant contended on appeal that this was arguing facts not in evidence. The evidence at trial was that defendant was in possession of and handling a pistol matching the description of the murder weapon; this evidence was sufficient to support the reasonable inference that the weapon seen in defendant's possession was the same weapon that the defendant later provided a coconspirator for the purpose of committing the murder.

Am Jur 2d, Trial §§ 609 et seq.

29. Criminal Law § 439 (NCI4th)— conspiracy and first-degree murder—prosecutor's argument—credibility of witness

There was no error in a prosecution for conspiracy and first-degree murder in an argument by the prosecutor that an officer had "the greatest degree of believability" where the prosecutor was responding to assertions made by the defendant. The prosecutor is allowed to respond to arguments made by defense counsel and restore the credibility of a witness who has been attacked in defendant's closing argument.

Am Jur 2d, Trial § 702.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness-state cases. 45 ALR4th 602.

30. Criminal Law § 439 (NCI4th)— conspiracy and first-degree murder—prosecutor's argument—credibility of witness

There was no error in a prosecution for conspiracy and first-degree murder where the prosecutor argued that a defense witness was not worthy of consideration or belief.

Am Jur 2d, Trial §§ 692 et seq.

Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases. 88 ALR4th 209.

31. Criminal Law § 439 (NCI4th)— conspiracy and first-degree murder—prosecutor's argument—credibility of witness

There was no error in a prosecution for conspiracy and first-degree murder in the prosecutor's argument concerning the testimony of the wife of a coconspirator. The prosecutor repeatedly encouraged the jury to weigh the witness's credibility based upon the jurors' observations; only if the jury determines that this witness is credible does the prosecutor contend that the weight of that testimony should be the same as other credible evidence.

Am Jur 2d, Trial §§ 692 et seq.

Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases. 88 ALR4th 209.

32. Criminal Law § 461 (NCI4th)— conspiracy and first-degree murder—defendant's argument—facts not in evidence—not a reasonable inference

There was no error in a prosecution for conspiracy and first-degree murder where the court sustained an objection to a portion of defendant's closing argument and instructed defense counsel to only argue facts in evidence. Although defendant asserts that the argument that a witness saw Babe Godwin and defendant's coconspirator riding around in Godwin's truck and carrying a gun was a reasonable inference from testimony that the witness had seen a Babe Godwin and a black male riding

around in Godwin's truck and carrying a gun, the witness was unable to identify the black male and defendant should not have referred to the black male as the coconspirator.

Am Jur 2d, Trial §§ 609 et seq.

33. Criminal Law § 819 (NCI4th)— conspiracy and first-degree murder—interested witness instruction

There was no error in a prosecution for conspiracy and first-degree murder where the court instructed the jurors that if they found one or more witnesses were interested in the outcome, they could take this interest into account and would treat such testimony the same as any other believable evidence if they believed such testimony in whole or in part, or where the court instructed the jurors that there was evidence that a particular witness was an accomplice and would be considered an interested witness whose testimony would be considered with the greatest care and caution, but if after doing so they believed the testimony in whole or in part they would treat the evidence as they would any other believable testimony.

Am Jur 2d, Trial § 1412.

34. Criminal Law § 817 (NCI4th)— conspiracy and first-degree murder—instructions—testimony from prior trial

There was no error in a prosecution for conspiracy and first-degree murder in the court's instruction that statements in prior proceedings or to other persons should not be considered as evidence of the truth but as corroboration or impeachment. Although defendant contended that the court with this instruction told the jury not to consider the testimony of two elderly alibi witnesses from the first trial whose testimony had been read into evidence at the second trial because they were in poor health, the court instructed the jury as to how it was to consider the testimony of the absent witnesses when it was introduced, these witnesses were not mentioned in this part of the charge, and the jury did not have trouble discerning that this part of the charge did not apply to these absent witnesses.

Am Jur 2d, Trial §§ 1406 et seq.; Witnesses § 941.

35. Criminal Law § 775 (NCI4th)— conspiracy and first-degree murder—instructions—voluntary intoxication

The trial court did not err in a prosecution for conspiracy and first-degree murder by not giving an instruction on voluntary

intoxication where defendant did not make the requisite showing that either defendant or the accomplice was utterly incapable of forming the requisite intent. Moreover, defendant's contention in this argument that the trial court committed constitutional error in its instruction on guilt under the theory of accessory before the fact in that the instruction violated his due process rights was rejected.

Am Jur 2d, Trial §§ 1279, 1280.

36. Homicide § 476 (NCI4th)— first-degree murder as accessory before the fact—instructions on intent—sufficient

The trial court did not err in a prosecution for first-degree murder in its final mandate where defendant contended that the court erred by failing to charge that either defendant or his accomplice must possess a specific intent to kill in order to convict defendant of first-degree murder under the theory of accessory before the fact. The court correctly charged the jury regarding the elements of first-degree murder as they applied to the accomplice, specifically including the requirement that there be proof beyond a reasonable doubt that he possessed the specific intent to kill the victim; the court correctly set out the necessary elements for conviction based upon the theory of being an accessory before the fact to first-degree murder; and the court charged that the killing had to be intentional when it charged in its final mandate that the jury had to be satisfied beyond a reasonable doubt that the killing was with premeditation and deliberation.

Am Jur 2d, Homicide § 501.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

37. Conspiracy § 18 (NCI4th)— murder and conspiracy to murder—no error in submitting both

There was no plain error in submitting both first-degree murder and conspiracy to murder to the jury.

Am Jur 2d, Conspiracy § 5-9.

38. Criminal Law § 1214 (NCI4th)— conspiracy to murder—sentencing—nonstatutory mitigating factors—plea agreement and sentencing of coconspirator

The trial court did not abuse its discretion when sentencing defendant for conspiracy to commit first-degree murder by not finding as a nonstatutory mitigating factor the plea agreement and sentencing of defendant's coconspirator. The finding of a nonstatutory mitigating factor is within the discretion of the sentencing judge.

Am Jur 2d, Criminal Law §§ 598, 599.

39. Criminal Law § 1135 (NCI4th)— conspiracy to murder and first-degree murder—sentencing—aggravating factors—inducement of others—position of leadership or dominance

The trial court did not err in a prosecution for conspiracy to murder by finding the aggravating factors that defendant induced others to participate in the commission of the offense and that defendant occupied a position of leadership or dominance in the commission of the offense where there was ample independent evidence upon which the court could base its finding of each of these factors. While some evidence supporting each of the factors and elements of the crime may overlap, discrete evidence exists to support each factor.

Am Jur 2d, Criminal Law §§ 598, 599.

40. Criminal Law § 1293 (NCI4th)— accessory to murder—sentencing—basis of verdict not specified—not prejudicial

There was no prejudice where a defendant received a Class A rather than a Class B life sentence for being an accessory before the fact to first-degree murder but there was nothing in the record as to whether the jury based its verdict solely on the uncorroborated testimony of a coconspirator or considered as well corroborating evidence presented at trial. The single distinction between a Class A and a Class B felony before 1 October 1994 is that a Class A felony is subject to capital punishment; no distinction is made between a Class A and a Class B life sentence either in sentencing or in the manner in which the Department of Correction handles an individual. N.C.G.S. § 14-5.2.

Am Jur 2d, Criminal Law §§ 535 et seq.

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 judgment imposing a sentence of life imprisonment entered by Stephens (Donald W.), J., at the 2 November 1992 Criminal Session of Superior Court, Brunswick County, upon a jury verdict of guilty of first-degree murder in a case in which defendant was tried capitally. The defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for conspiracy to commit murder was allowed 23 June 1993. Heard in the Supreme Court 12 September 1994.

The defendant was charged in Columbus County with conspiracy to commit murder and first-degree murder. At the first trial, the jury could not reach a verdict and a mistrial was declared. The case was then moved to Brunswick County for trial.

The evidence at the second trial showed the defendant hired Daniel Ray McMillian to kill Cecil Edwards. McMillian accomplished the murder by knocking on Mr. Edwards' door and shooting him when Mr. Edwards responded to the knock. McMillian pled guilty to second-degree murder and conspiracy to commit murder. He was sentenced to life in prison plus thirty years. McMillian testified for the State.

The defendant was convicted of first-degree murder and conspiracy to commit murder. The court ruled that there was not sufficient evidence of any aggravating circumstance to submit a death sentence to the jury. The defendant was sentenced to life in prison for murder and thirty years in prison for conspiracy, to be served consecutively. The defendant appealed.

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

Thomas F. Loflin III for defendant-appellant.

WEBB, Justice.

[1] The defendant first assigns error to the allowance of peremptory challenges to two black jurors. He contends that by the allowance of the challenges, there was impermissible racial discrimination in the selection of the jury. *Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991); *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). The defendant contends that his equal protection rights under the

Fourteenth Amendment and his right to an impartial jury under the Sixth Amendment to the Constitution of the United States were violated by the allowance of these peremptory challenges.

The Supreme Court of the United States held in *Holland v. Illinois*, 493 U.S. 474, 107 L. Ed. 2d 905 (1990), that a defendant's Sixth Amendment right to a trial by jury is not violated by the allowance of peremptory challenges by the State. There is no merit in this argument by the defendant that his Sixth Amendment rights were infringed.

[2] As to the defendant's claim that his equal protection rights were violated by the use of the peremptory challenges, the prosecuting attorney placed in the record his reasons for the challenges. He believed the first of the two jurors was not a registered voter in Brunswick County, he perceived "some reluctance" in his "no" answer to a question regarding fairness, and the prospective juror indicated that "he thought he had seen the Defendant's face somewhere." As to the second prospective juror, she was single; she had never held a job; and she was close to the same age as the defendant's son, who was a potential witness for the defendant. The court found that these rationales were "reasonable and acceptable, and are race neutral."

According, as we must, great deference to the findings of the trial court, we cannot find error in its findings of fact and conclusions. *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429 (1994); *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141 (1991). For examples of peremptory challenges which were deemed acceptable under *Batson*, see *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).

This assignment of error is overruled.

[3] The defendant, in his next assignment of error, contends that the trial court erred in instructing the jury regarding the testimony of interested witnesses. The defendant did not object at trial, so we must review this contention under the plain error standard of review. The trial court gave the questioned instruction *ex mero motu* in explanation of a line of questions posed by the prosecution during the jury *voir dire*. The trial court instructed as follows:

> The law of this State permits the State to grant immunity to someone who has committed a crime, and allow them not to be prosecuted in exchange for their cooperation, to testify as a wit-

ness for the State. Or the State can make an agreement with a potential witness for a sentence concession, that is, to reduce in some way either the charge or the sentence that's going to be imposed in that person's case in exchange for that person's cooperation and testimony.

If such a person testifies, and there is some concession that the State has made in exchange for that testimony, the jury is required to examine that person's testimony with the greatest of care and caution to determine whether or not you will believe or disbelieve that testimony.

However, you are required to consider it. And if after examining it you—you believe all, or part of the testimony, then you would treat what you believe *the same* as any other believable evidence in the case.

Is there anybody who—who cannot follow those requirements of the law as a juror if participating in this trial? Again I say, you are required to consider that testimony, and you *are required to accept* what you believe *the same as* any other believable evidence. If you choose—if you believe that testimony, after giving it great care and caution in light of the concessions that the State has made.

(Emphasis added.) The defendant contends the instructions require acceptance of such testimony and in so doing, invade the province of the jury. We disagree. The instruction is a correct statement of the law. *State v. Martin*, 294 N.C. 253, 261, 240 S.E.2d 415, 421 (1978). It was not error to give it. It does not require the jury to assign a certain weight to the evidence, but rather informs the jury that should it determine the evidence is believable, then the evidence takes on the same tenor as all other credible evidence before the jury. This assignment of error is overruled.

[4] The defendant assigns as error a comment made early in the jury selection process by the prosecutor, which the defendant asserts amounted to a personal endorsement of the credibility of Ray McMillian. While questioning a panel of prospective jurors, the prosecutor asked:

Will the State's reliance on the testimony of a confessed murderer, who has received some plea concessions in exchange for his *truthful testimony* at this trial, will the State's reliance on that

> cause any of you any problems in listening to his testimony, and listening—and weighing it as you weigh all the testimony?

(Emphasis added.) The defendant contends the use of the phrase "truthful testimony" constitutes an impermissible personal voucher of the truthfulness of Mr. McMillian. The defendant relies upon *United States v. Smith*, 962 F.2d 923 (9th Cir. 1992), as the authority for his position. In *Smith*, the circumstances surrounding the questioned argument were much more egregious. The prosecutor's closing argument in *Smith* included repeated personal assurances to the jury through direct comment and by inference that the testimony of a crucial witness was true. The court held that "[t]he prosecutor's recurrent harping on the issue of his special role was clearly improper. The repeated comments also demonstrate that the errors were not inadvertent." *Id.* at 935. We do not find *Smith* applicable to the instant case.

Here, the prosecutor made a single comment which contained a direct quote from the language of the plea agreement. We do not believe the prosecuting attorney by doing so made a personal endorsement of the truthfulness of Ray McMillian. This was left to the jury. This assignment of error is overruled.

[5] The defendant next assigns as error in his capital trial the trial court's conducting of six unrecorded bench conferences not attended by the defendant. The defendant did not object at trial. Of the six challenged conferences, a review of the record indicates that three were held at the request of the defendant's counsel, two at the court's request not in response to any objection, and one at the court's request in response to an objection by the State. Counsel for the defendant were present at all conferences. The defendant contends that *State v. Callahan*, 83 N.C. App. 323, 350 S.E.2d 128 (1986), *disc. rev. denied*, 319 N.C. 225, 353 S.E.2d 409 (1987), is controlling. We do not agree. In *Callahan*, the Court of Appeals held that the trial court erred in failing to record the questions and answers in the court's inquiry as to the defendant's understanding of his rights pertaining to proceeding *pro se*. There can be no doubt that such an inquiry necessarily involves the defendant's constitutional rights and therefore must be recorded. We do not find that the conferences at issue in this case rise to the same level.

Questions involving the defendant's unwaivable state contitutional right in capital cases to be present and to have all bench con-

ferences recorded arise frequently. In *State v. Buchanan*, 330 N.C. 202, 410 S.E.2d 832 (1991), we reviewed the issue extensively. In *Buchanan*, this Court concluded:

> Though defendant himself did not attend the conferences in this case, we conclude that the trial court's bench conferences with defense counsel and counsel for the State did not violate defendant's state constitutional right to be present at all stages of his trial. As stated above, defendant was personally present in the courtroom during the conferences. Further, and perhaps more importantly, his actual presence was not negated by the trial court's actions. At each of the conferences defendant was represented by his attorneys. Defendant was able to observe the context of each conference and inquire of his attorneys at any time regarding its substance. Through his attorneys defendant had constructive knowledge of all that transpired. Following the conferences defense counsel had the opportunity and the responsibility to raise for the record any matters to which defendant took exception. At all times defendant had a first-hand source of information as to the matters discussed during a conference. It also is relevant that bench conferences typically concern legal matters with which an accused is likely unfamiliar and incapable of rendering meaningful assistance. Other conferences typically deal with administrative matters that are nonprejudicial to the fairness of defendant's trial. In addition, such conferences do not diminish the public interest associated with defendant's right to presence. Unlike the excusal of prospective jurors following *ex parte* communications, in this case defendant, through his attorneys, had every opportunity to inform the court of his position and to contest any action the court might have taken.

Id. at 223, 410 S.E.2d at 844-45; *see State v. Upchurch*, 332 N.C. 439, 455, 421 S.E.2d 577, 586 (1992). In *Upchurch*, we found the fact that the defendant's own counsel requested several unrecorded conferences to be significant. *State v. Upchurch*, 332 N.C. at 456, 421 S.E.2d at 587. Recently, we reiterated our holding in *Buchanan*, stating that "[t]he burden is on the defendant to show the usefulness of his presence at the unrecorded bench conference." *State v. Lee*, 335 N.C. 244, 264, 439 S.E.2d 547, 557 (citing *State v. Buchanan*, 330 N.C. at 223-24, 410 S.E.2d at 845), *cert. denied*, ___ U.S. ___, 130 L. Ed. 2d 162, *reh'g denied*, ___ U.S. ___, 130 L. Ed. 2d 532 (1994).

In the instant case, the defendant contends the failure to involve him in the conference held at the court's request during the cross-

examination of Ray McMillian was especially prejudicial. He asserts that the question following the conference differed from the one asked prior to the conference, and this reflects a significant decision impacting upon his constitutional rights. We disagree. While the question was rephrased, an examination of the entire line of questioning and events in the court prior to and following the conference indicates that the outcome of the conference was beneficial to the defendant. Prior to the conference, the State raised several objections regarding the relevancy of the line of questions. The court indicated just prior to the conference that it was willing to allow the line of questions to proceed to determine the relevance. After the conference, defense counsel rephrased a question but was otherwise permitted to take the line of questioning to its logical conclusion. In so doing, counsel laid the groundwork for an impeaching inference that McMillian was involved in gang activity in prison.

The second conference the defendant specifically cites as being prejudicial occurred at the conclusion of the testimony of Tommy Hobbs. The defendant asserts the conference in actuality pertained to the next witness in the State's rebuttal evidence, Brenda Kirby. Since Ms. Kirby's testimony was damaging to the defendant, he asserts that he was prejudiced by not attending the conference held at his own counsel's request. While we concede that the testimony of Brenda Kirby damaged the defendant's case, after reviewing the record, we do not find any indication the conference in any way involved the testimony of Ms. Kirby. The conference was requested while the court was releasing the prior witness and before the State called Ms. Kirby to the stand. We do not find that "the subject matter of the conference implicates the defendant's confrontation rights[] or is of the nature that the defendant's presence would have a reasonably substantial relation to the defendant's opportunity to defend." *State v. Lee*, 335 N.C. at 264, 439 S.E.2d at 557.

The other conferences cited by the defendant were clearly held for administrative purposes and there has been no showing that the defendant's presence was necessary. We find no error in the trial court's conduct of these conferences.

[6] The defendant next contends the trial court failed to completely instruct the jury at each recess concerning the jurors' duties and responsibilities. The defendant cites twenty-eight separate instances in which the court failed to fully and adequately instruct the jury

according to the requirements of N.C.G.S. § 15A-1236. N.C.G.S. § 15A-1236 provides in pertinent part:

> (a) The judge at appropriate times must admonish the jurors that it is their duty:
>
> (1) Not to talk among themselves about the case except in the jury room after their deliberations have begun;
>
> (2) Not to talk to anyone else, or to allow anyone else to talk with them or in their presence about the case and that they must report to the judge immediately the attempt of anyone to communicate with them about the case;
>
> (3) Not to form an opinion about the guilt or innocence of the defendant, or express any opinion about the case until they begin their deliberations;
>
> (4) To avoid reading, watching, or listening to accounts of the trial; and
>
> (5) Not to talk during the trial to parties, witnesses, or counsel.
>
> The judge may also admonish them with respect to other matters which he considers appropriate.

N.C.G.S. § 15A-1236(a) (1988). The defendant acknowledges that in both *State v. Harris*, 315 N.C. 556, 340 S.E.2d 383 (1986), and *State v. Richardson*, 308 N.C. 470, 302 S.E.2d 799 (1983), this Court held that a trial court is not required to give repeatedly a full, formal rendition of the mandates found in N.C.G.S. § 15A-1236(a). However, the defendant contends the present case is distinguishable from both *Harris* and *Richardson*. In *Harris*, the issue revolved around the jury's exposure to a media report and the court's failure to adequately instruct on N.C.G.S. § 15A-1236(a)(4). *Richardson*, the defendant contends, addressed the question of whether, in the context of the entire record, the admonitions given the jury were adequate. The defendant contends the instructions cited in this case were not adequate and failed the *Richardson* test.

We find the instant case to be on "all fours" with *Richardson*. At the first recess during jury selection, the judge instructed prospective jurors:

> Ladies and Gentlemen, take about a ten-minute break. Please, obviously, don't discuss the matter among yourselves. Don't discuss it with anybody else. Be careful about your . . . . Be careful about your conduct. Don't have any association with anybody involved in the case. And—and keep an open mind.

This instruction specifically addresses each of the requisite elements with the exception of the media element. However, the overall context of the situation makes this oversight *de minimis* at best. At the conclusion of the first day of jury selection and prior to sending those jurors already selected home for the week, the court gave the following instruction:

> Now, please—please remember my instructions to you. And it's—it's certainly very important that you remember them and that you follow them, because you now know you're going to be on this jury.
>
> So please do not read anything about—in the newspaper about the matter. Now you know why you're here, what we're trying, so you can be careful to avoid any information about it. Don't go to any alleged crime scene, and don't let anybody talk to you about the case. And keep an open mind obviously, and don't discuss it with anybody else.

The judge continued at length regarding interaction with family and friends, what could and could not be said, reporting attempted contact to the sheriff, and in general, the requisite conduct of jurors. While not precisely following the language of the statute, we find this instruction to contain all of the elements found in the statute and to be sufficiently clear as to fulfill the intent of the statute.

After the full jury panel was seated and prior to the beginning of the trial, the trial court presented formal pretrial instructions to the full jury. The defendant does not assign error to this instruction, nor should he, as the trial court addressed to the jury a complete jury instruction, saying:

> Now, let me also remind you too, as I told you yesterday, it's very important that matters that are resolved in this Courtroom be resolved based upon what's heard in this Courtroom. You are not to obtain any information from any outside source. You are not to read anything in the newspaper, watch anything on television or listen to anything on the radio about the case. You are not to go to any alleged crime scene. You are not to read any law. You

are not to talk to anybody about the case. You are not to talk among yourselves about the case. You are obviously required to keep an open mind, as any Judge must, throughout the course of all the proceedings and don't make up your mind about the matter until you retire with your fellow jurors to deliberate and then having heard all the evidence as presented and the law and your responsibility as a juror as defined by the law, then and only then should you arrive at any decision in any manner that you hear this week.

You need to be extremely careful about your conduct, again I say, don't be—don't have any contact with anybody involved in the law suit, the witnesses, the lawyers, anyone who may testify or purport to have any knowledge about the matter or be associated with anybody who has some association with the parties in the law suit.

I think as we—as we—a juror yesterday, one juror sorta [sic] approached the District Attorney as if to say hello or something like that and the District Attorney kinda [sic] said I can't talk to you and I indicated likewise that he should not be talking to the D.A. You may see some people around here that you would walk up and speak to on any occasion. The Deputies, the District Attorney, the Attorneys for the Defendant, and normally it—in fact, it would be kinda [sic] unnatural for you not to say hello and just chat about what's going on in your life or the public life, but please remember as a juror, you can't take sides or have any association with either side so for the purposes of this proceeding this week, please do not have any contact or even any kind of casual conversations with the lawyers involved in the case. It's very important that you remain separate and apart from them and that they remain separate and apart from you throughout the course of all proceedings that you participate in this week.

As I said, due to the nature of the case that is going to be called for trial, it is possible that there may be some media coverage at some point during the proceeding. I don't know whether they will or not, but it is possible that there might be. There has been some in the past. Please, therefore, be careful that you don't read anything in the newspaper, watch anything on T.V. or listen to anything on the radio about it. If it's on like I said, just cut it off until that particular report is over and then you can turn it back on. If it's in the newspaper just—just pass over it, don't read it.

> You might want to have a member of your family kinda [sic] examine the newspaper to make sure its—that you're not exposed to it or clip it out and set it aside. If you want to read it later, after the case is over with, you certainly can. But, please don't be exposed to any information at all about the case. Again, I say "don't," please don't read anything about it or listen to anything about it in any of the media reports during the course of the week.

From that instruction to the end of the trial, the court consistently gave an abbreviated instruction which reminded the jurors to "keep an open mind" and not to discuss the case with anyone or let anyone discuss it with them. We hold here, as we did in *Richardson*,

> that these instructions, when examined in the context in which they were given—that is, instructions made repeatedly not to discuss the case or form an opinion about it which were delivered to a group of adult men and women—were perfectly adequate. We are confident that the members of the jury who sat on defendant's case were well aware of their statutory duties as jurors.

State v. Richardson, 308 N.C. at 485, 302 S.E.2d at 808. This assignment of error is without merit.

[7] The defendant next asserts that the trial court erred in permitting the State to introduce a photograph of the deceased. Of three photographs of the victim introduced by the State at trial, the defendant objected only to the introduction of State's Exhibit #2. The defendant asserts the photograph was cumulative, excessive, inflammatory, and introduced solely to arouse the passions of the jury. *See State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988). The photograph in question depicted the decedent's torso and head. State's Exhibit #1 depicted the position of the decedent as he was found. State's Exhibit #3 showed the decedent's back and, specifically, an exit wound in his back. The defendant asserts that State's Exhibit #1 adequately depicted the condition of the victim and that the closer view found in State's Exhibit #2 was excessively bloody and added no new information for the jury.

The defendant relies upon *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523, and N.C.G.S. § 8C-1, Rule 403, in arguing that the photograph in question was unfairly prejudicial and that this prejudice substantially outweighed any probative value. Recently, we stated:

> We have held in numerous cases that photographs may be introduced as evidence "even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *See State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988).

State v. Moseley, 336 N.C. 710, 722, 445 S.E.2d 906, 913 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 802 (1995). We do not believe that three photographs are excessive and do not find that the single photograph the defendant excepts to was cumulative. The photograph served to illustrate the coroner's testimony regarding what he saw upon arriving at the crime scene. Specifically, the photograph illustrated the visible wounds on the decedent's body. The trial court did not err in admitting State's Exhibit #2.

[8] The defendant next assigns as error the trial court's decision to admit into evidence a photograph of a pistol purported to be identical to the pistol Ray McMillian used in committing the murder. The defendant asserts that the photograph constitutes irrelevant evidence used by the prosecution to enhance the credibility of the witness' testimony. After the State laid the proper foundation, the trial court admitted the photograph with a limiting instruction to the jury that the photograph was to be considered for illustrative purposes only. Ray McMillian testified utilizing the picture to describe the weapon he received from the defendant at the time Ray McMillian agreed to commit the murder.

"It is well established that 'in a criminal case every circumstance calculated to throw any light on the supposed crime is admissible and permissible.' " *State v. Hunt*, 297 N.C. 258, 261, 254 S.E.2d 591, 594 (1979) (*quoting State v. Arnold*, 284 N.C. 41, 47, 199 S.E.2d 423, 427 (1973) (citations omitted)). In the instant case, Ray McMillian testified that he stripped the pistol of all removable parts and disposed of those parts in various locations. He led investigators to the frame of the pistol, which was subsequently introduced into evidence as State's Exhibit #9. "It is a familiar psychological fact that seeing a thing is more convincing than hearing it talked about." 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 248 (4th ed. 1993). The unique shape of certain, unrecovered parts of the weapon made the jury's understanding of the weapon important to the State's case. The testimony of Ray McMillian affirming that the weapon depicted in the photograph was similar to the one he

received from the defendant was sufficient for introducing the photograph into evidence for illustrative purposes. This assignment of error is overruled.

[9] The defendant next contends that the trial court erred in excluding evidence showing that the decedent's estranged wife had a motive to kill her husband. The defendant's theory of the case throughout was that Hilda Edwards arranged for the murder of her husband. In support of this theory, the defendant's brother, Marvin Larrimore, testified during a *voir dire* hearing that Mrs. Edwards had come to his home on several occasions. On one of those occasions in January 1991, the decedent appeared outside of Larrimore's trailer. Larrimore called the police, who informed Larrimore that the only way they could remove Edwards was if Larrimore swore out a warrant, which he did. Larrimore testified that later he discovered that the tires on Mrs. Edwards' car had been slashed. He said:

> I did not see who cut the tires but he [the deceased] was outside the house and Mark Sellers, sitting right here in the Courtroom, was with him. I did not see him cut the tires, or who cut the tires, but somebody cut four tires off of Hilda Edwards' car.

After hearing Larrimore's testimony, the trial court ruled that this testimony and accompanying hearsay testimony arising out of the encounter were inadmissible.

The law is well established that in order to be both relevant and admissible, evidence tending to show the guilt of one other than the defendant must point directly to the guilt of a specific person or persons. *State v. Jones*, 337 N.C. 198, 211, 446 S.E.2d 32, 40 (1994). The test set out in *State v. McNeill*, 326 N.C. 712, 392 S.E.2d 78 (1990), provides that

> where 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.

Id. at 721, 392 S.E.2d at 83; *see State v. Brewer*, 325 N.C. 550, 386 S.E.2d 569 (1989), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990).

In the instant case, the evidence offered by the defendant pointed solely to motive. Even viewed in the light most favorable to the

defendant, the evidence did no more than arouse suspicion that the decedent's estranged wife possessed a motive for the murder. There was no evidence linking Hilda Edwards to Ray McMillian, linking Hilda Edwards to a weapon, or in any other fashion linking Hilda Edwards to the crime. Further, the evidence was not inconsistent with the defendant's guilt. The State in the case *sub judice* produced substantial direct and circumstantial evidence linking the defendant to the crime. We find no violation of the defendant's due process rights nor of any other constitutionally guaranteed rights. As we noted in *Brewer*, the defendant was able to present relevant evidence in support of his theory through the testimony of other witnesses. The trial court properly excluded the evidence at issue here. We find no error.

[10] The defendant's next contention centers upon the reading into evidence of the testimony of Lori Hayes from the transcript of the earlier trial. This evidence was introduced by the State during the rebuttal phase of the State's case. The defendant contends his confrontation rights were violated by the State's action in not recalling an available witness.

During the presentation of the defendant's evidence, Lori Hayes was called and testified she saw Babe Godwin and Joseph Paul Davis at Hilda Edwards' trailer one week prior to the murder. Further, she testified that on the day of the murder, she saw Godwin and an unidentified black male enter Mrs. Edwards' trailer and remain there for some three and one-half hours. The defendant sought to utilize this testimony to bolster his theory of Mrs. Edwards' involvement in the plot to kill the victim. During cross-examination, the State sought to impeach Ms. Hayes by use of her testimony during the earlier trial in this matter. Finally, during the State's presentation of rebuttal evidence, the State was permitted over the defendant's general objection to introduce Ms. Hayes' earlier testimony.

In *State v. Whitley*, 311 N.C. 656, 319 S.E.2d 584 (1984), we faced this same question. "Under certain circumstances a witness may be impeached by proof of prior conduct or statements which are inconsistent with the witness's testimony. Inconsistent prior statements are admissible for the purpose of shedding light on a witness's credibility." *Id.* at 663, 319 S.E.2d at 589 (citing 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 46 (1982)). "When the witness's prior statement relates to material facts in the witness's testimony, extrinsic evidence may be used to prove the prior inconsistent statement

without calling the inconsistencies to the attention of the witness." *Id.*; *see State v. Green*, 296 N.C. 183, 250 S.E.2d 197 (1978).

The argument hinges on a determination of the materiality of the testimony involved. "Material facts involve those matters which are pertinent and material to the pending inquiry." *State v. Whitley*, 311 N.C. at 663, 319 S.E.2d at 589. The instant case is analogous to both *Whitley* and *Green*, inasmuch as the witness' testimony was crucial to the defendant's theory of the case. As the State argues, there can be little question that the evidence involved was material when the evidence formed the very foundation of the defense. The defendant knew of the existence of this statement and of the discrepancies between the witness' prior testimony and that given at this trial. The defendant's confrontation rights were not violated and the trial court did not err in admitting the reading into evidence of Lori Hayes' prior inconsistent testimony.

[11] The defendant next assigns error to testimony elicited from Sterling Cartrette, a detective with the Columbus County Sheriff's Office. Ray McMillian testified that he had driven a truck, which the defendant had borrowed from Charlie McPherson, to the home of Mr. Edwards the night McMillian killed Edwards. McMillian testified further that he drove the truck to another location and parked it. Ray McMillian then testified that when he returned the next day to retrieve the truck, he had to break a window because he had locked the keys in the truck.

The defendant testified that Ray McMillian had not driven the truck and that a window of the truck had not been broken. Charlie McPherson testified in substantial corroboration of the defendant. Detective Cartrette testified on rebuttal for the State that on a Monday he went to see Mr. McPherson about the truck and Mr. McPherson told him the defendant had borrowed it the previous Thursday. Detective Cartrette testified that he returned to Mr. McPherson's home the next day and the truck was not there. When Detective Cartrette asked McPherson about the truck, Mr. McPherson replied that when he called the defendant to ask the defendant to return the truck, the defendant advised him that the window had been broken out and the truck was in the shop being repaired.

The defendant contends this testimony by Detective Cartrette that Mr. McPherson told Detective Cartrette that the defendant had told him that the window in the truck had been broken was double hearsay introduced to prove that Ray McMillian was driving the truck

on the night of the murder. The defendant says that this testimony was not subject to any exception to the hearsay rule and that it was reversible error not to exclude it.

The testimony elicited from Detective Cartrette as to what Mr. McPherson told him was admissible as a prior inconsistent statement to impeach Mr. McPherson, who had testified that a window in the truck had not been broken. *State v. McKeithan*, 293 N.C. 722, 239 S.E.2d 254 (1977). The testimony as to what the defendant said in regard to the truck was admissible as an exception to the hearsay rule as an admission of a party. N.C.G.S. § 8C-1, Rule 801(d) (1992). The fact that this hearsay statement by the defendant was contained within a hearsay statement by Mr. McPherson does not affect its admissibility because both statements were admissible. *State v. Connley*, 295 N.C. 327, 345, 245 S.E.2d 663, 674 (1978), *judgment vacated*, 441 U.S. 929, 60 L. Ed. 2d 657, *on remand*, 297 N.C. 584, 256 S.E.2d 234, *cert. denied*, 444 U.S. 954, 62 L. Ed. 2d 327 (1979).

This assignment of error is overruled.

The defendant next assigns as error the trial court's decision to proceed with the cross-examination of Ray McMillian while the defendant was not present. The transcript of the trial indicates that a short recess was taken during a *voir dire* hearing involving Ray McMillian's testimony. At the conclusion of this recess, the following exchange occurred:

> COURT: All right. We're back in session. The jury is absent.
>
> Mr. Sauls, Mr. Pope, have you conferred with Mr. McMillian?
>
> MR. SAULS: Yes, sir, we have.
>
> MR. GORE: Your Honor, the Defendant's not here yet.
>
> COURT: Okay. Let me say this to the camera man. You need to turn your camera off now, please. Thank you. There are some matters that—in which under our rules cannot be videotaped. One of them you probably will remember involves testimony of victims or sex acts with—with regard to children or things of that nature. That's what we're going to inquire into right now, and so I do not want that on tape. Thank you.

At this point, the defendant's counsel proceeded with his cross-examination of McMillian. The transcript contains no further mention

of the defendant as being present until the resumption of court the following morning.

Subsequent to the filing of the defendant's brief in this appeal, the State filed a motion to amend the record on appeal. Accompanying that motion is a stipulation signed by both the defendant's trial counsel and the assistant district attorney in which they attest to the defendant's presence during the challenged portion of the trial. After reviewing this motion and the defendant's motion in opposition, we hereby grant the State's motion to amend. Having done so, no factual issue remains to be resolved. This assignment of error is overruled.

[12] The defendant's next contention centers upon the testimony of Jeanette McMillian, the wife of Ray McMillian. The defendant sought to question Mrs. McMillian about the State's removing her child from her custody. The goal of the defendant's line of questioning was to elicit testimony in which Mrs. McMillian indicated that she chose to stand by her husband even though to do so meant to lose custody of her child. During a *voir dire* hearing, the questions were asked and answered as the defendant anticipated. The questions asked were:

> Q. You even stood by him when the Department of Social Services took your child away, didn't you?
>
> . . . .
>
> Q. The Department of Social—the—the fact that the Department of Social Services took your child away had nothing to do with you, did it, Mrs. McMillian?
>
> . . . .
>
> Q. It had to do with Ray, didn't it?

The trial court ruled that only the first of these three questions could be asked. The defendant contends this decision "clearly deprived Defendant Larrimore of a meaningful right to confront and discredit Mrs. McMillian." The defendant asserts the testimony would have been "immensely important impeachment" evidence. For these reasons, the defendant contends the trial court erred in not permitting the full line of questions to be presented and answered before the jury.

The State asserts that the following statement by the defendant's attorney constituted waiver of the defendant's right to assign error to this decision by the trial court:

> My learned chief counsel says stick with your first ruling, Judge, so we'll do that. The ruling that allows the first, doesn't allow the last two. We withdraw our request to make the last—next to the last question.

Earlier in the discussion, the defendant's counsel acknowledged the probable inadmissibility of the third question when he stated:

> So, arguably, I mean, I—I would argue that they're all admissible but the last question is the least admissible of the ones I've argued.

Rule 10(b)(1) of the N. C. Rules of Appellate Procedure states that:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

Where, as here, a defendant withdraws challenged questions, we do not find that the court's ruling on those questions has been preserved for review. The defendant abandoned his position at trial and cannot now resume the battle in this forum.

[13] The defendant next assigns as error the trial court's decision permitting the State to cross-examine the defendant regarding the contents of his "Affidavit of Indigency" filed in conjunction with his motion that counsel be appointed for this trial. The trial court conducted a *voir dire* hearing on the matter and concluded:

> I'll allow a limited inquiry. I'll allow Mr. Kelly to ask him whether or not he signed an Affidavit on—under oath, on whatever date that was, that his—that the total value of his assets was Three Thousand, nine hundred Dollars, or whatever it says, and whether or not that statement was true.
>
> I will not allow you to go vehicle by vehicle, piece of property by piece of property. That's all I will do, now.
>
> . . . .
>
> . . . Just ask him—I'll allow you ask him whether or not he made a false statement to the Court.

> The Jury has heard right much about this man's property. The [jurors] in their own mind right now should be able to evaluate, based upon the testimony thus far, whether or not his total assets do not exceed Thirty-nine hundred Dollars. So, that's my ruling.

The defendant excepted to this ruling.

The defendant contends this ruling was error for three reasons. First, the evidence the prosecution sought to elicit had no "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). Second, the evidence was a blatant attempt by the prosecution to mislead the jury into an inference that the defendant was guilty of misdeeds without any proper basis for that inference. Finally, the defendant contends the trial court made no effort to perform a Rule 403 balancing test to ascertain the prejudicial impact of this evidence.

North Carolina Rules of Evidence, Rule 611 states that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." N.C.G.S. § 8C-1, Rule 611 (1992). We addressed this rule in *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990), noting that "although cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court." *Id.* at 290, 389 S.E.2d at 61; *see State v. Hosey*, 318 N.C. 330, 348 S.E.2d 805 (1986). The trial court in this case conducted a *voir dire* hearing, evaluated the evidence, limited the scope of the line of questioning, and then exercised its discretion in admitting a limited portion of the evidence.

With regard to the admissibility of the evidence permitted as the result of the trial court's ruling, Rule 608(b) provides in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning his character for truthfulness or untruthfulness . . . .

N.C.G.S. § 8C-1, Rule 608(b) (1992). In *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), we concluded

that the "types of conduct falling into this category include . . . 'making false statements on affidavits.' " *Id.* at 382, 428 S.E.2d at 135 (quoting *State v. Morgan*, 315 N.C. 626, 635, 340 S.E.2d 84, 90 (1986) (citation omitted)). We hold that the limited nature of the questions permitted by the trial court fall within the parameters of Rule 608(b).

The defendant's final question regarding the balancing test found in Rule 403 is without merit. The trial court obviously weighed the risk of prejudice against the information already known to the jury and concluded that the probative value of the limited questions outweighed the risk of prejudice to the defendant. We find no error.

[14] The defendant next asserts that the trial court erred in permitting the State's rebuttal witness, Brenda Kirby, to testify on redirect that she had been threatened by her boyfriend, Daniel Hill, should she testify in this trial. Daniel Hill was a former employee of the defendant. Brenda Kirby testified that she specifically remembered Hill being home on the day of the murder. She indicated that Hill never went to work for the defendant that day. On cross-examination, her testimony changed radically and she again reversed course on redirect. After the change during redirect, the following exchange occurred:

> Q. Did he [Hill] threaten you in any way today?
>
> A. Not really, no. He was just telling me—told me something. No, not really.
>
> Q. Did he say he was going to kick your butt for testifying—

After defense counsel's objections were overruled by the court, Ms. Kirby answered, "[y]eah, he was just playing, I reckon. I don't know. That's all. He was just talking to me." On recross, Ms. Kirby denied that Hill threatened her. Finally, on further redirect, Ms. Hill acknowledged that Hill had assaulted her "about two or three times" and maybe more.

The defendant argues that this testimony could be construed by the jury as an attempt by the defendant to intimidate a witness. The authority cited in support of his argument rests on cases in which the defendant directly threatened a witness. These cases concluded that evidence of such threats may be construed as an awareness of guilt on the part of the defendant. *State v. Hicks*, 333 N.C. 467, 428 S.E.2d 167 (1993); *State v. Minton*, 234 N.C. 716, 68 S.E.2d 844 (1952).

We have addressed attempts by third parties to intimidate witnesses in previous cases. In *Minton*, the parents of the defendant attempted to bribe a witness. We held:

> The [trial] court rightly ruled that the witness' explanation was competent for the consideration of the jury on the question of her veracity. After the opposing party has sought to impeach a witness by showing that he made statements out of court inconsistent with or contradictory of his testimony at the trial, the witness thus assailed is entitled to support his credibility by explaining the circumstances under which the statements were made and his reasons for making them. This is true even though evidence otherwise inadmissible is thereby introduced. In applying this rule, courts have held that it may be shown that the witness had been advised or bribed or intimidated by third persons to make the inconsistent or contradictory statements.

State v. Minton, 234 N.C. at 724-25, 68 S.E.2d at 850 (citations omitted). We find this to be the situation in the instant case. The witness presented an extremely flexible story that changed with each phase of the examination. Once the witness' credibility was placed at issue, the State properly sought to provide an explanation for the changes. The defendant has not shown that he was prejudiced. We find no error.

[15] In conjunction with the prior assignment of error, the defendant separately assigns as error the trial court's decision permitting Ms. Kirby to testify that Hill assaulted her on several occasions in the past. The defendant notes correctly that we have held

> that the prosecutor's cross-examination of defendant in this case concerning an alleged specific instance of misconduct, i.e., two assaults by pointing a gun at two people during the same incident, was improper under Rule 608(b) because extrinsic instances of assaultive behavior, standing alone, are not in any way probative of the witness' character for truthfulness or untruthfulness.

State v. Morgan, 315 N.C. 626, 635, 340 S.E.2d 84, 90. The instant case is clearly distinguishable. In the instant case, the prior conduct in question was not that of the witness, but instead impacted on the witness. Where, as here, the witness has been the subject of past acts of violence and thereby has reason to fear another individual, those past acts are relevant to the issue of the witness' character for truthfulness or untruthfulness. Further, we agree with the State that the defendant

opened the door for this line of questioning by eliciting answers from the witness indicating a close and loving relationship between Kirby and Hill. The trial court did not err in permitting limited evidence concerning past assaults by Daniel Hill upon the witness, Brenda Kirby.

[16] The defendant's next assignment of error involves the instruction given before the reading into evidence of the prior testimony of two elderly defense witnesses. Mr. and Mrs. Roy Squires testified on the defendant's behalf at the first trial in this matter. Due to their advanced age, the parties agreed by stipulation that the couple's testimony from the first trial would be read to the jury in its entirety. Prior to the admission of the testimony, the trial court instructed the jury:

> COURT: Ladies and Gentlemen, the next two witnesses will testify now by virtue of their previous transcribed testimony. Mr. and Mrs. Roy Squires are both elderly and they both have some health problems. They previously testified in an earlier stage of this proceeding, which occurred in Columbus County, in late July or early August of this year. Their testimony was taken down by the Court Reporter, just like everybody else's has been this week, and it has been typed up and so rather than have them come back and testify in your presence, the parties have agreed that you will be permitted to simply hear their previous testimony, given under oath, in Court, in this matter. *You'll treat this testimony as any other witness that you hear. You will treat this testimony no differently than any other witness that's been sworn and testified in person here in this Courtroom.*

(Emphasis added.) The defendant did not object to this language at trial. This assignment of error is therefore subject to the plain error standard of review.

The defendant contends that the vice in this instruction is that there was accomplice testimony and testimony by interested witnesses whose testimony the court instructed the jury to scrutinize. The defendant argues that by telling the jury to treat the testimony of Mr. and Mrs. Squires as they treated the testimony of other witnesses, the jurors were instructed to scrutinize this testimony.

We believe the jurors would have no difficulty understanding from the court's instruction that they were to treat the Squireses' testimony as they would the testimony of ordinary witnesses, with

scrutiny reserved for those witnesses about whom the court instructed.

The State asserts and we agree that the instruction benefitted the defendant. In the absence of Mr. and Mrs. Squires, the jury would have a tendency to give less weight to this testimony and the instruction served to inform the jury before it heard the testimony that this testimony was equally as important as any other evidence the jury heard. We find no error in the instruction given by the trial court.

[17] The defendant next assigns as error a comment made by the trial court in the presence of the jury. In reaction to a delay caused by the temporary absence of a defense witness, the following colloquy occurred:

> MR. GORE: Where is he?
>
> MR. GHISALBERTI: He's outside, going to the bathroom.
>
> COURT: The witnesses that you know you are going to call, would you just tell them to come on in and have a seat in the Courtroom so we don't have to go looking for them.
>
> MR. GHISALBERTI: Your Honor, to the best of my knowledge, he's got a bladder problem.
>
> COURT: Okay. Well, it seems like everybody's got a—have to stop and wait for them.
>
> Mr. Lee [Defense Counsel]: So do I, Judge.

The defendant contends the comment by Mr. Lee was intended to soften the impact of the trial court's comments. The defendant did not object to the comments at trial.

The defendant contends the comments constituted a violation of N.C.G.S. § 15A-1222 inasmuch as the comments were an improper expression of judicial opinion. According to the defendant, the trial court's statement "made it clear to the jury that he favored the State's witnesses over defense witnesses in this case."

We have long held that:

> It is fundamental to our system of justice that each and every person charged with a crime be afforded the opportunity to be tried "before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951). As the standard-bearer of impartiality the

> trial judge must not express any opinion as to the weight to be given to or credibility of any competent evidence presented before the jury. *E.g.*, N.C. Gen. Stat. § 15A-1222 (1978); *State v. Brady*, 299 N.C. 547, 264 S.E.2d 66 (1980); *State v. Guffey*, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

State v. Harris, 308 N.C. 159, 167, 301 S.E.2d 91, 97 (1983). In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized. *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985); *State v. Allen*, 283 N.C. 354, 196 S.E.2d 256 (1973); *State v. Holden*, 280 N.C. 426, 185 S.E.2d 889 (1972). "[U]nless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950).

In the instant case, the comments of the trial judge were less than exemplary, though it should be noted that the judge edited his own comments. Much as in *State v. Agnew*, 294 N.C. 382, 241 S.E.2d 684, *cert. denied*, 439 U.S. 830, 58 L. Ed. 2d 124 (1978), the statements in this instance reflected "efforts on the part of the trial judge to maintain progress and proper decorum in what was evidently a prolonged and tedious trial." *Id.* at 395, 241 S.E.2d at 692. The defendant has failed to show prejudice as a result of these comments. Furthermore, the trial court instructed the jury during the final jury charge, that:

> The law, as indeed it should, requires the presiding judge to be entirely impartial. And therefore, you are not to draw any inference from any ruling that I have made, or any inflection in my voice or expression on my face, or any question that I may have asked a witness, or anything else that I have said or done during the course of this trial, that I have an opinion or have intimated an opinion as to whether any part of the evidence should or should not be believed, as to whether any fact has or has not been proven, or as to what your findings ought to be. Again I say, it is your exclusive province to find the true facts of this case and to render a verdict reflecting the truth as you find it. It's my job to preside over this case, to make sure that both sides get a fair trial, and explain the law to you and submit the case to you.

After examining the transcript and considering the totality of the circumstances surrounding the court's comments, we do not find that the comments rise to the level of error, and certainly, the comments do not constitute plain error.

[18] In his next contention, the defendant assigns as error the trial court's denial of his motions to dismiss the conspiracy charge due to insufficient evidence. The defendant moved for dismissal at the close of the State's evidence, at the close of all evidence and after the verdict was announced, but before the entry of judgment.

It is well-settled law in this state that:

> In determining whether the evidence is sufficient to go to the jury, the trial court is to ascertain whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the evidence is sufficient, as a matter of law, to go to the jury. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The trial court is to determine whether the evidence allows a "reasonable inference" to be drawn as to the defendant's guilt.

State v. Woods, 307 N.C. 213, 217, 297 S.E.2d 574, 577 (1982) (citations omitted). The essential elements of the charge of conspiracy to commit murder are: (1) an agreement between two or more people; (2) to do an unlawful act, specifically, to murder another. *Id.* at 219, 297 S.E.2d at 578.

The defendant in the instant case contends that there was no evidence before the court that the defendant and McMillian ever had a "meeting of the minds." *State v. Christopher*, 307 N.C. 645, 300 S.E.2d 381 (1983); *State v. Gallimore*, 272 N.C. 528, 158 S.E.2d 505 (1968). A "conspiracy may be shown by circumstantial evidence." *State v. Gary*, 78 N.C. App. 29, 35, 337 S.E.2d 70, 74 (1985), *disc. rev. denied*, 316 N.C. 197, 341 S.E.2d 586 (1986). "Ordinarily the existence of a conspiracy is a jury question." *Id.* The testimony of Ray McMillian indicated that the defendant proposed the conspiracy, and by his actions, McMillian agreed to the proposed course of action. There was ample direct and circumstantial evidence provided through the testimony of Ray McMillian, through the corroborating testimony of others, and through the physical evidence presented at trial from which the jury could have concluded that there was a "meeting of the minds" between McMillian and the defendant as to the murder of Cecil Edwards.

[19] The defendant also contends that under Wharton's Rule, he cannot be found guilty of conspiracy to commit murder. Wharton's Rule is a rule of construction used to determine whether a legislative body intended to allow the prosecution of a person for conspiracy to commit a crime as well as the prosecution for commission of the crime. If the crime charged requires more than one person to commit it and the immediate consequences of the crime rest on the parties who commit it, rather than on society at large, Wharton's Rule has been used by some jurisdictions. Adultery, incest, bigamy and dueling are crimes which might implicate the rule. *Iannelli v. United States*, 420 U.S. 770, 43 L. Ed. 2d 616 (1975). We have not applied the rule in North Carolina. *State v. Branch*, 288 N.C. 514, 220 S.E.2d 495 (1975), *cert. denied*, 433 U.S. 907, 53 L. Ed. 2d 1091 (1977), *overruled on other grounds by State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984).

If Wharton's Rule were a part of the law of this state, it would have no application in this case. Murder, the crime for which the defendant was tried, does not require more than one person to commit it, and the immediate consequences of the crime do not fall only on the persons who commit it.

This assignment of error is overruled.

[20] The defendant next assigns error to the denial of his motion to dismiss the charge of first-degree murder. The defendant was tried as an accessory before the fact after the principal had pled guilty to second-degree murder. He contends he could not be tried for any greater offense than the offense to which the principal pled guilty, which was second-degree murder.

In *State v. Arnold*, 329 N.C. 128, 404 S.E.2d 822 (1991), we held it was reversible error to submit second-degree murder to the jury in the case of an accessory before the fact to murder. We held that only first-degree murder should have been submitted. *Arnold* holds that an accessory before the fact may be tried for first-degree murder although the principal has pled guilty to second-degree murder.

This assignment of error is overruled.

[21] The defendant next assigns error to the court's failure to submit second-degree murder as a possible verdict. The State's evidence tended to establish each and every element of first-degree murder, including premeditation and deliberation. The defendant denied any involvement in the crime and denied knowing McMillian. If the jury believed the State's evidence, it had to find the defendant guilty of

first-degree murder. If it believed the defendant's evidence, it would have had to find him not guilty. It thus would have been error to have submitted second-degree murder. *State v. Conner*, 335 N.C. 618, 440 S.E.2d 826 (1994); *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983), *modified on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986) (adopting Mitchell, J., concurrence as correct rule).

The defendant contends that there was evidence that he consumed alcoholic beverages during the time before the killing, which would support a finding that he could not have premeditated or deliberated about the killing. The evidence of this consumption of alcoholic beverages did not rise to such a level that the jury could find from it that the defendant was incapable of premeditating or deliberating the murder. We shall discuss later in this opinion how evidence of the consumption of alcohol is treated.

This assigment of error is overruled.

[22] The defendant next raises as error ten categories of comments made by the prosecution during closing arguments. Recently, we held:

> Trial counsel are granted wide latitude in the scope of jury argument, and control of closing arguments is in the discretion of the trial court. *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987); *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). Further, for an inappropriate prosecutorial comment to justify a new trial, it "must be sufficiently grave that it is prejudicial error." *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977).

State v. Soyars, 332 N.C. 47, 60, 418 S.E.2d 480, 487-88 (1992). The defendant did not object to any of the challenged comments at trial. "In deciding whether the trial court improperly failed to intervene *ex mero motu* to correct an allegedly improper argument of counsel at final argument, our review is limited to discerning whether the statements were so grossly improper that the trial judge abused his discretion in failing to intervene." *State v. Holder*, 331 N.C. 462, 489, 418 S.E.2d 197, 212 (1992) (citing *State v. Hamlet*, 312 N.C. 162, 172, 321 S.E.2d 837, 844 (1984)).

The defendant first assigns as error the following arguments by the prosecutor:

> If I had started before lunch *I wouldn't have been able to see you because of the smoke, and the smog, and the dust, and the dirt,*

cast up by the defense counsel. There would have been a cloud between me and you. I wouldn't have been able to see you. So we've had an hour and fifteen minutes for that cloud to dissipate itself and now I'm able to talk to you in an atmosphere free of those contaminates [sic].

. . . .

Absent the key, the whole scenario constructed by defense counsel and constructed artfully, I must say, falls apart. The key had no significance. *It is a red herring that they want you to chase. They want you to not see the truth. That's what the fog, the smoke, the dirt, that's what that was all cast out for, to obscure the truth.*

. . . .

Ray McMillian in describing the vehicles that he saw, said there was a Ford, a white Ford truck up there. So, *all these little smoke screens they've been throwing up.* Listen to them. Look at them. That's not really a smoke screen to say that those two men saw a white truck and, therefore, Ray McMillian couldn't have had Charlie Mac's [sic] truck, because the Defendant himself testified that he had a truck just like Charlie except that he had a dump bed—Charlie's had a dump bed and his didn't.

. . . .

This thing about the key. You know, your job here is to find the truth. This is sorta [sic] like a forest, this courtroom. Forest. And somewhere in that forest is the truth and your job is to find that truth. *The defense wants you chasing rabbits, when you ought to be hunting bear. And the bear is the truth. But they want you chasing rabbits. And the key's a rabbit.*

But I suggest to you, even [if] Ray McMillian had the key, and even if he got it from Babe Godwin, and even if he got it—and even if Babe Godwin got it from Mrs. Edwards, which there is absolutely, positively, no evidence that that key exited [sic] or that he got one. But even if he did, that doesn't exclude—that doesn't exclude that man from being a part of Babe Godwin getting a key from her. That doesn't—that doesn't exclude that. *But I don't want you chasing that rabbit, because I can explain that rabbit away, but it's not worth chasing,* because there's no evidence of it. And what you have to decide has to be based on your

> reason and common sense. It cannot be based on some fanciful, manufactured, theory by the defense. It's got to be based on reason and common sense and there's nothing there.

(Emphasis added.) While the defendant limits his assignments of error to the portions highlighted above, we have long held that arguments are to be evaluated in context. *State v. Shank*, 327 N.C. 405, 394 S.E.2d 811 (1990); *State v. Langford*, 319 N.C. 340, 354 S.E.2d 523 (1987); *State v. Arnold*, 314 N.C. 301, 333 S.E.2d 34 (1985). Each of the references which the defendant assigns as error refers to the defendant's emphasis upon his contention that Ray McMillian entered the victim's house by use of a key allegedly provided by the victim's estranged wife. While rich in hyperbole, we find no error in these arguments of the prosecution and certainly no gross impropriety requiring the trial court to intervene *ex mero motu*.

[23] The defendant next contends the prosecutor's arguments seeking to invoke sympathy for the victim were grossly improper and included facts outside the record. The prosecutor argued:

> Have you ever thought for a moment to yourself what it feels like when you—when Mr.—if you happened to be *this poor unfortunate individual who was talking on the phone and you come to a—an assassin at your door and you're shot full in the chest with a .45 caliber slug*, is it unusual for your body to be found ten feet away from the door that you were approaching. Is there anything unusual about that, seven feet, eight feet, whatever it was.

(Emphasis added.) The State argues and we agree that reading this passage in context indicates the intent of the prosecutor was to argue that the position of the body was explained by the circumstances in evidence and did not support the defense's theory of the case. We do not view this passage as improperly suggesting jurors place themselves in the position of the victim, nor does it seek to elicit sympathy for the victim. This argument is neither improper nor grossly improper.

[24] The defendant next asserts that the prosecutor attempted improperly to entice certain jurors into identifying with certain prosecution witnesses. The challenged argument reads:

> Now, as to each one of these people, I argue to you that they were believable and should be, in spite of the fact that they had some interest in the outcome. In spite of the fact that he might

have to be a law enforcement officer, or related to the Defendant. I've told you that you should observe and draw your own conclusions whether they were telling the truth or not.

Now, let's talk about another class of witnesses altogether. Another class of witnesses altogether. People like you, sir. People like you, ma'am. People like you. People like you ma'am. Just people in the community where this man lives. Just them and nobody else, with no axe to grind. To fill in the details, the defense calls it. Details. These details are killers. They're small but they're lethal.

. . . .

Now, these later people that I've been talking to you about, as I pointed out to you earlier, they're people just like you. They're just people doing their duty as they see it. They had no axe to grind against this man by saying what they said from this witness stand.

(Emphasis added.) Even though the prosecutor did single out certain jurors at times, he spoke to the jury collectively in making his point concerning the distinction between interested witnesses and noninterested witnesses who corroborated McMillian's account of events. *See State v. McNeil*, 324 N.C. 33, 51-52, 375 S.E.2d 909, 920 (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). As we held in *McNeil*, this type of argument is not grossly improper.

[25] The defendant next contends the prosecutor improperly invoked sympathy for the victim's family by arguing:

Without this—this man, this behind the scenes manipulator, there would have been no murder of Cecil Edwards. There would have been none. And his grandchildren would be home playing with him now but for this man over here (indicating).

We have addressed similar arguments on numerous occasions. In *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, 502 U.S. 876, 116 L. Ed. 2d 174, *reh'g denied*, 502 U.S. 1001, 116 L. Ed. 2d 648 (1991), we faced an analogous situation and determined that "[t]he prosecutor's brief reference to the victims and their families did not entitle the defendant

to a new trial." *Id.* at 106, 381 S.E.2d at 623-24 (citing *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)). We find the same to be true in the instant case.

[26] The defendant next contends that the prosecution improperly argued that the jury served as the conscience of the community. The defendant cites the following argument:

> *Ladies, Gentlemen, when you hear of such acts, you say, gee, somebody ought to do something about that. I want you to look around. You're that somebody that everybody else talks about. . . .*
>
> . . . .
>
> So, folks, you might as well look around. There is no mythical somebody hiding in this Courtroom. You are the somebody. You, the buck, as bad as you hate it, stops right here with you twelve people.
>
> *Today you are the moral conscious* [sic] *of that community. It's up to you to see that justice is done.*

(Emphasis added.) We recently addressed this issue and held:

> In *Scott*, this Court held that arguments designed to convince the jury to convict a defendant due to public sentiment against crime were improper. [*State v. Scott*, 314 N.C. 309, 312, 333 S.E.2d 296, 298 (1985).] We have, however, held that a reminder to the jury that for purposes of the present trial, it acts as the voice and conscience of the community is not improper. In the case at hand, the prosecutor explained to the jurors that they were the voice and conscience of the community. In addition, the prosecutor told the jurors that it was their responsibility to make a decision by reminding the jurors: "It's your verdict. It's how you look at it." Thus, the State did not tell the jurors to decide defendant's punishment based on community sentiment, but rather told the jurors that they were to act as the voice of the community.

State v. Robinson, 336 N.C. 78, 128, 443 S.E.2d 306, 331 (1994) (citation omitted), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995); *see State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480. We hold that the argument in the instant case is analogous to the argument cited in *Robinson*. We find no reason to overrule that decision and, therefore, find no error.

[27] The defendant next assigns as error arguments by the prosecutor describing the defendant in derogatory terms. These passages included the following:

> I'll admit that Ray McMillian was an evil man, Members of the Jury, but there are degrees of evil. There are degrees of it. What I'm talking to you today, and whom I'm pointing out over here (indicating), he's not. George Larrimore is not garden variety, every day type of evil. That's what—that's what Ray McMillian is. *This man is the ultimate. He is the quintessential evil* without which, without which, people like Danny Ray McMillian can [sic] function. Without the string pulled. With the puppet master over here (indicating). The manipulator. Without people like him you and I would not have to worry about the Danny Ray McMillian's [sic] of this world. It's the smart one's [sic] like George Larrimore who stay in the background and who pull the strings, and who operate in that sneaky fashion. They're the people that you have to—they're the people that you have to worry about.
>
> . . . .
>
> So, there he sits waiting for your judgment. There Mr. Larrimore sits. He is *one of the most dangerous men in this State*, I submit to you.

(Emphasis added.) We do not find that the argument reaches the level of gross impropriety requiring the trial court to intervene *ex mero motu*. *See State v. Pinch*, 306 N.C. 1, 18, 292 S.E.2d 203, 218, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *and by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994); *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979).

[28] The defendant next contends that the prosecutor improperly argued facts not in evidence in arguing

> [t]hat the murder weapon, that which can only be classed as the murder weapon, was seen by him [Bobby Carl Hinson], in possession of the Defendant, hours before Mr. Cecil Edwards was killed.

The State notes that Hinson testified at trial that he saw the defendant in possession of and handling a pistol matching the description of the murder weapon early on the day of the murder. Other witnesses

corroborated this account during the rebuttal phase of the State's case. We agree with the State's position that the description provided by Hinson and others was sufficient to support the reasonable inference that the weapon seen in the defendant's possession was the same weapon that the defendant later provided Ray McMillian for the purpose of committing the murder. As we have held numerous times, counsel "may argue the law and the facts in evidence and all reasonable inferences drawn from them." *State v. Kirkley*, 308 N.C. 196, 212, 302 S.E.2d 144, 153 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988); see *State v. Holder*, 331 N.C. 462, 418 S.E.2d 197. We find no error in the prosecutor's argument regarding Mr. Hinson's testimony and the murder weapon.

[29] The defendant next assigns as error the following portion of the prosecutor's closing argument:

> Sterling Cartrette, a sworn law enforcement officer, is a witness to whom you should have given the greatest attention, and who has the greatest degree of believability.

The defendant contends that as a rebuttal witness, Detective Cartrette testified in a manner inconsistent with his testimony at the earlier trial and recanted some earlier observations. The defendant contends the argument by the prosecutor invaded the province of the jury regarding assessing the credibility of witnesses.

The State argues that the portion of the argument cited by the defendant is taken out of context and contends we should also consider the preceding paragraph, in which the prosecutor argued:

> Do you really believe that Sterling Cartrette made up—this sworn law enforcement officer, made up what he told you? Do you believe that? That he saw this particular truck which he recognized as belonging to Mr. McPherson at the intersection of 1004 and 410 on the night of the murder. That he saw that truck. That he knows that truck. And that it was Mr. McPherson's truck that he saw with his wife when he was off duty. Do you think that that man made that up? Sterling Cartrette. Do you think he fabricated the fact that he saw the same truck a few days later and observed shards of glass inside that truck on the floor board and in the seat area? Do you think he fabricated all of that for your benefit? Sterling Cartrette, a sworn officer of the law. But defense counsel says, since he is a sworn law enforcement officer that he's biased. He's biased. You shouldn't believe him. He picks out this man over

> here to pick on, George Larrimore. He wants to construct the scenario around George Larrimore with all the fifty thousand people in Columbus County to nail with this.

After reviewing the defendant's closing arguments, we conclude that the prosecutor in this instance was responding to assertions made by the defendant. The defendant's counsel clearly questioned the credibility of Detective Cartrette. Numerous times in the past, we have held that "counsel is allowed to respond to arguments made by defense counsel and restore the credibility of a witness who has been attacked in defendant's closing argument." *State v. Perdue*, 320 N.C. 51, 62, 357 S.E.2d 345, 352 (1987) (citing *State v. McCall*, 289 N.C. 512, 223 S.E.2d 303, *sentence vacated in part on other grounds*, 429 U.S. 912, 50 L. Ed. 2d 278 (1976)); *see State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). We find no error in this argument by the prosecutor.

[30] The defendant contends the trial court also erred in permitting the prosecutor to argue that:

> There is not a shred of evidence, even if you assume that what Mr. Butler says is so, what kind of key this was. House key? Car key? Safe deposit box key? What kind of a key?
>
> Secondly, this man, Mr. Gerald Butler, is a convicted forger. Now, a convicted female abuser and assaulter is one thing. A convicted forger is quite another. A convicted forger is a type of thief, but he's not a type of theft [sic] that comes straight up to you face to face and takes what you got. He's the type of person that takes your money by stealth, by the faking of paper, checks, and things of that nature, in order to misrepresent himself and get money from you that way. That is plain garden variety theft, but it is a particular kind of theft. It is secret and sneaky.
>
> *The testimony of such a person as Gerald Butler, a convicted forger, is not worthy of your consideration let alone belief.*

(Emphasis added.) The defendant assigns as error the italicized portion of this argument. As we note throughout this discussion, the defendant did not object to this argument at trial, so the assignment of error is subject to the gross impropriety standard. After a thorough review of the argument and the record, we do not find this argument to be grossly improper.

[31] The defendant lastly assigns error to the portion of the prosecutor's argument dealing with the testimony of Jeanette McMillian. The prosecutor argued:

> Jeanette McMillian[] falls into the same category. She's the wife of this man and you got to be the judge of her creditability [sic], because you heard her testify. You heard her testify. You got to determine. You got to determine whether or not—what you heard had the ring of truth to it or whether it didn't. It is not an argument simply because she's the man's wife, or was the man's wife at that time, if she is therefore lying. That is not so. That does not make her an unreliable witness. You have a right to judge her creditability [sic] by what you saw, and what you heard, and whether you believe that, or whether you don't. And if you do believe her, in spite of the fact that she was his wife at the time, then she's entitled to the same weight to be given any disinterested witness.

The language utilized by the prosecutor here echoes the instruction on interested witnesses. The prosecutor repeatedly encourages the jury to weigh the witness' credibility based upon the jurors' observations. Only if the jury determines this witness was credible does the prosecutor contend that the weight of that testimony should be the same as other credible evidence. We find this to be a correct statement of the law.

Examining the totality of the arguments to which the defendant assigns error, we find that the trial court did not abuse its discretion in handling these arguments. The arguments do not rise to the level of gross impropriety individually or collectively. This assignment of error is overruled.

[32] The defendant next assigns error to the sustaining of an objection to part of the defendant's closing argument. During the defendant's closing argument, the following events occurred:

> [MR. GHISALBERTI:] Ms. Teresa Edwards, and I don't have any reason not to believe her. I do. And again, our hearts go out to her for the horror she had to endure. She said that twice on a Friday, before the killing, she saw Babe and Ray McMillian—
>
> MR. GORE: Objection.
>
> MR. GHISALBERTI:—riding around with a big gun.
>
> COURT: Sustained. Sustained. Only argue facts in evidence.

MR. GHISALBERTI: Teresa Edwards—Teresa Sellers, I'm sorry.

COURT: Sustained. Only argue facts in evidence.

The defendant asserts his argument was a reasonable inference based on Ms. Sellers' testimony on cross-examination that she had seen Babe Godwin and a black male riding around in Godwin's truck and carrying a gun. As the State correctly notes, Ms. Sellers was unable to identify the black male she saw with Godwin. The defendant's attorney should not have referred to the black male as Ray McMillian.

The defendant also challenges the trial court's ruling on the grounds that the phrasing of the court's admonition constituted an impermissible expression of judicial opinion. We do not agree. The court merely asserted a correct statement of the evidence.

The defendant's last contention under this assignment of error is that he was denied effective assistance of counsel. The defendant cites no authority and makes no argument for this contention and we deem the issue abandoned.

This assignment of error is overruled.

[33] The defendant next assigns error to a portion of the charge in which the jurors were told that if they found one or more witnesses were interested in the outcome, they could take this interest into account, and if after doing this they believed such testimony in whole or in part, they would treat such testimony the same as any other believable evidence. We have approved similar instructions in *State v. Martin*, 294 N.C. 253, 240 S.E.2d 415, and *State v. Griffin*, 280 N.C. 142, 185 S.E.2d 149 (1971). By the same token, it was not error to instruct the jurors that there was evidence that Ray McMillian was an accomplice and would be considered an interested witness whose testimony they would consider with the greatest care and caution, but if after doing so they believed his testimony in whole or in part, they would treat what they believe as any other believable testimony in the case. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981).

[34] The defendant argues next under this assignment of error that the court charged the jury in such a way that it weakened the testimony of two of his principal witnesses. Mr. and Mrs. Roy Squires testified at the first trial to matters that gave the defendant an alibi. They were in poor health and it would have been difficult for them to have attended the second trial. It was agreed that their testimony at the first trial could be read into evidence at the second trial. When the

transcript of the prior testimony was read to the jurors, the court instructed them that they would consider this testimony as if they were hearing it from Mr. and Mrs. Squires in the courtroom.

In the charge to the jury, the court instructed that the evidence showed that numerous witnesses had made statements in prior proceedings in this case or had made statements to other persons. The court told the jury not to consider such statements as evidence of the truth of what was said, but whether it corroborated or impeached other witnesses.

The defendant says that by telling the jury not to consider such statements to prove the truth of what was said, the court instructed the jury not to consider the testimony of Mr. and Mrs. Squires. We believe the jury had no trouble discerning that this part of the charge did not apply to Mr. and Mrs. Squires' testimony. Mr. and Mrs. Squires were not mentioned in this part of the charge. The court instructed the jury as to how it was to consider the testimony of Mr. and Mrs. Squires when it was introduced. We can assume the jury followed this instruction. The instruction applied only to prior testimony which supported or contradicted evidence at trial. This instruction could not apply to Mr. and Mrs. Squires' testimony.

This assignment of error is overruled.

[35] The defendant next assigns as error the trial court's failure to give an instruction on voluntary intoxication for either the defendant or Ray McMillian. The defendant contends that evidence indicated that both men had been drinking heavily for a prolonged period preceding the agreement and that McMillian continued drinking excessively up to the time of the murder. Based on this evidence, neither man was capable of forming the specific intent necessary as an element of first-degree murder. The defendant acknowledges that his trial counsel did not seek this instruction, but contends the trial court should have given the instruction based on the evidence before the court and committed plain error by not doing so.

We recently addressed this issue in *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 895 (1995), where we held:

> It is "well established that an instruction on voluntary intoxication is not required in every case in which a defendant claims that he killed a person after consuming intoxicating beverages or controlled substances." *State v. Baldwin*, 330 N.C. 446, 462, 412

S.E.2d 31, 41 (1992). This Court has repeatedly held that in order to be entitled to an instruction on voluntary intoxication, the defendant must produce evidence that would support a conclusion by a judge that defendant was so intoxicated that he could not form a deliberated and premeditated intent to kill. *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988); *see also State v. Shoemaker*, 334 N.C. 252, 272, 432 S.E.2d 314, 324 (1993); *State v. Vaughn*, 324 N.C. 301, 308, 377 S.E.2d 738, 741 (1989). "The evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *State v. Medley*, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978) (citations omitted); *see also State v. McQueen*, 324 N.C. 118, 141, 377 S.E.2d 38, 51 (1989); *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987). Evidence of mere intoxication is not enough to justify the instruction. *State v. Mash*, 323 N.C. at 346, 372 S.E.2d at 536.

State v. Skipper, 337 N.C. at 36-37, 446 S.E.2d at 271.

We do not find that the defendant has made the requisite showing that either man was "utterly incapable of forming" the requisite intent. *Id.* at 36, 446 S.E.2d at 271. The trial court did not err in not giving an instruction on voluntary intoxication.

In the same argument, the defendant also contends the trial court committed constitutional error in its instruction on guilt under the theory of accessory before the fact. The defendant contends the instruction violated his due process rights. The defendant cites no authority in support of this contention. We addressed this issue in *Skipper* and held against the defendant's position. *Id.* at 37, 446 S.E.2d at 271-72. We are not persuaded to alter that stance.

This assignment of error is overruled.

[36] The defendant next contends that the trial court erred in failing to charge the jury in its mandate that either the defendant or Ray McMillian must possess a specific intent to kill in order for the jury to convict the defendant of first-degree murder under the theory of accessory before the fact.

Reviewing the complete instructions given by the trial court, we note that the court correctly charged the jury regarding the elements of first-degree murder as they applied to Ray McMillian, specifically including the requirement that there be proof beyond a reasonable

doubt that he possessed the specific intent to kill Cecil Edwards. The court also correctly set out the necessary elements for conviction based upon the theory of being an accessory before the fact to first-degree murder. *See State v. Woods*, 307 N.C. 213, 218, 297 S.E.2d 574, 577.

The defendant challenges the mandate of the court in which the trial court stated:

> So I instruct you that if you find from the evidence beyond a reasonable doubt that on or about the 17th day of August 1991, Daniel Ray McMillian unlawfully killed Cecil Edwards with a firearm, and that he acted with malice, with *premeditation and with deliberation*, and that George Larrimore knowingly counseled, aided, and encouraged Daniel Ray McMillian to commit first-degree murder of Cecil Edwards, by providing a handgun and ammunition to Mr. McMillian to be used to kill Cecil Edwards; and by providing information to Mr. McMillian about the location of the residence of Cecil Edwards; and by providing a vehicle to Mr. McMillian to be driven by McMillian to carry out the first-degree murder of Cecil Edwards; and by paying Mr. McMillian approximately nine hundred dollars to commit a first-degree murder of Cecil Edwards.

This Court has held that "[a] specific intent to kill is a necessary constituent of the elements of premeditation and deliberation, and therefore, proof of premeditation and deliberation is also proof of intent to kill." *State v. Thomas*, 332 N.C. 544, 560, 423 S.E.2d 75, 84 (1992) (citing *State v. Lowery*, 309 N.C. 763, 768, 309 S.E.2d 232, 237 (1983)). When the court charged, in its final mandate, that the jury had to be satisfied beyond a reasonable doubt that the killing was with premeditation and deliberation, it charged that the killing had to be intentional.

This assignment of error is overruled.

[37] The defendant contends the trial court committed plain error in submitting both first-degree murder and conspiracy to commit murder to the jury. The defendant refers this Court back to his earlier arguments on merger and cites no additional authority in support of this assignment of error. This assignment of error is overruled.

[38] The defendant next assigns as error the trial court's denial of a requested nonstatutory mitigating factor. The defendant asked the court to take into consideration the plea agreement and sentencing of

Ray McMillian in determining the appropriate sentence for the defendant with respect to the conspiracy conviction. The trial court denied the request by stating, "[t]he court does not find that to be a mitigating factor." The defendant contends this decision violated the principles of *Eddings v. Oklahoma*, 455 U.S. 104, 110, 71 L. Ed. 2d 1, 8 (1982), in which the United States Supreme Court held that in capital sentencing hearings, a jury must consider all mitigating circumstances. The defendant asserts that ruling applies, by analogy, to all criminal sentencers. He cites no authority for this position. The mitigating factor which the defendant wanted is a nonstatutory mitigating factor. We have held that finding such a factor is within the discretion of the sentencing judge. *State v. Spears*, 314 N.C. 319, 333 S.E.2d 242 (1985). The State makes the point that "McMillian's sentence was not a factor in mitigation of punishment for defendant's conspiracy conviction." We find no abuse of discretion.

This assignment of error is overruled.

[39] The defendant next argues that the trial court erred in finding two aggravating factors in this case. The two factors found were: (1) the defendant induced others to participate in the commission of the offense, and (2) the defendant occupied a position of leadership or dominance of other participants in the commission of the offense. The defendant relies upon the holding in *State v. SanMiguel*, 74 N.C. App. 276, 328 S.E.2d 326 (1985), in reasserting his argument that there was no evidence of a meeting of the minds between the defendant and McMillian and then carrying this argument to the conclusion that the trial court therefore impermissibly based the aggravating factors on conjecture.

We found sufficient evidence to support the conspiracy charge as well as the accessory charge earlier in this opinion and need not restate our conclusions in full at this point. There was ample evidence upon which the trial court could base its finding of these two factors.

The defendant continues his argument by contending that the trial court improperly relied upon the same evidence to support both aggravating factors. *See* N.C.G.S. § 15A-1340.4 (1988). The defendant contends the trial court's reliance upon evidence necessary to prove essential elements of the crimes in deciding on aggravating factors placed him "twice in jeopardy for the same offense by being subjected to multiple punishments for the same offense."

The State contends, and we agree, that there was ample independent evidence to support each of the factors. The evidence at trial indicated that McMillian did not know Cecil Edwards and had no inclination to kill anyone prior to the defendant's offer of payment for the crime. The defendant had the means and the motive to commit the murder and induced McMillian into carrying out the act. Likewise, there was ample evidence indicating that the defendant made the plan, provided the weapon and the transportation, trained McMillian in the use of the weapon, and finally, provided the money after the task was complete. Each of these events serves as evidence of a leadership role in the conspiracy.

The defendant cites the passage from *SanMiguel* in which the Court of Appeals held that "inducement to enter an agreement necessarily precedes the agreement itself." 74 N.C. App. at 281, 328 S.E.2d at 330. As the State notes in its brief, the inducement and leadership are wholly discrete events from the actual agreement constituting the conspiracy. *State v. Wilson*, 338 N.C. 244, 449 S.E.2d 391 (1994). The inducement preceded the agreement, while the leadership followed the agreement. We determined earlier in this opinion that there was sufficient evidence of agreement to justify submission of the conspiracy charge to the jury. While some evidence supporting each of the factors and the elements of the crime may overlap, discrete evidence exists to support each factor. *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993). We find no error in the trial court's determination regarding factors in aggravation of the conspiracy conviction and no merit in the defendant's double jeopardy claim.

[40] In his final assignment of error, the defendant contends the trial court erred in imposing a Class A life sentence rather than the appropriate Class B life sentence. The controlling statute, N.C.G.S. § 14-5.2, provides:

> All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony. However, if a person who heretofore would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, *and the jury finds* that his conviction was based solely on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime, he shall be guilty of a *Class B felony.*

N.C.G.S. § 14-5.2 (1993) (emphasis added). In the instant case, the trial court failed to submit the special question to the jury regarding the basis of its verdict. Therefore, there is no record as to whether the jury based its decision "solely on the uncorroborated testimony" of McMillian or considered the corroborating evidence presented at trial as well. This constitutes error on the part of the trial court.

The defendant cites *State v. Tucker*, 331 N.C. 12, 414 S.E.2d 548 (1992), as authority in support of a new trial. We do not agree. While the defendant in *Tucker* was awarded a new trial, on other grounds, this Court correctly noted that whether the defendant "is tried . . . for a Class A or a Class B felony, the maximum punishment he can receive is life imprisonment." *Id.* at 30, 414 S.E.2d at 558. N.C.G.S. § 14-1.1, the sentencing statute in effect at the time of the trial of this matter, indicates that both a Class A felony and a Class B felony require mandatory life sentences, the single distinction between the two being that a Class A felony is subject to capital punishment. In the instant case, as in *Tucker*, were we to send this matter back to the trial court for resentencing as a Class B felony, the outcome in terms of sentence would be no different. N.C.G.S. § 15A-1371(a1) provides that "[a] prisoner serving a term of life imprisonment with no minimum term is eligible for parole after serving 20 years." N.C.G.S. § 15A-1371(a1) (1988) (repealed 26 March 1994, effective for cases tried on or after 1 October 1994). No distinction is made between a Class A life sentence and a Class B life sentence either in sentencing or in the manner in which the Department of Correction handles an individual. Throughout the General Statutes regarding parole and other sentence reducing considerations, Class A and Class B are consistently grouped together, as opposed to Class C and lower felonies. *See also* Stevens H. Clarke, *Law of Sentencing, Probation, and Parole in North Carolina* 41-43 (1991).

For the aforementioned reasons, we do not find that the defendant has been prejudiced by the trial court's error. We note, however, that this holding is limited to cases tried on or before 1 October 1994, as the new sentencing guidelines effective that date create marked distinctions between Class A and Class B felonies.

NO ERROR.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JOHNNY CARL RUSH

No. 250A94

(Filed 5 May 1995)

1. **Evidence and Witnesses § 2567 (NCI4th)— first-degree murder—statements of defendant's spouse to 911 dispatcher—admissible**

There was no plain error in a first-degree murder prosecution in the admission of statements made by defendant's spouse to a 911 dispatcher on the night of the murder. The sole prohibition of N.C.G.S. § 8-57(b) is directed to compelled testimony and does not address out-of-court statements made by a spouse and introduced against a defendant spouse through a third party; moreover, defendant concedes that these statements were not confidential. Under the common law rule not covered by the statute, allowing the admission of nonconfidential, out-of-court statements made by a spouse and introduced against the defendant spouse for the State through a third party promotes the administration of justice without infringing on the confidence of the marital relationship.

Am Jur 2d, Witnesses §§ 242, 253-255.

2. **Evidence and Witnesses § 761 (NCI4th)— first-degree murder—statements by defendant's spouse to 911 dispatcher—weight of other evidence—not prejudicial**

There was no prejudice in a first-degree murder prosecution in the admission of statements by defendant's spouse to a 911 dispatcher where, assuming error, the evidence establishing premeditation and deliberation was overwhelming and it could not be said that absent these comments the jury would have reached a different result.

Am Jur 2d, Appeal and Error § 806.

3. **Evidence and Witnesses § 761 (NCI4th)— first-degree murder—statement by defendant's wife to police—not prejudicial**

There was no prejudice in a first-degree murder prosecution in allowing the State to ask defendant on cross-examination about a pretrial statement made by defendant's spouse to police involving her screaming to defendant as he left their house not to

do it and to think of their son. Although defendant argued that the statement was within spousal privilege, the statement was competent and nonconfidential and, assuming that the question was improper because the prosecutor knew from voir dire that defendant had not heard the statement, there was plenary other evidence of premeditation and deliberation and no reasonable possibility that this single question, to which defendant gave a negative response, impacted the jury's verdict.

Am Jur 2d, Appeal and Error § 806.

4. Evidence and Witnesses § 2877 (NCI4th)— first-degree murder—cross-examination—fabricated defense

There was no error in a first-degree murder prosecution where the court overruled defendant's objections to questions asked by the prosecutor to defendant on cross-examination concerning the fabrication of a defense. Defendant's trial testimony differed from his prior accounts of the shooting to deputies and the prosecutor sought to attack defendant's credibility through defendant's inability to reconcile his testimony with his earlier statements. His first question was a proper attempt to expose a fabricated defense and his second was simply a vigorous cross-examination properly designed to discredit defendant's belated self-defense theory. Counsel is given wide latitude and has the right and duty to cross-examine vigorously a defendant who takes the stand in his own defense.

Am Jur 2d, Witnesses §§ 811 et seq.

5. Homicide § 558 (NCI4th)— first-degree murder—self-defense instructions—voluntary manslaughter as lesser offense

There was no error in a first-degree murder prosecution where defendant contended that the court's self-defense instructions incorrectly allowed a verdict of guilty of voluntary manslaughter based on a defense of imperfect self-defense only if defendant reasonably believed it was necessary to kill in self-defense. The issue has recently been decided against defendant's position in *State v. Rose*, 335 N.C. 301; any theory of self-defense is strongly negated by the fact that the victim had been shot in the back of the head; and any error was not prejudicial because the jury rejected both voluntary manslaughter and second-degree

murder when it found defendant guilty of first-degree murder on the basis of premeditation and deliberation.

Am Jur 2d, Homicide §§ 525 et seq.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Farmer, J., at the 2 November 1993 Criminal Session of Superior Court, Wake County, on a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 15 March 1995.

Michael F. Easley, Attorney General, by Marilyn R. Mudge, 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 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:

Bryan Bobbitt testified that defendant and the victim, Timothy Strickland, were his neighbors. On 18 June 1993, Bobbitt's father hosted a neighborhood cookout, which defendant attended. Defendant and Bobbitt left the cookout around midnight and sat down on the road outside to finish their beers. About thirty minutes later, Strickland drove up in his car and joined them. Bobbitt testified that defendant and Strickland had a history of animosity; that night tension began to build between them. Bobbitt was too intoxicated to recall much of their conversation, but he remembered Strickland accusing defendant of always "hiding behind his gun or knife." Defendant usually carried a .38-caliber Derringer on his belt, and he had it with him that night. Defendant responded to Strickland's comment by handing his gun and pocketknife to Bobbitt. Defendant then stood up, retrieved the weapons from Bobbitt, and left for home.

According to Bobbitt, defendant returned in ten minutes. He was carrying a .9-millimeter semiautomatic pistol. He knelt in front of Strickland and pointed the gun at him. He stated, "Do you think this is a game, do you think I'm playing with you," and shot Strickland

once in the forehead. Defendant then went home to call the police. Bobbitt did not see Strickland grab or lunge at defendant.

On cross-examination Bobbitt testified that defendant was disabled as a result of a roofing accident. He had a limp and could not run. Strickland was twenty years younger than defendant, had studied martial arts, and had a reputation for being violent when drunk. Strickland was intoxicated the night of the murder. Bobbitt admitted that his memory of the night was impaired because he had been intoxicated.

Deputy Sheriff Katrina Seitz was working as a 911 dispatcher during the early morning of 19 June. She testified she received a call at 1:45 a.m. from defendant that she recorded. The trial court admitted the tape recording and a written transcript of the call; the tape was played to the jury. During the 911 conversation, defendant told Seitz he had shot someone. He gave his name and address and agreed to cooperate with police when they arrived.

Dr. Frank Avery, a pathologist, testified that the victim had one bullet wound to the back of his head and another to his left leg. The victim's blood alcohol level was .17. On cross-examination Dr. Avery stated that the wounds could have been caused by the same bullet if the victim had been sitting and was shot first in the head. He further stated that, contrary to Bobbitt's testimony, the victim could not have been facing defendant when he was shot.

Deputy Sheriff Walt Martin testified that he responded to the 911 call placed by defendant. When Martin arrived, he saw the victim in the road and defendant standing on his porch. Martin asked for the gun, and defendant stated that it was inside. Defendant gave Martin permission to retrieve the gun and the pocketknife from the kitchen table. Martin did so.

Deputy Sheriff Robert Bizell testified that he interviewed defendant on the porch the morning of the shooting. Defendant was calm and polite. He admitted shooting the victim. He invited the officers to search him for other weapons. A search revealed no weapons.

Deputy Sheriff Dennis Currin met defendant outside his house at 3:00 a.m. He directed defendant to take a seat in the patrol car, read him his *Miranda* rights, and took his statement. Defendant stated that he and Bobbitt had been sitting in front of defendant's house drinking beer when Strickland arrived. All three men smoked some marijuana. Defendant and Strickland had fought with one another

previously. On that night defendant perceived that another confrontation was beginning. Consequently, he went inside his house and retrieved his .9-millimeter gun. Defendant had a smaller pistol with him at the scene, but he went into the house to get his larger gun. He then went outside, walked up behind the victim, and shot him in the back of the head. He explained he just decided to end the hostile relationship he had with Strickland. Currin asked defendant if Strickland had a weapon, such as a stick, a knife, or a gun, and defendant responded that Strickland did not. Currin then asked him if Strickland had threatened him in any way, and defendant responded that Strickland told him "he would do him in." Currin further testified he arrested defendant, who had been drinking but was not intoxicated. He indicated that defendant was lucid. Currin testified from notes taken during his interview with defendant.

Defendant's evidence tended to show the following:

Defendant testified that Strickland had a history of harassing him and making fun of his disability. He teased defendant about his limited ability to care for his yard and about his status as a house husband. Strickland had threatened to kill defendant in the past, and they had had several violent encounters. On one occasion Strickland shoved defendant onto a coffee table in defendant's home. Strickland at another time tried to run defendant down with a dirtbike and knocked him into a ditch on the side of the road. Defendant was aware that Strickland had studied martial arts and knew that he had engaged in fights with others. Because of his enhanced vulnerability due to his handicap, defendant always carried a gun for protection.

Defendant described what happened the night of the murder. A group of neighbors gathered at Bobbitt's for a cookout in celebration of defendant's birthday. Defendant drank approximately six beers. Defendant left the party around midnight. Bobbitt, who was highly intoxicated, followed him and invited him to sit and drink; defendant agreed. Strickland joined them; he also had been drinking. According to defendant, Strickland was immediately hostile towards him and accused him of always hiding behind a gun or knife. Defendant testified that he handed these to Bobbitt to reduce the tension. He decided to return to his house after a minor dispute occurred over whether Strickland had any marijuana.

Defendant further testified he looked outside about twenty minutes later and saw Bobbitt and Strickland still sitting by the road. Defendant was worried that Bobbitt might pass out in the path of traf-

fic, so he went back outside. In addition to the Derringer defendant already had, he picked up his .9-millimeter gun as a matter of habit. He approached Bobbitt and Strickland and told Bobbitt to go in. Strickland responded by cursing defendant and telling him to mind his own business. Strickland then yelled, "I'm going to kill you, motherf——," and he grabbed defendant's lame leg. Defendant stepped back to keep his balance, pulled out his gun, and shot Strickland. He stated that Strickland looked crazy and he was afraid Strickland would kill him. On cross-examination defendant stated that when he picked up his .9-millimeter gun in the house, he also had his Derringer in his belt and his knife in his pocket.

Several witnesses testified that defendant was a peaceable person and that Strickland was violent and argumentative when drunk and was always looking for a fight.

[1] Defendant first assigns as error the admission into evidence of out-of-court statements made by his spouse, Nancy Rush, to a 911 dispatcher the night of the murder. The tape was introduced through Deputy Sheriff Seitz, who took the call. It was played for the jury, and copies of the transcript were distributed to each juror. Ms. Rush spoke with Seitz after Seitz directed defendant to wait outside the house for police. Defendant argues that the portion of the call containing Ms. Rush's statements to Seitz should have been redacted because it was inadmissible based on Ms. Rush's refusal to testify against her husband. Defendant cites two comments made by Ms. Rush. Soon after defendant left the house, Ms. Rush asked Seitz, "How can he do this?" A few minutes later, and before defendant's arrest, Ms. Rush asked whether she would be required to accompany her husband "downtown."

Defendant did not object to the admission of this evidence. He maintains, however, that this issue is preserved for appellate review because its introduction "is forbidden by statute in the furtherance of public policy." *See State v. Warren*, 236 N.C. 358, 359-60, 72 S.E.2d 763, 764 (1952); *see also State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) ("[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial."). Defendant bases his contention on N.C.G.S. § 8-57, which he interprets as prohibiting the admission of out-of-court statements made by a defendant's spouse and introduced against the defendant for the State through a third party. For the reasons given in our sub-

stantive discussion of this issue *infra*, we conclude that the evidence was not forbidden by the statute. Defendant therefore has failed to preserve his right to appellate review of this issue. Thus, this assignment of error is reviewable only under the plain error rule. *See State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983) ("plain error" rule applies to evidentiary matters). In order to prevail under plain error analysis, defendant must first establish that the trial court committed error and then show 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).

In *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981), we reexamined the common law rule that a defendant's spouse is incompetent to testify against the defendant in a criminal proceeding. We concluded that "the rule sweeps more broadly than its justification" because the defendant there employed it to thwart our justice system rather than to promote family harmony, which was the intended purpose of the common law rule. *Id.* at 595, 276 S.E.2d at 453. We therefore held that "[h]enceforth, spouses shall be incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a 'confidential communication' between the marriage partners made during the duration of their marriage." *Id.* at 596, 276 S.E.2d at 453; *see also State v. Holmes*, 330 N.C. 826, 835-36, 412 S.E.2d 660, 665 (1992) (holding that under N.C.G.S. § 8-57(c) a spouse may not voluntarily testify to confidential communications when the defendant spouse asserts the spousal privilege). We concluded that

> [t]his holding allows marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation. However, by confining the spousal disqualification to testimony involving "confidential communications" within the marriage, we prohibit the accused spouse from employing the common law rule solely to inhibit the administration of justice.

Freeman, 302 N.C. at 596, 276 S.E.2d at 453-54.

In response to our decision in *Freeman*, the legislature amended N.C.G.S. § 8-57(b), which at the time of *Freeman* provided: "Nothing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding . . . ." 1967 N.C. Sess. Laws ch. 116, § 1. Section 8-57(b), in its amended form, provides in pertinent part:

> (b) The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action or grand jury proceedings . . . .

N.C.G.S. § 8-57(b) (1986). As amended, the statute embodies the common law rule, left undisturbed by *Freeman*, that a defendant's spouse may not be compelled to testify against a defendant for the State. By its declaration of the competency of the defendant's spouse, it also reflects our judicial abrogation in *Freeman* of the common law rule that a spouse is incompetent to testify against the defendant spouse when willing to do so.

The sole prohibition of N.C.G.S. § 8-57(b) is now directed to compelled testimony. The use of the word "testify" indicates that out-of-court statements made by a spouse and introduced through a third party are not within the purview of the statute. To "testify" means "to make a solemn declaration, under oath or affirmation, in a judicial inquiry, for the purpose of establishing or proving some fact." *Black's Law Dictionary* 1476 (6th ed. 1990). This section of the statute therefore does not address out-of-court statements made by a spouse and introduced against a defendant spouse for the State through a third party. We also note that N.C.G.S. § 8-57(c) is inapplicable here because defendant in his brief concedes that the statements at issue were not confidential. *See* N.C.G.S. § 8-57(c) ("No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage."). Our determination of this issue therefore is based on that part of the common law not covered by the statute. *See Freeman*, 302 N.C. at 594, 276 S.E.2d at 452 (except as modified by N.C.G.S. § 8-57, common law rule on competency of spouses to testify against each other remains in effect); *see also State v. Josey*, 328 N.C. 697, 704, 403 S.E.2d 479, 483 (1991) (discussing applicability of N.C.G.S. § 8-57 to issue of admissibility of confidential spousal communications through spousal testimony).

Since our judicial abrogation in *Freeman* of the common law rule of incompetence, we have not addressed the issue of whether a spouse's out-of-court statements may be introduced against a defendant spouse for the State. In cases decided prior to *Freeman*, we held that a spouse's out-of-court statements are inadmissible against the defendant spouse for the State. *See, e.g., State v. Dillahunt*, 244 N.C. 524, 525, 94 S.E.2d 479, 479-80 (1956) (holding inadmissible, because incompetent, an incriminating statement made by defendant's spouse

to sheriff); *State v. Warren*, 236 N.C. 358, 360, 72 S.E.2d 763, 764 (1952) (holding inadmissible, because incompetent, an incriminating statement made by defendant's spouse to a police officer whose testimony included the statement). Our decisions in those cases were based on the rationale that the statements were incompetent. In light of the principles enunciated in *Freeman*, that rationale no longer applies.

As we indicated in *Freeman*, we left intact the common law prohibition against disclosure of confidential marital communications in order to allow "marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation." *Freeman*, 302 N.C. at 596, 276 S.E.2d at 453-54. By so limiting the privilege, we sought to prevent the defendant spouse from using the rule to thwart the administration of justice. Here, the same principle applies. Allowing the admission of nonconfidential, out-of-court statements made by a spouse and introduced against the defendant spouse for the State through a third party promotes the administration of justice without infringing on the confidence of the marital relationship. *See* 1 Brandis & Broun, *North Carolina Evidence* § 135 at 468 (4th ed. 1993) ("[Post-*Freeman*] extrajudicial statements would seem to be admissible, when relevant, when offered for a nonhearsay purpose or under an exception to the hearsay rule, unless involving a matter privileged as a confidential communication."). Further, no compulsion occurs when the statements are introduced through a third party. We therefore hold that the spousal privilege does not bar nonconfidential, out-of-court statements made by a spouse and introduced against a defendant spouse for the State through a third party.

[2] Because these out-of-court statements by Ms. Rush were not barred by N.C.G.S. § 8-57 or the common law governing spousal privilege, we must determine whether they were relevant and offered either for a nonhearsay purpose or under an exception to the hearsay rule. Defendant maintains that the statements were irrelevant. He further contends that Ms. Rush's questioning of her husband's actions and her presumption that he would be arrested implied that she did not believe her husband had acted in justifiable self-defense. Therefore, according to defendant, the admission of the evidence was prejudicial.

Assuming *arguendo* that these unobjected-to statements were irrelevant, and that on that basis it was error to admit them, we can-

not say that absent these comments the jury probably would have reached a different result. The evidence establishing premeditation and deliberation was overwhelming. In defendant's statements to Seitz and to Currin immediately after the shooting, defendant admitted shooting Strickland. He indicated to Currin that he had gone into his house to retrieve a gun larger than the one he already had with him and that he shot Strickland in the back of the head because he wanted to end their hostile relationship. Further, the pathologist testified that Strickland was shot in the back of the head. This physical evidence comported with defendant's account of the shooting given at the scene and contradicted his claim of self-defense at trial. We therefore conclude that it is improbable that Ms. Rush's comments to the 911 dispatcher affected the jury's verdict. Thus, the admission of these statements was not plain error.

[3] In this assignment of error defendant also argues that the court erred by allowing the prosecutor to ask defendant on cross-examination about a pretrial statement made by Ms. Rush to police. During the prosecutor's cross-examination of defendant, the prosecutor asked defendant whether he heard his spouse screaming to him as he left the house just prior to the shooting. Defendant objected, and the objection was sustained. The prosecutor requested a hearing outside the presence of the jury. A voir dire was held during which the following exchange occurred between the prosecutor and defendant:

> Prosecutor: Sir, when you went out the door of your house, your wife screamed at you, "Do not do this. Think about your son," didn't she?
>
> Defendant: No, sir.
>
> Prosecutor: Are you denying that you heard, that you—you say she did not make the statement?
>
> Defendant: I didn't hear her make it.

The trial court ruled that the prosecutor could pursue this line of inquiry before the jury. Defendant excepted on the grounds that the spouse's statement could not be compelled as evidence against defendant, and moved for a mistrial. The court denied the motion, and the same exchange between the prosecutor and defendant occurred before the jury.

Defendant argues that the prosecutor should have been prohibited from asking about this out-of-court statement made by Ms. Rush

on the basis that the statement was within the spousal privilege. As discussed above, the statement was competent and nonconfidential and therefore proper for inquiry by the prosecutor if relevant and either nonhearsay or admissible under a hearsay exception. Defendant further argues, however, that the statement was an improper basis for cross-examination because the prosecutor was on notice that Ms. Rush's statement was not within the knowledge of the defendant, who during voir dire had denied that he heard it. In addition, at the time the question was posed the prosecutor knew the remark had no impeachment value because defendant indicated he did not hear it. Defendant also contends the statement was highly prejudicial because Ms. Rush's admonition to defendant prior to the shooting was the State's strongest evidence that defendant acted with premeditation and deliberation.

Assuming *arguendo* that the question posed by the prosecutor was improper because the prosecutor knew from voir dire that defendant had not heard the statement, we conclude that the error was not prejudicial. The assumed error does not implicate a right arising under the federal or state Constitution; therefore, the test is whether there is a reasonable possibility that had the error not occurred, the jury would have reached a different result. N.C.G.S. § 15A-1443(a) (1988); *State v. Lee*, 335 N.C. 244, 273, 439 S.E.2d 547, 561, *cert. denied*, —- U.S. —-, 130 L. Ed. 2d 162 (1994). Defendant has the burden of showing that such a reasonable possibility exists. N.C.G.S. § 15A-1443(a); *State v. Gibson*, 333 N.C. 29, 44, 424 S.E.2d 95, 104 (1992), *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993). Defendant has failed to carry that burden. Defendant's characterization of this statement as the State's strongest evidence of premeditation and deliberation is considerably exaggerated. There was plenary other evidence of premeditation and deliberation, as discussed above.

We conclude that there is not a reasonable possibility that this single question, to which defendant gave a negative response, impacted the jury's verdict. This assignment of error is overruled.

[4] Defendant next assigns as error the trial court's overruling of defendant's objections to questions posed by the prosecutor during his cross-examination of defendant. He contends that the trial court's failure to give any curative instruction to the jury or to declare a mistrial resulted in prejudicial error requiring a new trial.

During cross-examination of defendant, the following exchange occurred:

> Prosecutor: And you've been sitting around for the last two months fabricating this story about going out there to help Bryan Bobbitt out of the street and all this other stuff that you've told us today, because you knew what was going to happen to you if you stuck to the story you told this detective, didn't you?
>
> Defendant: No, sir. I told [my attorney] about it long before that.
>
> . . . .
>
> Prosecutor: When did you fabricate this story, sir?

Defense counsel then objected and was overruled. The prosecutor withdrew the question.

Defendant concedes that the first question was arguably acceptable as an attempt by the prosecutor to expose a fabricated defense. He argues, however, that the second question was a thinly disguised expression of the prosecutor's personal opinion about defendant's lack of veracity because defendant's response to the first question was negative. The prosecutor withdrew the second question, thereby indicating that he knew it to be improper. We disagree with defendant's characterization of the questioning.

Defendant's trial testimony differed from his prior accounts of the shooting to Currin and Seitz. In neither of those accounts did defendant offer a self-defense explanation. At trial defendant's account suggested that the victim grabbed his leg and threatened to kill him. The prosecutor consequently sought to attack defendant's credibility through defendant's inability to reconcile his testimony with his earlier statements. His first question to defendant was a proper attempt on cross-examination to expose a fabricated defense. *See State v. Mitchell*, 317 N.C. 661, 667-68, 346 S.E.2d 458, 462 (1986) (no error in prosecutor's question to defendant, "Took you awhile to dream all that stuff up, too, didn't it?" because it was an attempt to expose a fabricated defense); *see also State v. Alston*, 294 N.C. 577, 586, 243 S.E.2d 354, 361 (1978) (prosecutor's cross-examination of defendant not prejudicial error where defendant had given two completely different statements under oath).

The prosecutor's second question, regarding when the fabrication occurred, was precipitated by defendant's testimony that he told his story to his attorney more than two months before the trial. This

exchange was simply a vigorous cross-examination properly designed to discredit defendant's belated self-defense theory. Counsel is given wide latitude and has the right and duty to cross-examine vigorously a defendant who takes the stand in his own defense. "A [prosecutor] may ask a defendant . . . questions tending to discredit [his] testimony, no matter how disparaging the question may be." *State v. Daye*, 281 N.C. 592, 596, 189 S.E.2d 481, 483 (1972). This assignment of error is overruled.

[5] Defendant next assigns as error the trial court's instructions on self-defense. Defendant failed to object to the instructions. They therefore are subject to plain error review. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

The court instructed the jury on possible verdicts of guilty of first-degree murder, second-degree murder, or voluntary manslaughter and of not guilty. Defendant argues that the self-defense instructions incorrectly allowed a verdict of guilty of voluntary manslaughter based on a defense of imperfect self-defense only if defendant reasonably believed it was necessary to kill in self-defense. We recently decided this issue against defendant's position in *State v. Rose*, 335 N.C. 301, 330-31, 439 S.E.2d 518, 534, *cert. denied*, — U.S. —, 129 L. Ed. 2d 883 (1994), and *State v. Watson*, 338 N.C. 168, 179-81, 449 S.E.2d 694, 702-03 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 569 (1995). We decline to reconsider our position. We also note that the fact that the victim had been shot in the back of the head, and thus could not have been facing defendant when he was shot, strongly negates any theory of self-defense.

Finally, any alleged error in the instructions was not prejudicial because the jury rejected both voluntary manslaughter and second-degree murder when it found defendant guilty of first-degree murder on the basis of premeditation and deliberation. By so doing, the jury necessarily rejected the theory of an unintentional killing. *See State v. Hardison*, 326 N.C. 646, 654-55, 392 S.E.2d 364, 369 (1990) (if failing to instruct on voluntary manslaughter was error, harmless because jury was properly instructed on second-degree murder and found defendant guilty of first-degree murder based on premeditation and deliberation). This assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. WENDELL LEONDIAS HOUSE

No. 420A93-2

(Filed 5 May 1995)

1. Evidence and Witnesses § 1694 (NCI4th)— color photographs and slides of homicide victim's body—not unduly repetitive or prejudicial

Two photographs showing a murder victim's body as it was discovered, four photographs from the autopsy, and ten slides from the autopsy, all of which were in color, were not unfairly prejudicial or unduly repetitive, and defendant was not prejudiced by the manner in which they were presented to the jury, where they were admitted to illustrate the position and condition of the body when found and various injuries sustained by the victim when he was dragged behind defendant's logging truck. The photographs and slides were not irrelevant because defendant admitted dragging the victim behind his truck and leaving the victim on the side of the road since they supported the jury's finding that the murder was premeditated and deliberate.

Am Jur 2d, Evidence §§ 963, 964; Homicide §§ 417 et seq.

Admissibility in evidence of colored photographs. 53 ALR2d 1102.

Admissibility in evidence of enlarged photographs or photostatic copies. 72 ALR2d 308.

2. Evidence and Witnesses § 1730 (NCI4th)— videotape—admission for illustrative purposes

The trial court did not err by admitting a videotape illustrating testimony describing the route along which a homicide victim had been dragged behind defendant's logging truck and the location of blood along the route two days after the murder.

Am Jur 2d, Evidence §§ 979-985, 987.

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

Admissibility of visual recording of event or matter giving rise to litigtion or prosecution. 41 ALR4th 812.

Admissibility of visual recording of event or matter other than that giving rise to litigation or prosecution. 41 ALR4th 877.

3. Jury § 203 (NCI4th)— first-degree murder—recent murder of juror's friend—denial of challenge for cause

The trial court did not err by denying defendant's challenge for cause of a potential juror in a first-degree murder trial on the basis that the recent murder of a friend of the juror could impair her ability to be fair and impartial in this case where the juror stated that she could follow the law and could separate the facts of her friend's murder from the one for which defendant was charged; on two occasions she stated that she would not be substantially impaired in her ability as a juror; and she stated that she would give defendant a fair trial and hold the State to its burden of proof.

Am Jur 2d, Jury §§ 266, 267, 291.

4. Constitutional Law § 309 (NCI4th)— ineffective assistance of counsel—concession of defendant's guilt—silent record as to defendant's consent—question not decided

The Supreme Court will not pass upon defendant's assignment of error that his right to the effective assistance of counsel was denied by his attorney's concession to the jury in closing argument that defendant was guilty of involuntary manslaughter or second-degree murder where the record is silent as to whether defendant consented to his attorney's concession of guilt. Defendant's appropriate remedy, if any, is to file a motion for appropriate relief in the superior court pursuant to N.C.G.S. § 15A-1415(b)(3) based upon ineffective assistance of counsel.

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

Adequacy of defense counsel's representation of criminal client regarding argument. 6 ALR4th 16.

5. Evidence and Witnesses § 1070 (NCI4th)— instructions on flight—sufficient supporting evidence

The evidence in a first-degree murder trial was sufficient to support the trial court's instruction on flight as evidence of guilt where it showed that defendant left the scene of the murder and drove to his home in Virginia; after defendant became aware of injuries to the victim from being dragged behind defendant's log-

ging truck, defendant drove the victim to a deserted area and dropped the victim into a creek fifteen to eighteen feet off the road and at the bottom of a twenty-feet drop; and after defendant got home, his truck was cleaned up and painted so that there was no evidence of blood on the truck.

Am Jur 2d, Evidence §§ 1430, 1431; Trial §§ 1333-1335.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Llewellyn, J., at the 10 May 1993 Criminal Session of Superior Court, Nash County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 17 March 1995.

Michael F. Easley, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Indicted for the first-degree murder of J.D. Brinkley in violation of N.C.G.S. § 14-17, defendant was tried capitally and convicted as charged. Following a capital sentencing proceeding, the jury recommended that defendant be sentenced to life imprisonment; and the trial court entered judgment accordingly.

At trial the State's evidence tended to show that on 19 February 1992, defendant met the victim, J.D. Brinkley, in the Town of Spring Hope. The victim and defendant had been having a homosexual affair which defendant wanted to end. The victim wanted to continue the relationship and was threatening to tell defendant's wife. Defendant drove with the victim in defendant's logging truck to an isolated dirt road outside Spring Hope. The two argued. Defendant then tied the victim to his logging truck with a chain and drove around Spring Hope, dragging the victim behind the truck. Defendant eventually stopped his truck and threw the victim into a creek at the bottom of an embankment. The victim was later found lying facedown in approximately four inches of water. The cause of the victim's death was believed to be drowning; however, some evidence suggested that the victim may have died as the result of hypovolemic shock triggered by loss of blood. After disposing of the victim, defendant drove to his

home in Virginia not far from the North Carolina line. At some point before he was apprehended, defendant painted the back of his truck, blackened the tires, and cleaned it up so that the truck looked almost new. The State also presented evidence that on 16 February, as defendant was driving through Spring Hope, he saw the victim standing on the street; commenting to a passenger in the car about the way the victim was looking at him, defendant stated he would kill the victim.

Defendant testified that he did not know the victim but saw the victim standing on the side of the road on 19 February 1992. The victim flagged defendant down and asked if defendant would drive him home. The victim directed defendant to a dirt road and then, according to defendant, grabbed defendant between the legs and said that he wanted defendant "to suck him off." Defendant refused and told the victim to get out of his truck. When the victim refused to get out of the truck, defendant physically pulled the victim out of the truck and threw him to the ground. The victim then grabbed defendant from behind, and defendant broke loose, causing the victim to hit his head on the truck as the victim fell. Defendant then picked the victim up, placed him on a platform in the back of the truck, and wrapped a logging chain around him. Defendant further testified that he intended to drop the victim off in the same place that he had picked him up, but he got lost and could not find that location. At some point defendant realized the victim had fallen off the truck. Defendant stopped and put the victim back in the truck. He then drove around and eventually left the victim on the side of the road next to a ditch. Defendant testified that he saw a mailbox and a house nearby and thought someone would find the victim if he left him at that location.

Additional evidence will be presented as necessary to the understanding of a particular issue.

[1] Defendant first contends that the trial court erred in overruling defendant's objections to the admission and manner of presenting various gory and gruesome photographs of the victim. The State introduced twenty-six photographs, ten of which were slides, and a videotape. Defendant objected to two color photographs showing the body as it was discovered, four photographs from the autopsy, ten slides from the autopsy, and a videotape that tracked the route taken by defendant's vehicle on the night of the murder.

Defendant argues that the sixteen pictures at issue were minimally relevant and unfairly prejudicial for the reason that they were

in color rather than black and white, some were presented as slides rather than prints, and all were unnecessarily repetitive. Additionally, many of the pictures depicted the injuries to the victim resulting from his being dragged on the street, and illustration of these injuries was not relevant inasmuch as the victim drowned.

Defendant also argues that the manner in which the jury was shown the pictures was prejudicial. Specifically, the State should have used photographs instead of slides, should not have placed the screens for the slides so close to the jury box, and should not have allowed the pathologist to display photographs to the jury. When an alternate juror fainted during the slide presentation, defendant moved for a mistrial, which was denied.

As noted by defendant, *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988), sets out the standard by which the Court considers whether pictures are admissible. In *Hennis* the Court stated:

> 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.

Id. at 284, 372 S.E.2d at 526.

The Court noted further in *Hennis* that

> 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 the circumstances composing that presentation.

Id. at 285, 372 S.E.2d at 527.

"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. Alford*, 339 N.C. 562, 577, 453 S.E.2d 512, 520 (1995). Additionally, photographs taken during an autopsy are generally deemed admissible, *State v. Skipper*, 337 N.C. 1, 35, 446 S.E.2d 252, 270 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995), even if they are presented as slides rather than photographs, *see State v. Moseley*, 338 N.C. 1, 39, 449 S.E.2d 412, 435 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 738 (1995).

In the instant case, the challenged pictures showed the position of the body and its condition when discovered; damage done to the shoes the victim was wearing when being dragged behind the logging truck; and injuries to the victim's knees, face, lower abdomen, back, left arm, right arm, and heels. After reviewing the ten slides and six photographs objected to by defendant, the testimony that they were presented to illustrate, and the manner in which they were presented, we are of the opinion that the pictures were not unfairly prejudicial or unduly repetitive. The pictures were admitted to illustrate testimony describing where the body was found, the position of the body when found, and the various injuries sustained by the victim after the victim was dragged around the streets of Spring Hope.

Defendant argues that the pictures were not relevant because defendant admitted dragging the victim behind his truck and leaving the victim on the side of the road. We disagree. This Court has held that "[i]n a first-degree murder case, autopsy photographs are relevant even when such factors as the identity of the victim or the cause of death are not disputed." *Skipper*, 337 N.C. at 35, 446 S.E.2d at 270. Premeditation and deliberation are not readily susceptible to proof by direct evidence. "The nature and number of the wounds and evidence that the murder[] [was] done in a brutal manner are circumstances from which premeditation and deliberation can be inferred." *Id.* at 35, 446 S.E.2d at 271. In this case, the pictures illustrated testimony which supported a jury's finding that the murder was premeditated and deliberate.

[2] Defendant also objected to the presentation of a videotape showing the route along which the victim had been dragged. Our review of the transcript and videotape discloses that the videotape simply tracks the path defendant took on the night of the murder and was introduced to illustrate a witness' testimony describing the route the truck travelled and the location of blood along the route two days after the murder.

After reviewing the totality of the circumstances in which the videotape, photographs, and slides were admitted, we conclude the trial court did not abuse its discretion in admitting the evidence or denying defendant's request for a mistrial based on the presentation of the slides and photographs.

[3] Next, defendant argues that the trial court erred by failing to dismiss for cause potential juror Sharon Blount (Blount), thereby deny-

ing defendant his constitutional and statutory right to a neutral and unbiased jury.

During jury selection, defendant sought to challenge Blount for cause on the basis that the recent murder of a friend of Blount's could substantially impair her ability to be fair and impartial in this case. The trial court denied the challenge for cause, and defendant exercised a peremptory challenge to remove Blount. After exhausting his remaining peremptory challenges, defendant sought to challenge for cause potential juror Jenkins. The trial court also denied this challenge for cause. Pursuant to N.C.G.S. § 15A-1214(i), defendant renewed his challenge for cause as to Blount. When this challenge was again denied, he moved for additional peremptory challenges, which motion was also denied.

Counsel for defendant initially sought to remove Blount for cause after the following exchange:

> MR. ALFORD [Defense counsel]: The fact that that happened [the murder of her friend] and that you knew the victim and all and that's going on in your mind, do you feel like that would substantially impair your ability to serve as a fair juror in this case?
>
> MS. BLOUNT: Yes, I think it would.

The trial court then questioned the juror as follows:

> THE COURT: Are you saying, ma'am, that the facts of that situation as [sic] such that it would spill over into this case and be part of your consideration as to this man's guilt or innocence?
>
> MS. BLOUNT: Yes, I do. I don't see no justification for a human killing another human for no reason at all. . . .
>
> . . . .
>
> . . . I don't think I could sit here and listen to this case without thinking about my friend.
>
> THE COURT:: So you're saying that those facts are such that . . . if you voted for first degree murder, you would not be able to consider life imprisonment as an option in this case?
>
> MS. BLOUNT: Yes, I could.

The trial court then asked defendant to question Blount again, stating that the court thought she may have misunderstood the question. Defendant asked the following:

MR. ALFORD: Do you feel like the fact that you are aware of this case that's going on and you said it would stay on your mind during this case, do you feel like the fact that this is going on in your life now would substantially impair your ability to serve as a juror in this case?

MS. BLOUNT: No.

MR. ALFORD: You do not feel like it would substantially impair your ability?

MS. BLOUNT: No.

MR. ALFORD: Do you feel like that you can take the facts and circumstances of that case out of your mind and separate it from this case that we've got here?

MS. BLOUNT: Yes, I think I could.

Defendant again challenged Blount for cause, and his challenge was again denied.

The role of the trial judge in jury selection has been explicated as follows:

> It is the trial court's duty "to supervise the examination of prospective jurors and to decide all questions relating to their competency." *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991) (*quoting State v. Young*, 287 N.C. 377, 387, 214 S.E.2d 763, 771 (1975), *judgment vacated in part on other grounds*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976)). The trial court has the opportunity to see and hear the juror on *voir dire* and, having observed the juror's demeanor and made findings as to his credibility, to determine whether the juror can be fair and impartial. *See State v. Kennedy*, 320 N.C. 20, 26, 357 S.E.2d 359, 363 (1987). For this reason, among others, it is within the trial court's discretion, based on its observation and sound judgment, to determine whether a juror can be fair and impartial. *Id.* at 28, 357 S.E.2d at 364.

State v. Yelverton, 334 N.C. 532, 543, 434 S.E.2d 183, 189 (1993).

A review of the entire *voir dire* of venireperson Blount discloses that her ability to be fair and impartial was not compromised. Blount stated that she did not feel that defendant was guilty of something simply because he had been charged with a crime, and she agreed she could hold the State to its burden of proof beyond a reasonable doubt and return a verdict of not guilty if the State did not meet its burden

of proof. Blount also stated that she had not formed an opinion as to defendant's guilt or innocence and that she could keep an open mind and give defendant a fair trial. She further stated that she would be able to separate the facts of her friend's murder from the murder under consideration, would not be substantially impaired in her ability as a juror, and could give defendant a fair trial.

In support of his position, defendant cites *State v. Cunningham*, 333 N.C. 744, 429 S.E.2d 718 (1993), and *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992). We are not persuaded that this case is controlled by either of those cases. In *Hightower*, the juror stated that he could follow the law, but the fact defendant did not testify would stick in the back of his mind and might hinder his decision. *Id.* at 638-39, 417 S.E.2d at 239. This Court held it was error not to excuse the juror. *Id.* at 641, 417 S.E.2d at 240. Unlike Blount, the juror in *Hightower* never unequivocally said that he could give defendant a fair trial and would not consider defendant's silence against him, although he did state he would try to follow the law.

In *Cunningham* a juror stated that she felt that defendant had to prove he was innocent. 333 N.C. at 748, 429 S.E.2d at 720. Even after the law had been explained to her and the juror answered that she could follow the law, the juror's responses suggested that she would do so reluctantly; she stated that "if he doesn't want to prove his innocence, I would have to accept that." *Id.* at 752, 429 S.E.2d at 722. This Court held it was error not to excuse the juror in *Cunningham* because the juror was either confused about or fundamentally misunderstood the principles regarding the presumption of innocence. *Id.* at 754, 429 S.E.2d at 723. In *Cunningham* the Court distinguished *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991), in which the Court held that it was not error to deny a challenge for cause when a juror originally stated on *voir dire* that she may require defendant to present evidence in his own behalf. The basis for distinguishing *McKinnon* was that the juror in *McKinnon*, " 'ultimately agreed *three times* that if the State did not meet its burden of proof she could find defendant not guilty even though he presented no witnesses in his behalf.' " *State v. Cunningham*, 333 N.C. at 755, 429 S.E.2d at 723 (quoting *State v. McKinnon*, 328 N.C. at 677, 403 S.E.2d at 479).

In this case, Blount unequivocally stated after further questioning that she could follow the law and that she could separate the facts of her friend's murder from the one for which defendant was charged. On two occasions, she stated she would not be substantially impaired

in her ability as a juror; she also stated she would give defendant a fair trial and hold the State to its burden of proof. On the record before us, the instant case is more nearly analogous to *McKinnon* and is distinguishable from *Cunningham* and *Hightower*. The following other cases also relied upon by defendant are likewise distinguishable: *State v. Leonard*, 296 N.C. 58, 248 S.E.2d 853 (1978) (holding error not to excuse for cause three jurors who were unwilling to accept an insanity defense); *State v. Lee*, 292 N.C. 617, 234 S.E.2d 574 (1977) (holding error not to remove for cause a juror whose husband was a police officer on the force with State's witnesses and who equivocated as to the effect this connection with the police would have on her ability to be impartial); and *State v. Allred*, 275 N.C. 554, 169 S.E.2d 833 (1969) (holding error not to remove for cause a juror who was a relative of two accomplices expected to testify for the State and who revealed he likely would be unable to disbelieve their testimony).

The record is clear that Blount ultimately felt she could put her feelings about her friend's murder aside and give defendant a fair trial based solely on the evidence presented in defendant's trial. Hence, the trial court's denial of defendant's challenge for cause was not error.

[4] Defendant, in his next assignment of error, contends that his state and federal constitutional right to effective assistance of counsel was violated by his lawyer's concession to the jury in closing argument that defendant was guilty of involuntary manslaughter or second-degree murder. Citing *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), defendant argues that in the absence of an express waiver manifesting defendant's knowledge, understanding, and approval of defense counsel's concession of defendant's guilt, defendant is entitled to a new trial.

The record on appeal before this Court is silent as to whether defendant did or did not consent to his attorney's concession of guilt. This Court will not presume from a silent record that defense counsel argued defendant's guilt without defendant's consent. *See State v. Adams*, 335 N.C. 401, 410, 439 S.E.2d 760, 764 (1994) (holding that incompleteness in a record precludes a defendant-appellant from showing that an error occurred). Accordingly, we do not pass on this assignment of error. In this situation the appropriate remedy, if any, is for a defendant to file, either before or after direct appeal, a motion for appropriate relief in the superior court based upon ineffective

assistance of counsel pursuant to N.C.G.S. § 15A-1415(b)(3). We note specifically that our ruling herein is without prejudice to this defendant's right to file such motion. Further, we take this opportunity to urge both the bar and the trial bench to be diligent in making a full record of a defendant's consent when a *Harbison* issue arises at trial.

[5] Finally, defendant argues that the trial court erred by instructing the jury on "flight" as evidence of guilt. During the charge conference, the prosecutor requested that the trial judge instruct, pursuant to N.C.P.I.—Crim. 104.36, that flight is evidence indicating consciousness of guilt. Defendant objected to the instruction, but his objection was overruled. The trial court instructed the jury that:

> The State contends in this case that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show of consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt. Further, this circumstance has no bearing on the question of whether the defendant acted with premeditation and deliberation, therefore, it must not be considered by you as evidence of premeditation or deliberation.

Defendant argues that the evidence in the record is insufficient to support an instruction on flight. Although the evidence at trial showed that defendant went home to Virginia after the murder occurred, defendant urges that the evidence does not support an inference that this action by defendant was motivated by guilt or amounted to flight from justice since defendant lived in Virginia and had no connections to Spring Hope beyond a few personal and business acquaintances.

> A trial court may properly instruct on flight " '[s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.' " *State v. Green*, 321 N.C. 594, 607, 365 S.E.2d 587, 595 (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)), *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). "[T]he relevant inquiry [is] whether there is evidence that defendant left the scene of the murder and took steps to avoid apprehension." *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990).

State v. Moseley, 338 N.C. at 36, 449 S.E.2d at 434. In *Moseley* the Court held that the jury could have reasonably inferred flight from the evidence that defendant left the victim in a secluded area, without identification; left the scene; and was not apprehended for over three months. *Id.* at 37, 449 S.E.2d at 434.

We conclude that the evidence in the present case is also sufficient to support an instruction on flight. Defendant left the scene of the murder and drove to his home in Virginia. Before he went home, defendant took steps to avoid apprehension. Defendant's own evidence shows that once he became aware of injuries to the victim, defendant did not leave the victim where he found him; rather, he put the victim back into the truck and drove to a deserted area. Defendant then dropped the victim into a creek fifteen to eighteen feet off the road and at the bottom of a fifteen- to twenty-foot drop. This evidence supports an inference that defendant left the body where he did to avoid apprehension. The evidence also shows that after defendant got home, but before he was arrested, his truck had been cleaned up and painted so that there was no evidence of blood on the truck. As the evidence suggests "that defendant left the scene of the murder and took steps to avoid apprehension," *State v. Levan*, 326 N.C. at 165, 388 S.E.2d at 434, the trial court did not err in giving an instruction on flight.

Defendant also argues that the circumstances under which our appellate courts have upheld giving the flight instruction are so broad and varied as to render the concept of flight as evidence of guilt essentially meaningless. In *State v. Jefferies*, 333 N.C. 501, 509-10, 428 S.E.2d 150, 154 (1993), in response to an almost identical argument, this Court declined to reconsider the rules on flight as established by our prior cases. Defendant has presented no persuasive reason to revisit our decision in *Jefferies* at this time.

Having reviewed the trial transcript and the objected-to photographs, slides, and videotape, as well as the other issues raised by defendant before this Court, we conclude that defendant received a fair trial free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. NATHAN WAYNE BOWIE

STATE OF NORTH CAROLINA v. WILLIAM BARFIELD BOWIE

No. 50A93

(Filed 5 May 1995)

1. Criminal Law § 1362 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—age of defendant—not submitted

There was no error in a first-degree murder sentencing hearing where the trial court failed to submit the statutory mitigating circumstance of the age of defendant Nathan Bowie. The evidence does not support a finding that this defendant's intellectual and emotional development was less than normal in that he was placed in a foster home at twelve years of age; he then developed at a normal rate, graduated from high school and took classes at a community college; he related well to other students and had many friends; his teachers, coaches, and principal testified that he was polite, cooperative, and able to handle criticism and follow the rules; and his social worker found him trustworthy enough that she lent him $2,000 to purchase a truck for which he regularly made payments.

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

2. Criminal Law § 21 (NCI4th)— first-degree murder—motion for psychiatric exam denied—no error

There was no error in a first-degree murder prosecution in the denial of defendant William Bowie's motion for a psychiatric examination to determine whether he was competent to stand trial. Defendant's attorney did not set forth in the motion any conduct by the defendant that led him to make the motion; N.C.G.S. § 15A-1002(a) provides that a motion which questions the defendant's ability to proceed shall detail the specific conduct that leads the moving party to question defendant's capacity to proceed.

Am Jur 2d, Criminal Law §§ 65 et seq.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition. 32 ALR2d 434.

3. Homicide § 706 (NCI4th)— first-degree murder—no instruction on voluntary manslaughter—conviction for first-degree murder—harmless error

Even if there was sufficient evidence to support an instruction on voluntary manslaughter in a first-degree murder prosecution, the failure to give the instruction was harmless error in light of the conviction for first-degree murder.

Am Jur 2d, Homicide §§ 529 et seq.

4. Evidence and Witnesses § 920 (NCI4th)— first-degree murder—absent witness—testimony by officer as to witness's mother's statement—not hearsay

There was no error in a first-degree murder prosecution in the admission of testimony by an officer that the mother of an absent witness had said that the witness had moved and that she did not know where the witness was. The testimony was admissible to prove the difficulty of finding the witness and was not hearsay when used for that purpose. The prosecutor's *lapsus linguae* in stating that the testimony was offered for the truth of the matter did not convert nonhearsay testimony to hearsay and, in any event, the testimony was so peripheral that it could not have prejudiced defendants.

Am Jur 2d, Evidence §§ 664, 668 et seq.

5. Evidence and Witnesses § 981 (NCI4th)— first-degree murder—statement of unavailable witness—admissible

There was no error in a first-degree murder prosecution where the court admitted the statement of an absent witness to officers. The evidence showed that the witness made a statement to officers and moved to Philadelphia; the prosecutor filed a petition and the court entered a motion several weeks before the trial that the witness be taken into custody and delivered to a North Carolina officer to assure her attendance at trial; an officer went to Philadelphia a few days before the trial and went to the address he had been given with an officer of the Philadelphia police department; the witness's mother told them that the witness had moved and that she did not know the new address or telephone number; and the officers searched the house but could not find the witness. The court could conclude from this evidence that the witness was absent from trial and that the State was

unable to secure her presence by process or other reasonable means. N.C.G.S. § 8C-1, Rule 804(a)(5).

Am Jur 2d, Evidence §§ 697-700.

6. Evidence and Witnesses § 1268 (NCI4th)— first-degree murder—confession—Miranda rights not repeated

The trial court did not err in a first-degree murder prosecution by admitting defendant William Bowie's confession where defendant was given *Miranda* warnings and questioned by one detective and contended that he should have been advised of his rights again before being questioned by the second detective after a ten to fifteen minute break. Although defendant contended that the court's order admitting the confession applied only to the statements taken by the first detective, each of the two detectives stayed in the interrogation room throughout the questioning of the defendant and there was only one interview.

Am Jur 2d, Criminal Law § 797; Evidence §§ 749, 750.

7. Evidence and Witnesses § 1278 (NCI4th)— first-degree murder—confession—waiver of rights—totality of circumstances

Although a defendant in a first-degree murder prosecution contended that the totality of circumstances surrounding his statement, the presence of psychological coercion, and his condition show that his statement should not have been admitted, the court found based on substantial evidence that no threats or promises induced defendant to make his statement, that defendant was not under the influence of alcohol, was not in need of medical attention, and did not request food or beverage, and these findings are based on substantial evidence and are binding.

Am Jur 2d, Criminal Law § 797; Evidence §§ 749, 750.

8. Criminal Law § 427 (NCI4th)— first-degree murder—prosecutor's argument—defendant's failure to testify—curative instruction

There was no error in a first-degree murder prosecution where the prosecutor commented in his argument to the jury on defendant's failure to testify, defense counsel objected, and the court instructed the jury not to consider the statement of counsel and that defendant had no obligation to offer evidence. Although defendant contended that this instruction was insufficient, it met

the requirements of *State v. Reid*, 334 N.C. 551 and *State v. McCall*, 286 N.C. 472.

Am Jur 2d, Trial §§ 577-587.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify. 14 ALR3d 723.

Violation of federal constitutional rule *(Griffin v. California)* prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error. 24 ALR3d 1093.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error—modern cases. 32 ALR4th 774.

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

There was no error in two death sentences where the evidence supports the findings of the aggravating circumstances, the sentences were not imposed under the influence of passion, prejudice or any other arbitrary factor, and the sentences of death were not excessive or disproportionate to the penalties imposed in similar cases. Although the murders in this case were not as shocking for their brutality or rapacity as those in many cases, the Supreme Court was impressed with the calculated nature of the killings and the defendants' wanton disregard for the value of human 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.

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.

STATE v. BOWIE

[340 N.C. 199 (1995)]

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death for each defendant by Ferrell, J., at the 11 January 1993 Criminal Session of Superior Court, Catawba County, upon jury verdicts of guilty of first-degree murder. Heard in the Supreme Court 14 September 1994.

Each of the defendants was tried in one action on two counts of first-degree murder. The jury found both defendants guilty on each count as charged. The evidence showed that Nelson Shuford and Calvin Wilson were standing with some friends in a residential neighborhood of Hickory, North Carolina. The defendants, holding their hands behind their backs, approached the group, and began shooting at them. Shuford and Wilson were killed in the attack.

The jury recommended the death penalty for each defendant for both murders, which sentences were imposed.

The defendants appealed.

Michael F. Easley, Attorney General, by William B. Crumpler, Associate Attorney General, and Joan Herre Byers, Special Deputy Attorney General, for the State.

W. Thomas Portwood, Jr. for defendant-appellant Nathan Wayne Bowie; Robert W. Adams for defendant-appellant William Barfield Bowie.

WEBB, JUSTICE.

[1] The defendant Nathan Bowie first assigns error to the court's failure to submit to the jury the statutory mitigating circumstance "[t]he age of the defendant at the time of the crime." N.C.G.S. § 15A-2000(f)(7) (Supp. 1994). Nathan Bowie was twenty years of age when the crime was committed. We have held that chronological age is not the determinative factor with regard to this mitigating circumstance. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983). The defendant's immaturity, youthfulness, or lack of emotional or intellectual development at the time of the crime must also be considered. *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, 502 U.S. 876, 116 L. Ed. 2d 174, *reh'g denied*, 502 U.S. 1001, 116 L. Ed. 2d 648 (1991).

The defendant contends that this case is governed by *State v. Turner*, 330 N.C. 249, 410 S.E.2d 847 (1991), which holds that the age

circumstance should have been submitted to the jury when the evidence showed the twenty-two year old defendant had been neglected and abused as a youth, was reared by a dysfunctional mother, and was raised in a situation in which there was a significant lack of stability and guidance. In this case, Nathan Bowie presented evidence that he was twenty years of age when the crime was committed, that he was illegitimate, and that he lived in an unstable environment until he was twelve years of age. The defendant was placed in a foster home when he was twelve years of age and continued living in the foster home until he finished high school. The defendant says these factors place him within the holding of *Turner* and he must have a new sentencing hearing.

We do not believe the evidence supports a finding that the defendant's intellectual and emotional development was less than normal. Unlike the defendant in *Turner*, the defendant Nathan Bowie was placed in a foster home when he was twelve years of age. He then developed at a normal rate. He graduated from high school and took classes at a community college. He related well to other students and had many friends. His teachers, coaches, and principal testified that he was polite, cooperative, and able to handle criticism and follow the rules. His social worker found him trustworthy enough that she lent him $2,000 to purchase a truck for which he regularly made payments.

We believe this case is more like *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986), in which the defendant's foster parents testified that in their opinion the defendant was emotionally immature for his age, which was twenty-three. The foster parents, with whom the defendant had lived for two years, based their opinions on the defendant's bedwetting, emotional behavior, and being fired from his first job. The foster parents also testified to his normal physical and intellectual development and his level of experience. We held that the evidence did not require the court to submit this circumstance. The evidence in this case did not show that the defendant Nathan Bowie had not developed normally mentally or emotionally.

This assignment of error is overruled.

[2] The defendant William Bowie assigns error to the court's denial of his motion for a psychiatric examination. He contends that the denial of this motion prevented his counsel from adequately representing him at the trial. He argues that it also prevented him from presenting evidence to the jury in regard to the mitigating circumstances

"[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance" and "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C.G.S. § 15A-2000(f)(2) and (6).

The defendant William Bowie bases this assignment of error on a motion his attorney made one month before the commencement of the trial. His attorney asked in the motion that the defendant be examined to determine whether he was competent to stand trial. He did not set forth any conduct by the defendant that led him to make the motion.

N.C.G.S. § 15A-1002(a) provides that when a motion is made which questions a defendant's ability to proceed, the "motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed." N.C.G.S. § 15A-1002(a) (1988). We cannot hold that it was error to deny this motion when nothing was shown to the court as to why the motion should have been granted.

This assignment of error is overruled.

[3] The third assignment of error pertains to both Nathan Bowie and William Bowie. The defendants contend that the trial court erroneously denied their request for a jury instruction on voluntary manslaughter. The court in this case submitted to the jury possible verdicts of first-degree murder, second-degree murder, and not guilty. The jury convicted the defendants of first-degree murder. "When the jury is instructed on possible verdicts for first-degree murder and second-degree murder and the jury convicts on the basis of first-degree murder, any failure to instruct on a possible verdict for manslaughter cannot be harmful to the defendant." *State v. Ginyard*, 334 N.C. 155, 160, 431 S.E.2d 11, 14 (1993); *accord State v. Shoemaker*, 334 N.C. 252, 270-71, 432 S.E.2d 314, 323-24 (1993). Even if there was sufficient evidence to support an instruction on voluntary manslaughter, which we do not decide, in light of the jury's verdict, the trial court's failure to give the instruction is harmless error.

This assignment of error is overruled.

[4] The defendants next assign error to the admission of certain testimony by Sgt. Dan Carlson, an investigating officer with the City of Hickory Police Department. Sgt. Carlson testified to his inability to find the defendant William Bowie's sister Rochelle Bowie. This was

done in order to have her declared unavailable as a witness so that her statement could be read to the jury.

Sgt. Carlson testified that in his search for Rochelle Bowie he went to the home of her mother, Ernestine Bowie, in Philadelphia, Pennsylvania. The following colloquy then occurred:

> Q. After you weren't able to locate Rochelle Bowie, what, if anything, did you do?
>
> A. We asked Ernestine Bowie if she knew where Rochelle Bowie was and she —
>
> MR. CUMMINGS: OBJECT.
>
> MR. PORTWOOD: OBJECT.
>
> THE COURT: SUSTAINED as to what she may have said.
>
> MR. PARKER: That would be offered for the truth of the matter, not —
>
> THE COURT: All right, sir.
>
> Q. What did she say?
>
> MR. CUMMINGS: OBJECT.
>
> MR. PORTWOOD: OBJECT.
>
> THE COURT: Answer, sir.
>
> A. Ernestine Bowie advised us that Rochelle Bowie had moved out Saturday prior to us arriving there and that she had moved in with a girlfriend. We had asked her what the girlfriend's name was. Ernestine Bowie advised us that she did not know the girlfriend's name, telephone number, or address as to where she was.

This testimony by Sgt. Carlson as to what Ernestine Bowie told him was admissible to prove the difficulty of finding Rochelle Bowie. When used for this purpose it was not hearsay. N.C.G.S. § 8C-1, Rule 801(c) (1992). The defendant contends that because the prosecuting attorney said this testimony was "offered for the truth of the matter," we should treat this statement as if it is hearsay and determine whether it is admissible as an exception to the hearsay rule.

This statement by the prosecuting attorney, which may have been a *lapsus linguae*, does not convert nonhearsay testimony to hearsay testimony. In any event, the testimony of Sgt. Carlson was so periph-

eral to the case that its admission could not have prejudiced the defendants.

This assignment of error is overruled.

[5] The defendants next assign error to the admission of hearsay testimony in the form of a statement made by Rochelle Bowie to the investigating officers. The State offered this testimony as an exception to the hearsay rule allowed under N.C.G.S. § 8C-1, Rule 804(b)(5). The defendants contend that the finding by the superior court that the witness was unavailable was not supported by the evidence. Rule 804(a)(5) provides that a witness is unavailable if "the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means." N.C.G.S. § 8C-1, Rule 804(a)(5) (1992).

The evidence in this case showed that Rochelle Bowie made a statement to the officers concerning the events in regard to the crimes. She then moved to Philadelphia. Several weeks before the trial, the prosecutor filed a petition with the court pursuant to N.C.G.S. § 15A-813, the statute that governs summoning out-of-state witnesses to testify. Judge Ferrell entered an order, which included a recommendation, pursuant to the provisions of the statute, that Rochelle Bowie be taken into custody and delivered to a North Carolina officer to assure her attendance at the trial. As a result of this recommendation, rather than attempting to serve Ms. Bowie well in advance of the trial, Sgt. Carlson went to Philadelphia a few days before the commencement of the trial. Sgt. Carlson, accompanied by an officer of the Philadelphia Police Department, went to the address they had been given for Rochelle Bowie. Ms. Bowie's mother, Ernestine Bowie, told the officers that Rochelle had moved and that she did not know her daughter's new address or telephone number. The officers searched the house but could not find Rochelle Bowie.

The superior court could conclude from the above evidence that Rochelle Bowie was absent from the trial and that the State was unable to secure her presence by process or other reasonable means. This supports the finding that the witness was unavailable.

This assignment of error is overruled.

[6] The defendant William Bowie next assigns error to the admission into evidence of a confession he made to Detectives Michael Cohen and James Alexander of the Philadelphia Police Department. The

defendant objected to the admission of this confession and a *voir dire* hearing was held out of the presence of the jury.

The evidence at the *voir dire* hearing showed that the defendant William Bowie was stopped by a police officer in Philadelphia for a traffic violation. The defendant's name was put in a computer which showed he was wanted for questioning in regard to a homicide in North Carolina. The defendant William Bowie was then taken to the police station where he was questioned by Detectives Cohen and Alexander. The defendant was given the *Miranda* warnings and signed a paper waiving his right to remain silent and to confer with an attorney. The transcript shows that Detective Alexander first questioned William Bowie and then Detective Cohen questioned him. The court found facts consistent with this evidence and concluded that the defendant had waived his rights enunciated in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). The court ordered that the confession be admitted.

The defendant contends that there was a ten to fifteen minute break between the questioning by Detective Alexander and the questioning by Detective Cohen. He says he should have again been advised of his *Miranda* rights before the questioning by Detective Cohen. He says the court's findings on the *voir dire* hearing apply only to the statements taken by Detective Alexander and the statements taken by Detective Cohen should not have been admitted.

We disagree with the defendant's contention that the court's order admitting the confession applied only to the statements taken by Detective Alexander. The court specifically found that the defendant freely and voluntarily made statements to Detective Cohen. The court also referred to the defendant's statement as "State's Exhibit Voir Dire No. 4," which is the entire statement and not merely the first portion.

Each of the two detectives stayed in the interrogation room throughout the questioning of the defendant. There was only one interview. It was not necessary, as defendant William Bowie contends, to advise him for the second time of his *Miranda* rights when Detective Cohen began his questions. We can assume he had not forgotten them during the interview. *State v. McZorn*, 288 N.C. 417, 219 S.E.2d 201 (1975), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976).

[7] The defendant argues finally under this assignment of error that the totality of circumstances surrounding the statement, the presence

of psychological coercion, and his condition show that his statement to Detective Cohen should not have been admitted. The court found, based on substantial evidence, that no threats or promises induced the defendant to make his statement. The court also found that the defendant was not under the influence of alcohol, was not in need of medical attention and did not request food or beverage. These findings of fact are based on substantial evidence and are binding upon us. They support the conclusion that the confession was not coerced. *State v. Greene*, 332 N.C. 565, 579, 422 S.E.2d 730, 738 (1992); *State v. Richardson*, 316 N.C. 594, 598-99, 342 S.E.2d 823, 827 (1986).

This assignment of error is overruled.

[8] The defendant Nathan Bowie next assigns error to the prosecuting attorney's comment during his argument to the jury on Nathan Bowie's failure to testify. The prosecutor made the following remarks:

> Mother suffered [an] addiction to drugs, made him go get the drugs for her, and he spent several weeks in a boys' home in Philadelphia while his mother recovered—received substance abuse treatment. So what? How did that affect you Nathan? Huh? Did that bother you any? Did you hear anything from him saying how it affected him?

The defense counsel objected. The court sustained the objection and instructed the jury as follows:

> Do not consider the statement of counsel as to whether or not you heard him say how it affected him. Do not deliberate on that, members of the jury. Defendant has no obligation to offer any evidence in this regard from himself.

The defendant Nathan Bowie argues that this instruction consisting of only five lines was not sufficient to cure the comment. He relies on *State v. Lindsay*, 278 N.C. 293, 179 S.E.2d 364 (1971), in which we approved a much longer instruction. The State contends this statement by the prosecuting attorney was not a comment on Nathan Bowie's failure to testify, but was only an argument on the absence of any evidence from the defendant showing how his mother's drug addiction affected him. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). Assuming the argument was a comment on the defendant Nathan Bowie's failure to testify, the court cured any error by its action in sustaining the objection and giving the curative instruction.

In *State v. Reid*, 334 N.C. 551, 556, 434 S.E.2d 193, 197 (1993), we said a comment by the prosecutor on a defendant's failure to testify may be cured by an instruction from the court that the comment was improper followed by an instruction not to consider the failure of the defendant not to offer himself as a witness. *See also State v. McCall*, 286 N.C. 472, 487, 212 S.E.2d 132, 141 (1975). The instruction given in this case meets the requirements of *Reid* and *McCall*. The instruction not to consider the argument in effect told the jury it was improper. The instruction that he had no obligation to offer evidence from himself told the jury not to consider the failure of the defendant to testify.

This assignment of error is overruled.

We find no error in the trial or sentencing hearing.

[9] Finding no error in the trial, it is our duty to determine (1) whether the record supports the jury's finding of aggravating and mitigating circumstances; (2) whether any of the sentences were imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether any of the sentences of death is excessive or disproportionate to the penalty imposed in similar cases. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). An examination of the record reveals the evidence supports the findings of the aggravating and mitigating circumstances. Neither of the defendants contends otherwise. We also hold that the sentences were not imposed under the influence of passion, prejudice or any other arbitrary factor.

Our next task is to determine whether either of the sentences imposed is excessive or disproportionate to the penalties imposed in similar cases. As to Nathan Bowie, the jury found in both cases two aggravating circumstances: (1) did the defendant kill the victim while he was an aider or abettor of a person who was attempting to kill another person, and (2) was the murder for which he was convicted part of a course of conduct which included other crimes of violence against another person. N.C.G.S. § 15A-2000(e)(5) and (11). In both cases against the defendant William Bowie, the jury found the two aggravating circumstances found in Nathan Bowie's case and found as an additional aggravating circumstance that he had previously been convicted of a felony involving the use or threat of violence. N.C.G.S. § 15A-2000(e)(3).

In the case of Nathan Bowie, fifteen mitigating circumstances were submitted to the jury. One or more jurors found ten of them, including one statutory mitigating circumstance, that the defendant had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1). In William Bowie's case, one or more jurors found nine of the sixteen mitigating circumstances submitted. None of them were statutory mitigating circumstances.

This Court gives great deference to a jury's recommendation of a death sentence. *State v. Quesinberry*, 325 N.C. 125, 145, 381 S.E.2d 681, 694 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603, *on remand*, 328 N.C. 288, 401 S.E.2d 632 (1991). In only seven cases have we found a death sentence disproportionate. *State v. McCollum*, 334 N.C. 208, 240-42, 433 S.E.2d 144, 162-63 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895, *reh'g denied*, —— U.S. ——, 129 L. Ed. 2d 924 (1994). In several cases which have characteristics similar to this case, we have affirmed the imposition of the death penalty.

In *State v. McHone*, 334 N.C. 627, 646, 435 S.E.2d 296, 307 (1993), *cert denied*, —— U.S. ——, 128 L. Ed. 2d 220 (1994), there were multiple killings. In *State v. Gardner*, 311 N.C. 489, 514, 319 S.E.2d 591, 607 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985), the killings were cold-blooded, calculated and senseless. In *State v. Gibbs*, 335 N.C. 1, 72, 436 S.E.2d 321, 362 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994), the defendants employed a calculated plan of attack. In *State v. Hutchins*, 303 N.C. 321, 357, 279 S.E.2d 788, 810 (1981), the defendant's course of conduct amounted to a wanton disregard for human life. In *State v. Robinson*, 336 N.C. 78, 137, 443 S.E.2d 306, 336 (1994), there was no evidence of remorse by the defendants. All these characteristics are present in this case.

The murders in this case are not as shocking for their brutality or rapacity as are those in many of the cases that come to this Court, but we are impressed with the calculated nature of the killings and the defendants' wanton disregard for the value of human life. The defendants planned the killings over a period of at least nine hours and apparently killed to avenge the loss of some jewelry the victims allegedly had taken from a relative of the defendants. When the killings in this case are compared to those in the cases listed above in which death sentences were imposed, the similarity of the characteristics of the cases convinces us that the penalties imposed in this case

were not excessive or disproportionate to the penalties imposed in similar cases, considering the crimes and the defendants.

We hold that the defendants received trials and sentencing hearings free of prejudicial error; that the aggravating circumstances found were supported by the evidence; that the sentences of death were not imposed under the influence of passion, prejudice or any other arbitrary factor; and that the sentences of death are not excessive or disproportionate to the penalties imposed in similar cases.

NO ERROR.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. KELVIN MAURICE SOLOMON

No. 233A93

(Filed 5 May 1995)

1. **Evidence and Witnesses §§ 601, 693 (NCI4th)—reading letters to jury—absence of authentication, offer of proof**

The trial court did not err by refusing to permit defendant to have a State's witness read into evidence the contents of three letters written on his behalf to defendant where there was no proper identification or authentication of the letters, and defendant made no offer of proof or other attempt to show the court what he was trying to do with regard to the contents of the letters.

Am Jur 2d, Trial §§ 436 et seq.

2. **Criminal Law § 445 (NCI4th)— argument that defendant lied in testimony—no impropriety**

The prosecutor did not improperly inject his own beliefs, personal opinions or knowledge by his jury argument that defendant lied during his testimony. Rather, the prosecutor's remarks were consistent with the facts in evidence from the defendant himself and reasonable inferences drawn therefrom. Assuming that the prosecutor's statements were improper, the impropriety was not so gross or excessive as to require the trial court to intervene *ex mero motu* since the prosecutor in effect argued that the jury

should reject defendant's testimony because his credibility, having been impeached, made his version of the events unbelievable.

Am Jur 2d, Trial §§ 692 et seq.

3. Evidence and Witnesses § 2791 (NCI4th)— knowledge of oath—truthful testimony—questions excluded—no error

The trial court did not err by refusing to permit defense counsel to ask a defense witness whether she knew she was under oath where, notwithstanding the rule that credibility is for the jury, the witness was ultimately allowed to testify that she told the truth. Nor did the trial court err by refusing to allow defense counsel to ask defendant whether he had accurately pointed out to the prosecutor all of the places in his pretrial statements that were untrue since the effect of the question was to ask defendant whether the remainder of his testimony was truthful, and the question of whether a witness told the truth was for the jury to decide.

Am Jur 2d, Witnesses §§ 743 et seq.

4. Homicide § 255 (NCI4th)— first-degree murder—shooting victim numerous times—second-degree instruction not required—argument insufficient to show incapacity to deliberate

The evidence in a first-degree murder prosecution did not require the trial court to instruct the jury on the lesser offense of second-degree murder where defendant's evidence tended to show that another person shot and killed the victim, and the State's evidence tended to show that defendant and the victim argued because the victim had cheated defendant in a drug deal, defendant shot the victim in the groin, and as the victim attempted to run away, defendant ran after him and shot him several more times at close range. Evidence that defendant and the victim argued, without more, is insufficient to show that defendant's anger was strong enough to disturb his ability to reason and that he was thus incapable of deliberating his actions.

Am Jur 2d, Homicide §§ 482 et seq.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Michael, J., at the 30 November 1992 Criminal Session of Superior

Court, Halifax County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 13 February 1995.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor, Assistant Appellate Defender, for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 1 June 1992 for the first-degree murder of Jessie Smith. The defendant was tried noncapitally, and the jury found defendant guilty of first-degree murder on the theory of premeditation and deliberation. By judgment and commitment dated 3 December 1992, Judge Michael sentenced the defendant to a term of life imprisonment.

At trial, the State presented evidence tending to show that Jessie Smith bled to death on 9 April 1992 as a result of multiple shotgun wounds to the arms, chest, abdomen and legs. Dr. Louis Levy, Medical Examiner for Nash and Edgecombe Counties, performed an autopsy on the victim. Dr. Levy's examination revealed that the victim's left lung and the main artery coming out of the heart were totally destroyed. The victim also suffered soft tissue and bone injuries. Dr. Levy discovered the presence of birdshot, buckshot, and plastic and fiber wadding material from shotgun shells inside the victim's body.

The State's evidence established that Delvin and Terence Dickens were with the defendant when the victim was shot. In November 1992, in lieu of facing murder charges, the Dickens brothers pled guilty to being accessories after the fact to murder and agreed to testify truthfully against the defendant.

Delvin Dickens testified that on the evening of 9 April 1992, he and his brother, Terence Dickens, drove to Scotland Neck, North Carolina, to pick up Delvin's girlfriend. On the way, Delvin and Terence stopped in Enfield, North Carolina, to pick up the defendant. At some point after the defendant was picked up, the victim, Jessie Smith (also known as "Booger"), came to the car, talked to the defendant and then got in the car. After driving away, the defendant and the victim began to argue. The car stopped and Delvin asked them to get out of the car. At that time, Delvin noticed that the defendant had a pistol grip shotgun between his legs. Terence asked the defendant what was going on, and the defendant replied, "This

guy [Smith] stuck me up for twenty dollars worth of stuff." Delvin believed that the defendant was referring to "crack" cocaine.

According to Delvin, as the victim left the car, the defendant began shooting. The first shot hit the victim in his groin area. The victim tried to run or hop away, but the defendant ran after him and shot the victim again. The victim continued to run until the defendant shot him a third time, at which point the victim screamed, "I'm a dead man. I'm dead." The defendant again approached the victim and shot him a fourth time. Smith fell to one knee. As Smith stood up, the defendant shot him a fifth time. Smith fell and did not move again.

Terence Dickens, the brother of Delvin Dickens, similarly testified that on the evening of 9 April 1992, he received a telephone call from the defendant. The defendant asked Terence to drive him downtown to meet someone. When Terence and Delvin arrived at the defendant's residence, the defendant was carrying a green jacket. Terence testified that he noticed a gun in the coat. When asked why he had the gun, the defendant stated that he needed to go downtown to give the gun to someone named "Booger."

Terence and the defendant found "Booger," and "Booger" got into the car. Terence drove out toward the country, and at some point, the defendant told Terence where to stop the car. According to Terence, he and Delvin got out of the car and made the defendant and the victim get out of the car. Terence testified that Delvin asked the defendant "what was going on," and the defendant replied that Jessie Smith "had stuck him up for twenty dollars worth of drugs." The defendant then began shooting "Booger." The victim attempted to run away, but the defendant ran after him while continuing to shoot. Defendant shot the victim numerous times at "point-blank range."

The defendant then got back into the car and told the Dickens brothers to take him home. Upon arrival at the defendant's home, the defendant told the Dickens brothers "not to tell anyone about this."

I.

[1] In his first assignment of error, the defendant contends that the trial court erred by sustaining the State's objections to defense counsel's repeated efforts to cross-examine Delvin Dickens about letters written to the defendant on Dickens' behalf.

On direct examination, Delvin Dickens testified that at his request, other inmates wrote three letters to the defendant urging him

to admit to killing the victim in order to clear Dickens' own name. On cross-examination, Dickens testified that other inmates wrote the letters on his behalf, that he read the letters, and that he intended for the letters to be sent to the defendant. Without further questioning, defense counsel then asked Dickens to read the three letters in an attempt to introduce their contents into evidence. The State's objections to each attempt to read the letters into evidence were sustained.

The defendant argues that contrary to Delvin Dickens' testimony, the letters do not contain any statements urging the defendant to admit to shooting the victim. Instead, the letters clearly state that Dickens told the police he did not know who killed the victim; that Delvin, Terence and the defendant should refuse to testify against one another; and that they all faced severe punishment unless they cooperated to deceive the police. The defendant contends that the trial court erred by not allowing him to cross-examine Dickens about the letters. The defendant asserts the following five arguments in support of his position that he should have been allowed to read into evidence the contents of the letters: (1) the letters contained prior inconsistent statements; (2) the letters were admissible for purposes of impeachment as a specific instance of prior bad conduct; (3) the State opened the door to the testimony; (4) the letters demonstrated bias; and (5) the letters were admissible generally under N.C.G.S. § 8C-1, Rule 611(b).

The defendant correctly argues that he was entitled to cross-examine Delvin Dickens about the letters. However, it is clear that the defendant was not seeking to cross-examine Dickens about the letters, but rather, was seeking to have Dickens read each letter into evidence. Further, defendant failed to lay a proper foundation prior to asking Dickens to read the letters. There was no point of reference made to any specific statement in any of the three letters so that the witness could either admit or deny such statement. In fact, there was no foundation or question asked by defendant to establish that the three letters (defendant's Exhibits 1, 2 and 3) were the same letters referred to by the witness on direct examination. The witness was merely asked to "read the letter."

The record reflects that the following testimony was elicited after defense counsel handed the witness the letter marked defendant's Exhibit No. 3:

> Q. All right. Was this letter written while you were held in Halifax Jail?

A. Repeat the question, please.

Q. Was that letter written while you were in the Halifax Jail?

A. Yes, sir.

Q. Do you know about when it was written?

A. No. I really don't.

Q. It was written with your consent and at your direction. Is that right? But you didn't write it?

A. No. I didn't write it.

Q. Who is that addressed to up at the top?

A. Kelvin Solomon.

Q. All right. Read the letter that was written with your consent, with your name, with the intent to go to Kelvin Solomon, read what's marked Exhibit #3.

[State's objection sustained.]

Without query or any argument to the court or exception taken or proffer, and without continuing to cross-examine as to the letter marked defendant's Exhibit No. 3, the defendant's counsel merely continued his cross-examination with respect to the other two letters. The questioning set out above is representative of, and virtually identical to, the language preceding the State's objections to the defendant's attempts to have the witness read the remaining two letters to the jury.

In essence, the defendant contends, in all of his arguments on this issue, that he was not allowed to cross-examine a key prosecution witness, regarding statements the witness made on direct examination about some letters written on his behalf, simply because he was not allowed to read into evidence the entire contents of what we can only presume are the same letters. This is not the case, as the record reflects. Defendant was allowed to cross-examine the witness as to his testimony about "some letters," but he failed to extend this cross-examination sufficiently to allow the reading of the entire contents of these particular letters into evidence. A written statement is not admissible as evidence without proper identification or authentication. *State v. Artis*, 325 N.C. 278, 305, 384 S.E.2d 470, 485 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604, *on remand*, 327 N.C. 470, 397 S.E.2d 223 (1990).

Additionally, as above noted, after the prosecutor's objections were sustained, the defendant made to the trial court no offer of proof or other attempt to show the court where he was going or what he was trying to do with regard to the contents of the letters. Absent such an offer of proof, coupled with the failure to lay a proper foundation for the introduction of the letters, there was no showing of relevance. Evidence not relevant is not admissible. N.C.G.S. § 8C-1, Rule 402 (1992). The trial court properly sustained each of the prosecutor's objections. We would note that for the same reasons as stated above, the letters were similarly not admissible through the defendant's own testimony. This assignment of error is overruled.

II.

[2] In his next assignment of error, the defendant contends that the trial court abused its discretion by failing to intervene *ex mero motu* to prevent closing argument by the prosecutor that the defendant lied during his testimony.

The prosecutor made the following arguments, to which defendant now takes exception:

> Not only is he a murderer, but he's bold as brass cause [sic] he can be taken in, be advised of his rights, come in here under oath and get right up on that witness stand and deny that he understood what his rights were one minute and then turn around and admit that he did the next, and then start *lying his head off* about what happened in April of 1992. And then want this jury to believe him. *To come up with a cock and bull story* in December of 1992 and expect you to brush away everything that's been said and every untruth he's ever told like you're suppose to say, we'll [sic] *let's give him best one out of four.*
>
> . . . .
>
> . . . The thing about Kelvin Solomon is he has not dealt with the truth in so long that he's forgot what it is. And he wants you to forget what the truth is. He wants to boldly come in here *after giving what he says are three untruthful statements* and . . . pull the wool over your eyes.

(Emphasis added.)

Prosecutors are given wide latitude in the scope of 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). "Even so, counsel may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence." *State v. Johnson*, 298 N.C. 355, 368, 259 S.E.2d 752, 761 (1979). Counsel may, however, argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom. *Syriani*, 333 N.C. at 398, 428 S.E.2d at 144.

It is well established that control of counsel's arguments is left largely to the discretion of the trial judge. *Johnson*, 298 N.C. at 368, 259 S.E.2d at 761. When no objection is made at trial, as here, the prosecutor's argument is subject to limited appellate review for gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*. *State v. Pinch*, 306 N.C. 1, 17, 292 S.E.2d 203, 218, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *and by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994). In order to determine whether the prosecutor's remarks are grossly improper, the remarks must be viewed in context and in light of the overall factual circumstances to which they referred. *Id.* at 24, 292 S.E.2d at 221.

The evidence tends to show that after his arrest, the defendant made three statements to law enforcement officers. As the record reflects below, the defendant repeatedly stated, on cross-examination, that he had lied when giving these previous statements:

> Q. Mr. Solomon, once you were advised of your rights, you told Detective Tripp, and this was at 10:30 A.M. on the eleventh of April when you were picked up, you told Detective Tripp, "Terry, I don't know his last name, came and picked me up the other night." Isn't that what you told Detective Tripp?
>
> A. Yes, but I lied too, on that statement.
>
> . . . .
>
> Q. You said in your statement you heard about five shots?
>
> A. I lied on that.
>
> . . . .
>
> Q. You said in your statement it was a white four-door car. Isn't that right?
>
> A. No, sir.

Q. You didn't say that on your statement?

A. I lied if I did.

. . . .

Q. And then the very next sentence after that and the last sentence on that statement is, "Then we went up 48 and that's when he shot the hell out of him."

A. I lied on this statement.

On numerous other occasions, the defendant did not specifically state that he lied, but instead, when asked if he was telling the truth, answered, "No, sir." The defendant also testified at one point that he did not understand his *Miranda* rights. Later, he changed his answers and admitted that he did indeed understand those rights. At yet another point in his testimony, the defendant denied knowing what the phrase "stuck me up" meant before admitting that the phrase referred to someone being cheated on a drug deal. Clearly, in light of the defendant's own testimony, the prosecutor did not inject his own beliefs, personal opinions or knowledge into his jury argument. Rather, the prosecutor's remarks were consistent with the facts in evidence from the defendant himself and the reasonable inferences drawn therefrom.

Assuming *arguendo* that the statements which the defendant now complains of were improper, the impropriety was not so gross or excessive that we would conclude the trial court abused its discretion by failing to intervene *ex mero motu*. When read in context, the prosecutor's argument was no more than an argument that the jury should reject the defendant's testimony in that the defendant's credibility, having been impeached, made his version of the events unbelievable. A prosecutor may properly argue to the jury that it should not believe a witness. *State v. McKenna*, 289 N.C. 668, 687, 224 S.E.2d 537, 550, *death sentence vacated*, 429 U.S. 912, 50 L. Ed. 2d 278 (1976). This assignment of error is, accordingly, overruled.

III.

[3] In his third assignment of error, the defendant contends that the trial court erred by sustaining the State's objections to the defendant's efforts to ask two defense witnesses if they were telling the truth.

Defense counsel argues that the defendant and Cassandra Morrow were both vulnerable on cross-examination: the defendant

because he had made prior inconsistent statements to the police, and Ms. Morrow because her status as the defendant's girlfriend and mother of his children might imply bias. To bolster each witness' credibility on redirect examination, defense counsel asked the defendant whether he had accurately pointed out to the prosecutor all the places in his prior statements that were untrue and asked Ms. Morrow whether she knew she was under oath. The State objected to each question. The defendant argues that the trial court erred when it sustained each objection. We disagree.

The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone. *State v. Ford*, 323 N.C. 466, 469, 373 S.E.2d 420, 421 (1988). Recently, this Court held that a trial court correctly sustained the prosecutor's objection to the question, "Are you telling this jury the truth?" *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). Notwithstanding this principle, Ms. Morrow was ultimately allowed to testify that she told the truth. We find no merit to the defendant's argument with respect to Ms. Morrow as she was permitted to testify to more than that which was previously excluded by the trial court. Defense counsel's question to the defendant was no more than a means to ask the witness whether the remainder of his testimony, which he did not point out as being untrue, was truthful. Thus, pursuant to our ruling in *Skipper*, the question of whether this witness, who was affirmed to tell the truth, did in fact tell the truth in his testimony, was something for the jury to decide, not the witness. *Id.* This assignment of error is without merit.

IV.

[4] Defendant next contends that the trial court erred by denying his request to instruct the jury on second-degree murder as a lesser included offense of first-degree murder.

Murder in the first degree, the crime of which the defendant was convicted, is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 337 (1986). Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Brown*, 300 N.C. 731, 735, 268 S.E.2d 201, 204 (1980). A defendant is entitled to have a lesser included offense submitted to the jury only when there is evidence to support that lesser included offense. *Id.* at 735-36, 268 S.E.2d at 204.

Here, evidence of the lesser included offense of second-degree murder is totally lacking. The defendant's defense and his evidence, if believed, tended to show that Delvin Dickens shot and killed the victim and that the defendant had no role in the killing. The State's evidence on the other hand tended to show that Terence and Delvin Dickens, at the defendant's request, drove the defendant, who was armed with a sawed-off shotgun, to Enfield, North Carolina, to search for Jessie Smith, the victim. After finding Smith, the four men drove out toward the country. At some point, the defendant asked Terence Dickens to stop the car. The State's evidence further showed that the defendant and the victim were arguing because the victim had "stuck [the defendant] up," a term meaning he had cheated the defendant in a drug deal. The defendant then shot the victim in the groin. As the victim attempted to run away, the defendant ran after him and shot the victim several more times, all at close range. Neither the defendant's nor the State's view of the evidence tended to show a killing with malice but without premeditation and deliberation.

The defendant argues that the jury could have inferred that the defendant lacked the requisite element of "deliberation" based on evidence that the defendant and the victim were arguing prior to the shooting. Deliberation means that the defendant formed an intent to kill and carried out that intent in a cool state of blood, in furtherance of a fixed design for revenge or other unlawful purpose and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. *State v. Faust*, 254 N.C. 101, 106-07, 118 S.E.2d 769, 772, *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961). "The requirement of a 'cool state of blood' does not require that the defendant be calm or tranquil." *Fisher*, 318 N.C. at 517, 350 S.E.2d at 337. The fact that the defendant was angry or emotional at the time of the killing will not negate the element of deliberation unless such anger or emotion was strong enough to disturb the defendant's ability to reason. *Id.* Thus, evidence that the defendant and the victim argued, without more, is insufficient to show that the defendant's anger was strong enough to disturb his ability to reason. Without evidence showing that the defendant was incapable of deliberating his actions, the evidence could not support the lesser included offense of second-degree murder. We therefore conclude that the trial court correctly denied the defendant's request to submit the offense of second-degree murder to the jury. In this assignment, we find no error.

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

NO ERROR.

RICHARD F. FLORADAY, JR. AND WIFE, CHRISTINE E. FLORADAY v. DON GALLOWAY HOMES, INC.

No. 232PA94

(Filed 5 May 1995)

Negligence § 125 (NCI4th)— negligent construction of retaining wall—subsequent purchaser of house—claim against builder

An owner of a dwelling house who is not the original purchaser has a claim against the builder for the negligent construction of other structures where the defective construction materially affects the structural integrity of the house itself. Therefore, a subsequent purchaser had a claim against the builder for negligent design and construction of a backyard retaining wall where there was a severe gradient in the backyard of the house, and the wall was necessary to prevent mud slides, thereby directly affecting the structural integrity of the house.

Am Jur 2d, Negligence §§ 119-129, 190-192.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 114 N.C. App. 214, 441 S.E.2d 610 (1994), reversing summary judgment for defendant entered by Sitton, J., in Superior Court, Mecklenburg County, on 25 June 1992. Heard in the Supreme Court 17 March 1995.

Morris, York, Williams, Surles & Brearley, by Gregory C. York, for plaintiff-appellees.

Kellam, Lancaster & Trotter, by Raymond L. Lancaster and William H. Trotter, Jr., for defendant-appellant.

FRYE, Justice.

This appeal presents the question of whether an owner of a dwelling house who is not the original purchaser has a cause of action

against the builder for negligence in the construction of a backyard retaining wall that materially affects the structural integrity of the house, when such negligence results in damage to the owner. We conclude that the reasoning in *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985), extends to such structures. We, therefore, affirm the decision of the Court of Appeals, which reversed summary judgment entered by the superior court in defendant's favor.

On or about 27 August 1984, Charles and Kathleen Gindhart entered into a contract with defendant to purchase a single-family dwelling located at 11838 Post Ridge Court in Charlotte. At the time the contract was formed, the residence was partially completed, and there was a severe gradient in the backyard. The contract was contingent on the Gindharts' acceptance of the mud slide protection which was to be installed by defendant. Prior to closing on the contract, defendant built—and the Gindharts accepted—a backyard retaining wall which was constructed from railroad ties.

Plaintiffs subsequently purchased the residence from the Gindharts on 24 August 1987. In June of 1989, plaintiffs were preparing to sell the home when a structural inspection of the property uncovered problems with the retaining wall. The wall was infested with termites, improperly treated for ground contact, and on the verge of collapse. Upon learning of the condition of the wall, plaintiffs paid to remove and replace the wall built by defendant.

Plaintiffs filed their complaint against defendant in Superior Court, Mecklenburg County, on 12 September 1990. Plaintiffs alleged that the retaining wall was defective and that defendant was negligent in the design and construction of the wall. Plaintiffs also alleged expenditures in an amount in excess of $10,000 to replace the retaining wall. On 7 December 1990, defendant filed an answer asserting that plaintiffs' claim should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Additionally, defendant asserted as affirmative defenses the statute of limitations and statute of repose. The courts below have not ruled on the affirmative defenses, and those questions are not before this Court.

On 13 May 1992, pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, defendant filed a motion for judgment on the pleadings, requesting dismissal of the action on the grounds that the complaint failed to state a claim upon which relief could be granted. At the hearing on this motion, plaintiffs submitted pho-

tographs of both the wall which defendant built and the new wall. Additionally, plaintiffs submitted affidavits from themselves and Kathleen A. LaFrance, formerly Kathleen Gindhart. The affidavits indicated that plaintiffs were not aware of the damage to the wall when they purchased the home and that the initial owners purchased the home on the condition that defendant build the retaining wall to insure against mud slides. Defendant did not present any material beyond the pleadings.

On 25 June 1992, the trial judge entered summary judgment in favor of defendant and dismissed plaintiffs' action. On appeal by plaintiffs, the Court of Appeals reversed, with Judge John concurring in a separate opinion. We allowed defendant's petition for discretionary review in order to determine whether the Court of Appeals erred in holding that plaintiffs' complaint stated a claim for relief under North Carolina law.

Although defendant's motion was made under Rule 12(c) for judgment on the pleadings, the trial court correctly treated it as a motion for summary judgment since plaintiffs filed affidavits and photographs which were not excluded by the trial court. Rule 12(c) provides:

> (c) *Motion for judgment on the pleadings.*—After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C.G.S. § 1A-1, Rule 12(c) (1990). Thus, we are presented with the question of whether the trial court properly entered summary judgment for defendant.

We have held that summary judgment should be " 'granted when, viewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' " *Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co.*, 326 N.C. 771, 774, 392 S.E.2d 377, 379 (1990) (quoting *Beckwith v. Llewellyn*, 326 N.C. 569, 573, 391 S.E.2d 189, 191, *reh'g denied*, 327 N.C. 146, 394 S.E.2d 168 (1990)). In

order to be entitled to summary judgment, the moving party must bear the burden and show that no questions of material fact remain to be resolved. *Id.*

Plaintiffs' claim raised a genuine issue as to defendant builder's negligence in the design and construction of the retaining wall, the necessary costs to remedy defects caused by defendant builder's negligence, and the appropriate damages for which plaintiffs might be compensated. Additionally, plaintiffs submitted affidavits and photographs in support of their claim. Defendant submitted no material beyond its pleadings. Defendant, the moving party here, did not meet its burden of showing that no questions of material fact remained to be resolved or that it was entitled to summary judgment as a matter of law. *See generally Vassey v. Burch*, 301 N.C. 68, 269 S.E.2d 137 (1980). The trial court thus erred by entering summary judgment for defendant.

While the record is clear that the forecast of evidence before the trial court was insufficient to support summary judgment for defendant, there is still a question of whether plaintiffs' complaint stated a claim for relief under North Carolina law. Defendant contends that a subsequent purchaser does not have a right to file a negligence action against a builder for any defect to a structure not within the four walls of the house itself. We disagree and conclude that plaintiffs' complaint did state a claim for relief.

The Court of Appeals, in reversing the trial court, concluded that there can be, under certain circumstances, related structures on a residential property which should have the same protection as the house itself because they are essential for the use and enjoyment of the home. The Court of Appeals reasoned that the structure built on plaintiffs' property—the retaining wall—was such a structure and that plaintiffs therefore did have a right to bring a negligence action against the builder of the retaining wall. The majority of the panel concluded that factual questions remained as to whether the alleged damage to the retaining wall had materially affected the use and enjoyment of the house and, if so, whether the damage was due to a breach of duty by defendant. *Floraday v. Don Galloway Homes*, 114 N.C. App. 214, 217, 441 S.E.2d 610, 612 (1994). Accordingly, summary judgment for defendant was reversed.

Judge John concurred in the result, noting:

> It is uncontroverted that the retaining wall in question, although not physically attached to the house structure, was part

> and parcel of the original construction of the residential premises purchased by plaintiffs, and indeed part of the purchase contracted for by the original buyers. As such, it fell within a fair interpretation of the purview of *Oates* without the majority's imposition of a new "materially affected" test, and summary judgment should not have been entered against the plaintiffs herein.

Id. at 218, 441 S.E.2d at 613 (John, J., concurring).

The right of a subsequent purchaser to bring an action against a builder for negligent construction of a dwelling was established in *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E.2d 222. In *Oates*, the plaintiffs were the third purchasers of a house and lot located in Wake County. In summarizing the specifics of the alleged negligence, this Court stated:

> According to the allegations in the complaint, the plaintiffs, after moving into the house, "discovered numerous defects, faulty workmanship and negligent construction of the residence," consisting of, among other things, the installation of a drain pipe which had been cut, the failure to use grade-marked lumber, the failure to comply with specific provisions of the North Carolina Uniform Residential Building Code pertaining to certain weight bearing requirements, improper and insufficient nailing on bridging and beams, and faulty and shoddy workmanship. As a result of these specific acts of negligence, plaintiffs alleged they suffered economic loss and were forced to undergo extensive demolition and repair work to correct the defective, dangerous and unsafe conditions caused by the defendant's negligence.

Id. at 277-78, 333 S.E.2d at 224. The defendant builder moved to dismiss the complaint in *Oates* for failure to state a claim upon which relief could be granted because plaintiffs did not purchase the home from defendant. This Court held that subsequent purchasers may maintain an action against a home builder for negligent construction of the house.

We have not passed upon the question of whether our holding in *Oates* applies to structures which are not attached to the house itself. However, our reasoning, and the rationale of similar decisions in other jurisdictions, would hold a builder liable to subsequent purchasers of homes where the builder's negligence causes defects that materially impair the structural integrity of the dwelling. *See Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 378 A.2d 599 (1977) (subsequent

purchasers stated cause of action against home builder for faulty septic system); *Simmons v. Owens*, 363 So. 2d 142 (Fla. Dist. Ct. App. 1978) (builder liable to subsequent buyers for foreseeable negligent construction of a home which was damaged by water rot and termite infestation), *overruled in part on other grounds by Casa Clara Condominium Ass'n v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993); *Brown v. Fowler*, 279 N.W.2d 907 (S.D. 1979) (builder liable to subsequent purchasers for negligently constructing a home on filler material); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979) (builder of home is liable to subsequent purchasers for foreseeable damages from his negligent installation of electrical wiring). Counsel have cited no cases rejecting such a claim on the sole ground that the structure is not attached to or a part of the four walls of the house, and we have found none.

The structure in question is a retaining wall which is located in the back of the house, as opposed to being attached to the house; however, the wall is no less important to the structural integrity of the dwelling than parts of the house itself. It is undisputed that there was a severe gradient in the backyard of the home and that the wall was necessary to insure against mud slides, directly affecting the structural integrity of the house. The wall was such a necessary part of the home that the initial purchasers made the building of the retaining wall a condition of the contract to purchase the house.

Defendant contends that it is significant that the parties to the original contract to build the home characterized the retaining wall as landscaping. We disagree. Notwithstanding the characterization of the wall as landscaping, it is undisputed that the wall was required to prevent mud slides, directly affecting the structural integrity of the house. Thus, without the wall, the home would be of little or no value.

As an alternative to its contention that plaintiffs' complaint does not state a claim for relief, defendant argues that the standard adopted by the Court of Appeals is unworkable. The Court of Appeals held that "a subsequent purchaser of a home has a cause of action against the home's builder where the builder's negligence in building a structure on the premises has materially affected the use and enjoyment of the house itself." *Floraday v. Don Galloway Homes*, 114 N.C. App. at 217, 441 S.E.2d at 612. At oral argument, defendant contended that the holding of the Court of Appeals should, at least, be restricted to those cases where the defect in question materially affects the structural integrity of the house. We agree. Accordingly, we hold that

a subsequent purchaser of a home may hold the builder liable for the negligent construction of other structures where the defective construction materially affects the structural integrity of the house itself.

Thus, for the reasons stated herein, rather than those stated by the Court of Appeals, we affirm the decision of the Court of Appeals, which reversed the trial court's grant of summary judgment in favor of defendant.

AFFIRMED.

STATE OF NORTH CAROLINA v. SHAWN DELAMAR TRUESDALE

No. 319A94

(Filed 5 May 1995)

1. **Appeal and Error § 155 (NCI4th)— assignment of error to instructions—failure to preserve issue for appeal—waiver**

Defendant failed to preserve for appellate review an issue as to an instruction by the trial court on premeditation where he did not object to the instruction to which he now assigns error. Furthermore, defendant waived his right to appellate review of this issue by failing specifically and distinctly to contend that the court's instruction constituted plain error. N.C. R. App. P. 10(c)(4).

Am Jur 2d, Appeal and Error §§ 562 et seq.

2. **Homicide § 494 (NCI4th)— instructions—circumstances showing premeditation and deliberation—supporting evidence**

The trial court's instructions that premeditation and deliberation could be shown by the use of grossly excessive force and by the infliction of lethal wounds after the victim was felled were supported by the evidence where the pathologist's testimony showed that the unarmed victim had been shot three times, and two eyewitnesses testified that defendant continued to shoot the victim after the first shot as the victim ran away from defendant and into a closet.

Am Jur 2d, Homicide §§ 501 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.

3. Homicide § 253 (NCI4th)— first-degree murder—sufficient evidence of premeditation and deliberation

The State presented sufficient evidence of premeditation and deliberation to support the trial court's submission of an issue of defendant's guilt of first-degree murder to the jury where the evidence tended to show that the victim and defendant, who were drug dealers, appeared at the home of a drug distributor during the early morning hours; the victim stated that the person with him had a gun with which he was going to shoot him, and said he needed to talk with the distributor; the victim asked the distributor to lie to defendant so he would not think the victim had misappropriated drug money, but the distributor refused; defendant than pulled out his handgun and fired three shots into the unarmed victim; one bullet struck the victim in the back, and two shots struck him as he attempted to flee. A finding of premeditation and deliberation was supported by the victim's statement that defendant had a gun and was going to kill him, the victim's plea to the distributor to lie about the whereabouts of the drug money because he feared serious harm at the hands of defendant unless she did so, and defendant's firing of three shots into the unarmed victim.

Am Jur 2d, Homicide §§ 437 et seq.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Ross, J., at the 4 April 1994 Criminal Session of Superior Court, Mecklenburg County, on a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 11 April 1995.

Michael F. Easley, Attorney General, by James P. Erwin, Jr., Special Deputy Attorney General, for the State.

Thomas H. Eagan 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.

The State's evidence tended to show the following:

Alisa Rucker testified that she and her husband lived in Charlotte in November 1993. Alisa met the victim, Ronald Moore, about three months prior to his death. They were involved in the use and sale of narcotics with a person known as Flat Top. Alisa testified that two weeks before Moore's death, Flat Top allotted him a small amount of crack cocaine. Moore was to intercept people going to Alisa's house to buy drugs because inside she and Flat Top had a large amount of cocaine which they wished to conceal.

Alisa's husband, Donald Rucker, testified that in the early morning of 15 November 1993, he awoke to a ruckus outside his bedroom window. He looked out and saw two shadows. He heard a male voice say, "I want to speak to Alisa," and he responded that she was sleeping. Moore, the victim, who was outside the window, then told Donald he had to talk to Alisa because "[t]here's a man out here got a gun and he's going to shoot me." Donald let Moore and the other man inside.

Alisa testified that on 15 November 1993, she awoke and saw defendant standing in her living room with Moore. Moore bent down and asked her to tell defendant he had paid her Flat Top's money. Alisa stated, "No," and then defendant asked her whether Moore had paid her Flat Top's money; she responded, "Hell, no." Defendant pulled out a silver handgun, pointed it toward the lower portion of Moore's body, and fired.

According to Alisa, after that shot Moore ran to the bedroom and defendant followed him. Alisa heard two or three more shots, and then defendant returned and said, "Excuse me, Lisa," and left the house.

Donald's testimony corroborated Alisa's. He found Moore on the floor in the bedroom closet. He testified that there were no bullet holes in the closet door.

Dr. J.M. Sullivan, a forensic pathologist, testified Moore had been shot three times—once in the back, once in the left wrist, and once in the upper left leg. Dr. Sullivan stated that the wound in Moore's back was consistent with being shot from behind.

Defendant's evidence tended to show the following:

Officer E.M. Corwin testified that defendant confessed to him that he shot Moore. Corwin took a lengthy written statement from defendant. He read from defendant's statement to the jury:

> I asked [Moore] where my money was, and . . . he said, I gave it to Lisa, I gave it to Lisa. She said, no, you didn't, g-dd——it, no, you didn't. I believed Lisa, so I shot [Moore] in the leg. When he grabbed his leg and then came towards me like he was going to take the pistol, . . . I stepped back and shot him again. When he turned and started to go in the hallway, that's when I shot the third time, when he ran into the back room and got in the closet.

Defendant testified in his own behalf. He stated that Moore charged at him and that he pulled out his gun and tried to shoot at Moore's leg. After he did so, Moore jumped at him, threw his body at him, and two more shots just went off. Moore then ran to the bedroom closet. Defendant testified that there was very little time between when the victim came towards him and when he turned towards the bedroom. He indicated that it all happened in a matter of seconds.

[1] Defendant first assigns as error the instructions given on first-degree murder and second-degree murder, specifically, the use of the phrase "time, no matter how short" to describe premeditation. The trial court gave the pattern jury instruction on first-degree murder with a deadly weapon, N.C.P.I.—Crim. 206.10 (1989), which defendant specifically requested. After the instruction was given and the jury was excused for deliberations, the trial court asked whether there were any objections to the instructions as delivered. Defendant did not object to the premeditation and deliberation portion of the instruction to which he now assigns error. He thus failed to preserve this issue for appellate review. N.C. R. App. P. 10(b)(2); *see also State v. Allen*, 339 N.C. 545, 552-55, 453 S.E.2d 150, 154-55 (1995) (discussing preservation of assignments of error in jury instructions under Rule 10(b)(2)). Further, Rule 10(c)(4) provides:

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

N.C. R. App. P. 10(c)(4) (emphasis added). Defendant has failed specifically and distinctly to contend that the trial court's instruction on first- and second-degree murder constituted plain error. Accordingly, he has waived his right to appellate review of this issue. *See State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994).

[2] In this assignment of error, defendant also argues that the trial court's instructions on premeditation and deliberation were erroneous because the court instructed the jury that it could determine premeditation and deliberation from

> circumstances . . . 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 is felled and any other manner in which or means by which the killing was done.

After the court instructed the jury and asked whether there were any objections to the delivered instructions, defendant objected to the recitation of two circumstances from which premeditation and deliberation could be shown: the use of grossly excessive force and the infliction of lethal wounds after the victim is felled. He argues that these examples are confusing and are not supported by the evidence. We disagree.

The court gave the pattern jury instruction on premeditation and deliberation. *See* N.C.P.I.—Crim. 206.10. We previously have stated: "The elements listed [there] 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).

As to "the use of grossly excessive force," the evidence supports this example. The pathologist's testimony supports an inference that excessive force was used because the unarmed victim had been shot three times. *See State v. Smith*, 328 N.C. 99, 137-38, 400 S.E.2d 712, 734 (1991) (evidence supported premeditation and deliberation example of "grossly excessive force" where unarmed victim was shot twice from close range). As to "the infliction of lethal wounds after the victim is felled," the evidence also supports this example. We recently noted: "Under the 'felled victim theory' of premeditation and deliberation, 'when numerous wounds are inflicted, the defendant

has the opportunity to premeditate from one shot to the next.' " *State v. Watson*, 338 N.C. 168, 179, 449 S.E.2d 694, 701 (1994) (quoting *State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987)). Alisa and Donald Rucker both testified that defendant continued to shoot the victim after the first shot as the victim ran away from defendant and into a closet. The victim was shot three times. The evidence therefore supported this example. This assignment of error is overruled.

[3] In defendant's next assignment of error, he contends the trial court erred by instructing the jury on first-degree murder based on the theory of premeditation and deliberation because the evidence was insufficient to support a finding of premeditation and deliberation. Defendant moved to dismiss the first-degree murder charge at the close of the State's evidence and at the close of all the evidence. The trial court denied the motions.

In ruling on a motion to dismiss a first-degree murder charge, the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom. *State v. Jackson*, 317 N.C. 1, 22, 343 S.E.2d 814, 827 (1986), *judgment vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987). Substantial evidence must be introduced tending to prove the essential elements of the crime charged and that defendant was the perpetrator. *Id.* The evidence may contain contradictions or discrepancies; these are for the jury to resolve and do not require dismissal. *Id.* at 22-23, 343 S.E.2d at 827.

First-degree murder is the unlawful killing of a human being with malice, premeditation, and deliberation. *See* N.C.G.S. 14-17 (1993); *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). "Premeditation" means that the defendant formed the specific intent to kill the victim "for some length of time, however short," before the murderous act. *State v. Joyner*, 329 N.C. 211, 215, 404 S.E.2d 653, 655 (1991) (quoting *State v. Biggs*, 292 N.C. 328, 337, 233 S.E.2d 512, 517 (1977)). "Deliberation" means that the defendant formed the intent to kill in a cool state of blood and not as a result of a violent passion due to sufficient provocation. *State v. Stager*, 329 N.C. 278, 323, 406 S.E.2d 876, 902 (1991). Premeditation and deliberation usually are not proved by direct evidence but "by actions and circumstances surrounding the killing." *Joyner*, 329 N.C. at 215, 404 S.E.2d at 655. Examples are:

(1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Huffstetler, 312 N.C. 92, 109-10, 322 S.E.2d 110, 121 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985).

Taken in the light most favorable to the State, the evidence tended to show that the victim and defendant, who were drug dealers, appeared at the home of Alisa Rucker, a drug distributor, during the early morning of 15 November 1993. They awakened Donald Rucker. The victim identified himself, stated that the person with him had a gun with which he was going to shoot him, and said he needed to talk to Alisa. After entering the house, the victim approached Alisa and asked her to lie to defendant so he would not think the victim had misappropriated drug money. Alisa refused. Defendant then pulled out his handgun and fired three shots into the victim, who was unarmed. One bullet struck the victim in the back. Two struck him as he attempted to flee. Defendant then apologized to Alisa and left.

Under these facts, reasonable jurors could conclude that defendant acted with the purpose to kill the victim and formed the intent to kill before he acted. The victim's statement to Donald that defendant had a gun and was going to kill him supports a finding of premeditation and deliberation. Further, his plea to Alisa to lie about the whereabouts of the drug money suggested that he feared he was going to suffer serious harm at the hands of defendant unless she did so. This evidence also supports a finding that defendant must have "formed the intent to kill the victim over some period of time, however short," before he acted. Finally, defendant's firing of three shots into the victim, who was unarmed, also supports premeditation and deliberation. The trial court properly denied defendant's motion to dismiss. This assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. JAMES FREDERICK LEACH

No. 399A93

(Filed 5 May 1995)

1. Homicide § 232 (NCI4th)— first-degree murder—premeditation and deliberation—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of first-degree murder based upon premeditation and deliberation where it tended to show that defendant had a loaded gun when he and two other men went to the home of Weldon, the ex-girlfriend of one of his companions; defendant left the home, waited in his companion's car, and eventually followed the companion to the victim's car, which was also occupied by Weldon's current boyfriend; defendant pointed a gun at Weldon's current boyfriend and then at the victim, stating that he would "ice" the victim; defendant then fired a shot into the victim's head at close range; the victim in no way provoked the shooting; Weldon's current boyfriend saw defendant pull his gun from the car window; and defendant then exchanged gunfire with the current boyfriend.

Am Jur 2d, Homicide §§ 425 et seq.

2. Homicide § 706 (NCI4th)— failure to instruct on voluntary manslaughter—error cured by first-degree murder verdict

Assuming that the trial court's failure to instruct on voluntary manslaughter was error, such error was harmless where the court instructed on first-degree and second-degree murder, and the jury returned a verdict of guilty of first-degree murder.

Am Jur 2d, Homicide §§ 527 et seq.

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

3. Criminal Law § 818 (NCI4th)— interested witness instruction—necessity for request

Defendant's request for an instruction on accomplice testimony could not be construed as including a request for an instruction on the testimony of interested witnesses, and the trial

court was not required to instruct on the credibility of interested witnesses absent a request by defendant.

Am Jur 2d, Trial §§ 1406 et seq.

4. Homicide § 489 (NCI4th)— instructions—circumstances showing premeditation and deliberation—supporting evidence unnecessary

The trial court did not err by instructing the jury that it "may" find premeditation and deliberation from certain circumstances, "such as" circumstances listed by the court, even in the absence of evidence to support each of the circumstances listed, since the instruction did not preclude the jury from finding premeditation and deliberation from direct evidence or other circumstances, and it did not indicate to the jury that the trial court was of the opinion that evidence existed which would support each or any of the circumstances listed. The decision of *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 is disapproved to the extent that it may be construed to be inconsistent with this holding.

Am Jur 2d, Homicide § 501.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Gaines, J., at the 25 January 1993 Criminal Session of Superior Court, Mecklenburg County. Heard in the Supreme Court on 16 February 1995.

Michael F. Easley, Attorney General, by John G. Barnwell, Assistant Attorney General, for the State.

Harry C. Martin, J. Matthew Martin, and John A. Martin, for the defendant-appellant.

MITCHELL, Chief Justice.

Defendant was tried capitally and convicted by a jury of first-degree murder, discharging a firearm into occupied property and assault with a deadly weapon. After a capital sentencing proceeding, the jury recommended a life sentence for the murder, and the trial court entered sentence accordingly.

The State's evidence tended to show that on Sunday, 7 June 1992, Ronald Roseboro, David Rose and defendant James Frederick Leach met at the Luxbury Hotel near Interstate 85 in Charlotte. The three men left the hotel and drove to LeNita Weldon's apartment in Roseboro's car. Weldon was Roseboro's ex-girlfriend and the mother of his daughter. Weldon had called Roseboro earlier in the day to discuss putting their daughter in day care. Defendant carried a loaded pistol wrapped in a white towel into Weldon's home. While the three men were in Weldon's apartment, Weldon's current boyfriend, Leonard Livingston, and the victim, Ronald Lumpkin, arrived. Weldon, Livingston and Lumpkin went upstairs. Weldon and Livingston argued about Roseboro being in Weldon's home.

Roseboro, Rose and defendant left the apartment after hearing a pistol cock. A short time later, Lumpkin, Weldon and Livingston emerged from the apartment and went to Lumpkin's car. Livingston and Lumpkin got in the car. Roseboro approached Livingston and spoke to him for a moment before leaving. Roseboro returned to Lumpkin's car when Livingston opened the passenger door of the car. Defendant, following Roseboro, approached Lumpkin's car on the driver's side. Defendant told Livingston that he was there just to make sure everything was "cool." Livingston turned to see defendant point a gun at him and then pull the gun back toward Lumpkin. Defendant stated that he would "ice" Lumpkin right there. Livingston turned away from defendant to locate Roseboro. As he turned, he heard a gunshot. During this entire time, Lumpkin was seated in the driver's seat of his car, watching the parties converse, with his hands on the steering wheel. Lumpkin never spoke to defendant, and defendant never spoke directly to him.

After hearing the gunshot, Livingston turned back toward Lumpkin. Livingston saw defendant standing next to the car, pulling his gun out of the car window. Lumpkin had been shot in the head. Livingston jumped out of the car and exchanged fire with defendant as defendant ran away. Roseboro and Rose also fled the scene. No one else was hurt.

An autopsy revealed powder burns around the entrance of the victim's wound indicating that the gun had been fired within two or three feet of the victim. The police recovered a .45-caliber bullet from the trunk of a car parked next to the victim's vehicle. That bullet had been fired from the same gun as the bullet removed from the victim during the autopsy.

[1] Defendant argues in his first assignment of error that the trial court erred by denying his motion to dismiss the charge of first-degree murder due to insufficiency of the evidence. On a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382 (1988). We recently defined first-degree murder as follows:

> First-degree murder is the unlawful killing—with malice, premeditation and deliberation—of another human being. N.C.G.S. § 14-17 (1993); *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). Premeditation means that defendant formed the specific intent to kill the victim for some length of time, however short, before the actual killing. *State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980). Deliberation means that defendant carried out the intent to kill in a cool state of blood, "not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *State v. Hamlet*, 312 N.C. 162, 170, 321 S.E.2d 837, 842-43 (1984).

State v. Arrington, 336 N.C. 592, 594, 444 S.E.2d 418, 419 (1994).

The evidence in the present case tended to show that defendant arrived at Weldon's home with a loaded gun. He left the home and waited in Roseboro's car, eventually following Roseboro to the victim's car. Defendant pointed the gun at Livingston and then at the victim, stating that he would "ice" the victim. The evidence showed that the victim in no way provoked the shooting. The bullet that killed Lumpkin was fired from close range. Livingston saw defendant pulling his gun from the car window. Defendant exchanged gunfire with Livingston as he left the scene. This evidence, taken in the light most favorable to the State, was substantial evidence that defendant committed premeditated and deliberate murder. This assignment of error is without merit.

[2] In another assignment of error, defendant argues that the trial court erred by failing to instruct the jury on voluntary manslaughter. It is unnecessary to decide whether the evidence supported a voluntary manslaughter instruction. Assuming *arguendo* it was error not to instruct on voluntary manslaughter, a review of the possible verdicts submitted to the jury and the jury's ultimate verdict reveals that such error was harmless. The trial court instructed the jury that it could find defendant (1) guilty of first-degree murder, based either on the theory of premeditation and deliberation or the theory of felony mur-

der; (2) guilty of second-degree murder; or (3) not guilty. The jury returned a verdict finding defendant guilty of first-degree murder on both theories submitted. This Court, addressing the identical argument presented by defendant, has said:

> "A verdict of murder in the first degree shows clearly that the jurors were not coerced, for they had the right to convict in the second degree. That they did not indicates their certainty of his guilt of the greater offense. The failure to instruct that they could convict of manslaughter therefore could not have harmed the defendant."

State v. Shoemaker, 334 N.C. 252, 271, 432 S.E.2d 314, 324 (1993) (quoting *State v. Freeman*, 275 N.C. 662, 668, 170 S.E.2d 461, 465 (1969)). Thus, even if it was error to fail to instruct the jury in this case regarding voluntary manslaughter, such error was harmless.

[3] In another assignment of error, defendant notes that he asked the trial court to give an instruction regarding the credibility of Livingston and Roseboro in light of evidence that they were his accomplices. On appeal, defendant properly concedes that on the evidence presented, Livingston and Roseboro did not fall within the definition of "accomplices" and that the trial court did not err by failing to instruct the jury regarding accomplice testimony. Nevertheless, defendant argues that his request should have alerted the trial court that Livingston and Roseboro were interested parties and that the trial court should have instructed the jury concerning testimony of interested parties. Defendant contends that such an instruction was warranted because Livingston and Roseboro had not been charged for any crime related to the shooting of Ronald Lumpkin. Therefore, he concludes, it was in their best interests to testify in a manner favorable to the State so they would not be charged.

The idea that defendant's request for an instruction regarding testimony by accomplices encompassed a request that the trial court also instruct the jury on the credibility of interested witnesses is not supported by the record. The transcript clearly shows that the colloquy between defense counsel and the trial court concerning defendant's request for an instruction on accomplice testimony could in no way be construed to include a request for an instruction on the testimony of interested witnesses. Thus, defendant essentially argues that the trial court should have, *sua sponte*, instructed the jury on the credibility of interested witnesses. The law is otherwise; "an instruction as to the credibility of an interested witness relates to a subordi-

nate feature of the case and the court is not required to charge thereon absent a request." *State v. Eakins*, 292 N.C. 445, 447, 233 S.E.2d 387, 388 (1977). As defendant did not request such an instruction in the present case, this assignment of error is without merit.

[4] In his final assignment of error, defendant contends that the trial court erred by instructing the jury that when deciding whether the killing was done with premeditation and deliberation, it could consider whether (1) the defendant used grossly excessive force, or (2) the circumstances of the murder were brutal or vicious. Defendant argues that neither of those circumstances was supported by the evidence and that the prejudice he suffered due to the trial court's instruction entitles him to a new trial. *See State v. Buchanan*, 287 N.C. 408, 420-22, 215 S.E.2d 80, 87-88 (1975).

The trial court instructed the jury on premeditation and deliberation as follows:

> Neither premeditation or deliberation is usually susceptible of direct proof. They may be proved by proof of a circumstance from which they may be inferred such as a lack of provocation by the Victim; conduct of the Defendant before, during and after the killing; threats and declarations of the defendant; use of grossly excessive force or vicious circumstances of the killing or the manner or means by which the killing was done.

This instruction is based upon the North Carolina Pattern Instructions. N.C.P.I.—Crim. 206.10 (1989). This Court said in *State v. Weathers*, 339 N.C. 441, 451 S.E.2d 266 (1994), that " '[t]he elements listed [in this pattern jury instruction] 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.' " *Id.* at 454, 451 S.E.2d at 273 (quoting *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 76 (1990)).

The instruction in question informs a jury that the circumstances given are only illustrative; they are merely examples of some circumstances which, if shown to exist, permit premeditation and deliberation to be inferred. The instruction tells jurors that they "may" find premeditation and deliberation from certain circumstances, "such as" the circumstances listed. The instruction does not preclude a jury from finding premeditation and deliberation from direct evidence or

other circumstances; more importantly, it does not indicate to the jury that the trial court is of the opinion that evidence exists which would support each or any of the circumstances listed. Therefore, the trial court did not err by giving the instruction at issue here, even in the absence of evidence to support each of the circumstances listed. Accordingly, we reject this assignment of error. To the extent that *State v. Buchanan*, 287 N.C. 408, 420-22, 215 S.E.2d 80, 87-88, may be construed to be inconsistent with our holding on this issue, it is disapproved.

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

NO ERROR.

JACK L. ADAMS v. LARRY D. COOPER, WILLIAM A. GRIFFIN, WILLIAM M. HOOPER, JIMMY R. JENKINS

No. 194A94

(Filed 5 May 1995)

Mortgages and Deeds of Trust § 119 (NCI4th)— purchase of restaurant—action against guarantors of purchase money note—anti-deficiency statute

The trial court did not err by dismissing plaintiff's action against the guarantors of a purchase money note used in the purchase of a restaurant. Defendants are afforded the protection of the anti-deficiency statute, N.C.G.S. § 45-21.38, because their obligation to plaintiff arises out of a purchase money obligation for a part of the purchase price of real estate. In all cases interpreting the anti-deficiency statute, the overriding principle is that when the purchase money debtor defaults, the purchase money creditor is limited strictly to the property conveyed and nothing else.

Am Jur 2d, Mortgages § 920.

Mortgages: effect upon obligation of guarantor or surety of statute forbidding or restricting deficiency judgments. 49 ALR3d 554.

Justice WHICHARD concurring.

Justices LAKE and ORR join in this concurring opinion.

Appeal by defendants 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. 459, 442 S.E.2d 141 (1994), reversing a judgment for defendants entered by Trawick, J., on 11 May 1993 in Superior Court, Dare County. Heard in the Supreme Court 13 March 1995.

Trimpi & Nash, by John G. Trimpi, for plaintiff-appellee.

Twiford, Morrison, O'Neal & Vincent, by Edward A. O'Neal, for defendant-appellants.

MITCHELL, Chief Justice.

On or about 3 January 1989, One December Enterprises, Inc. ("One December"), purchased a restaurant located in Dare County from the plaintiff. One December made a cash down payment, assumed two notes which were secured by a first and second deed of trust, and executed a promissory note for the balance of the purchase price—in the principal amount of $156,330.71—which was secured by a third deed of trust. Defendants signed the purchase money note, secured by the third deed of trust, as guarantors.

One December defaulted on its indebtedness to plaintiff, and the second deed of trust was foreclosed. The foreclosure of the second deed of trust had the effect of destroying the security for the third deed of trust.

Plaintiff filed this action to recover the amount owed on the purchase money note secured by the third deed of trust from defendants as guarantors of the note. Defendants moved, pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), to dismiss the action, contending that it was barred by the anti-deficiency statute. The trial court allowed defendants' motion and plaintiff appealed. The Court of Appeals, with Judge McCrodden dissenting, reversed the decision of the trial court. The defendants then appealed to this Court.

The sole issue presented on this appeal is whether North Carolina's anti-deficiency statute, N.C.G.S. § 45-21.38 (1991), bars an action against the guarantors of a purchase money note to recover the debt for the balance of the purchase price represented by the note.

We conclude that such action is barred by the statute and reverse the decision of the Court of Appeals.

North Carolina's anti-deficiency statute provides in pertinent part:

> In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust . . . to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same . . . .

N.C.G.S. § 45-21.38. Because the defendants' obligation to the plaintiff arises out of a purchase money obligation for a part of the purchase price of real estate, the defendants are afforded the protection of the anti-deficiency statute. Our cases interpreting and applying the anti-deficiency statute have consistently held that the 1933 General Assembly intended it to prevent any suit on such a purchase money obligation other than one to foreclose upon the real property securing the obligation.

This Court has stated that the anti-deficiency statute is to be read broadly in order to give effect to its legislative intent and to prevent evasions of the statute. *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979). In construing the meaning of the anti-deficiency statute, we have said:

> [T]he manifest intention of the Legislature was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price.

Id. at 370, 250 S.E.2d at 273. The anti-deficiency statute prevents an action for personal judgment on the note and limits the creditor to the property conveyed in the deed of trust. *Id.* at 371, 250 S.E.2d at 274.

Barnaby v. Boardman, 313 N.C. 565, 330 S.E.2d 600 (1985), is another case involving the application of N.C.G.S. § 45-21.38. In *Barnaby*, we reemphasized that our anti-deficiency statute bars any suit on the note, whether before or after foreclosure, and strictly limits the creditor " '*to the property conveyed.*' " *Id.* at 571, 330 S.E.2d at

604 (quoting *Realty Co. v. Trust Co.*, 296 N.C. at 370, 250 S.E.2d at 273) (alteration in original).

In *Merritt v. Edwards Ridge*, 323 N.C. 330, 372 S.E.2d 559 (1988), the purchase money creditor sought recovery of back taxes, expenses of the foreclosure sale, and attorneys' fees. This Court concluded that the anti-deficiency statute precludes such recovery, stating that in our earlier cases we had not limited its protection to situations

> in which the purchase money creditor was suing on the note or was seeking only to recover the unpaid balance of the purchase price. Given our prior construction of our anti-deficiency statute in *Realty Co.*, and more recently in *Barnaby*, we now hold that when the purchase money debtor defaults, the purchase money creditor is limited *strictly to the property conveyed in all cases* in which the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price.

Id. at 335, 372 S.E.2d at 562 (emphasis added).

In the recent case of *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 432 S.E.2d 855 (1993), the property sold and deeded to Goforth was secured by his purchase money note and deed of trust. Subsequent to the execution of the purchase money note and deed of trust, Goforth executed a document entitled "Supplemental Deed of Trust" conveying certain other real property to the trustee for the benefit of the beneficiaries in the original purchase money deed of trust. Goforth defaulted on the purchase money note and deed of trust, and the property was foreclosed upon and sold; however, the proceeds of that foreclosure sale did not satisfy the debts secured by the purchase money note and deed of trust. The trustee then attempted to foreclose upon and sell the other property subject to the supplemental deed of trust in order to satisfy the deficiency. This Court concluded that it would violate the anti-deficiency statute to satisfy the deficiency by foreclosing on the additional property provided as collateral in the "Supplemental Deed of Trust" because a purchase money creditor is limited to the property conveyed.

Likewise, in the present case, the signature of the guarantors was given as additional security for the debt of One December. We again emphasize that in all cases interpreting the anti-deficiency statute, the overriding principle to be followed is that "when the purchase

money debtor defaults, the purchase money creditor is limited strictly to the property conveyed" and nothing else. *Merritt v. Edwards Ridge*, 323 N.C. at 335, 372 S.E.2d at 562.

For the foregoing reasons, the decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals to reinstate the order of the trial court dismissing the plaintiff's action.

REVERSED.

Justice WHICHARD concurring.

In *Merritt v. Edwards Ridge*, 323 N.C. 330, 372 S.E.2d 559 (1988), one of the cases relied upon in the opinion for the Court, I stated in dissent: "By a pure judicial gloss on the anti-deficiency judgment statute, N.C.G.S. § 45-21.38 (1984), the majority today deprives the plaintiffs of the benefits of a bargain, fairly and properly entered, which violates no established policy. Neither the express terms of the statute nor its underlying policy requires this result." *Merritt*, 323 N.C. at 338, 372 S.E.2d at 564 (Whichard, J., dissenting). This proposition applies equally here. The obligation of the guaranty "is separate and independent of the obligation of the principal debtor." *Investment Properties v. Norburn*, 281 N.C. 191, 195, 188 S.E.2d 342, 345 (1972); *see also Exxon Chemical Americas v. Kennedy*, 59 N.C. App. 90, 91-92, 295 S.E.2d 770, 770-71 (1982); *Gillespie v. DeWitt*, 53 N.C. App. 252, 258-59, 280 S.E.2d 736, 741 (1981). As such, it is not proscribed by any limitation, express or implied, contained in N.C.G.S. § 45-21.38. Other courts interpreting similar statutes have so held. *See, e.g., Paradise Land & Cattle Co. v. McWilliams Enters.*, 959 F.2d 1463, 1466 (9th Cir. 1992) (anti-deficiency statute "does not apply to guaranties of [purchase money] obligations"); *Miller & Schroder, Inc. v. Gearman*, 413 N.W.2d 194, 196 (Minn. Ct. App. 1987) ("[anti-deficiency] statute clearly does not apply to a guarantor"); *First Nat'l Bank & Trust Co. v. Anseth*, 503 N.W.2d 568, 573 (N.D. 1993) ("a guarantor of another's debt or default is not protected by the anti-deficiency statutes"); *Bank of Kirkwood Plaza v. Mueller*, 294 N.W.2d 640, 643 (N.D. 1980) (action against guarantors "is not based on obligations imposed by the notes or mortgages given to secure the notes, but on a separate and distinct contract of guaranty"). For a general discussion of this topic, see J.A. Bryant, Jr., Annotation, *Mortgages: Effect Upon Obligation of Guarantor or Surety of Statute Forbidding or Restricting Deficiency Judgments*, 49 A.L.R.3d 554 (1973).

I believe the foregoing cases represent the better-reasoned view. I perceive from N.C.G.S. § 45-21.38 no compelling public-policy reason, express or implied, to deny a plaintiff-creditor the benefit of a bargain with a defendant-guarantor. The guarantor is subrogated to the rights of the creditor. N.C.G.S. § 26-3.1 (1986) (surety, including guarantor, has benefit of "any action or . . . any remedy which the creditor himself might have had against the principal debtor"); *Peebles v. Gay*, 115 N.C. 38, 40, 20 S.E. 173, 174 (1894) ("Upon general principles of equity a surety, paying the debt of his principal, [is] entitled to be substituted to all the rights of the creditor . . . ."). Because N.C.G.S. § 45-21.38 limits a creditor to recovery of the property that is the subject of the purchase money instrument, the guarantor, too, is thus limited. Therefore, the policy motivating the statute, namely, protecting a debtor against loss beyond the property, is not violated by allowing a creditor to proceed against a guarantor.

If writing on a clean slate, I would so hold. I agree with the opinion for the Court, however, that this Court, over my dissent, has clearly held that

> when the purchase money debtor defaults, the purchase money creditor is limited strictly to the property conveyed in all cases in which the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price.

Merritt, 323 N.C. at 335, 372 S.E.2d at 562. That interpretation has now become an integral part of the statute. *Gupton v. Builders Transport*, 320 N.C. 38, 43-44, 357 S.E.2d 674, 678 (1987). Therefore, restitution of the freedom to bargain that our jurisprudence normally accords, absent express legislative proscription, is a matter for the General Assembly, not this Court. I am bound in this case by the Court's prior interpretation of the statute limiting the purchase money creditor strictly to the property conveyed, and I thus reluctantly concur in the opinion for the Court.

Justices LAKE and ORR join in this concurring opinion.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 169, JAMES E. MARTIN, RESPONDENT

No. 236A94

(Filed 5 May 1995)

Judges, Justices, and Magistrates § 36 (NCI4th)— censure of district court judge—conduct prejudicial to administration of justice

A district court judge is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute based upon the following conduct: (1) respondent's initiation of a series of extensive *ex parte* communications with law enforcement and court personnel concerning the fifteen-year-old son of a friend who had been taken into custody for felonious breaking and entering, informing personnel that the juvenile was "a good kid," asking for help on behalf of the juvenile, and expressing his view that the matter was not one for the court; and (2) respondent's initiation of *ex parte* communications with a law officer concerning an automobile accident which resulted in charges being filed against the driver of a car in which the daughter of respondent's friend was a passenger and respondent's expression to the officer of his opinion that the matter was civil rather than criminal, and that if the case came before him he would so declare it, and his suggestion to the officer that he reconsider his assessment as to fault.

Am Jur 2d, Judges § 21.

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness. 82 ALR4th 567.

This matter is before the Court upon a recommendation by the Judicial Standards Commission (Commission), entered 4 May 1994, that Judge James E. Martin, a Judge of the General Court of Justice, District Court Division, Third and now Three-A 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 2A, 2B, and 3A(4) of the North Carolina Code of Judicial Conduct. Heard in the Supreme Court 14 April 1995.

IN RE MARTIN

[340 N.C. 248 (1995)]

Isaac T. Avery, III, Special Deputy Attorney General, Special Counsel for the Judicial Standards Commission.

Maxwell, Freeman & Beason, P.A., by James B. Maxwell, for respondent-appellant.

ORDER OF CENSURE.

It is upon two incidents that the Commission bases its recommendation that respondent be censured: (1) the respondent's initiation of a series of extensive *ex parte* communications with both law enforcement personnel and court personnel concerning the fifteen-year-old son of a friend who had been taken into custody for the felonious breaking and entering of a Wal-Mart store, informing personnel that the juvenile was "a good kid," asking for help on behalf of the juvenile, and expressing respondent's view that the matter was not one for court; and (2) the respondent's initiation of *ex parte* communications with a law enforcement officer concerning an automobile accident which resulted in charges being filed against the driver of a car in which the daughter of respondent's friend was a passenger and respondent's expression to the officer of his opinion that the matter was civil rather than criminal, and that if the case came before him he would so declare it, and his suggestion to the officer that he reconsider his assessment as to fault.

In his answer, the respondent "specifically denies that his conduct was willful misconduct or that it was prejudicial to the administration of justice."

After reviewing the record, the recommendation of the Commission, and the briefs of both parties, and after hearing oral argument, 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.

Therefore, 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, it is ordered that Judge James E. Martin be, and he is hereby, censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Done by order of the Court in Conference this the 4th day of May 1995.

s/Orr J.
For the Court

JANELLE M. LAVELLE, PLAINTIFF-APPELLANT v. GUILFORD AREA MENTAL ILLNESS, MENTAL RETARDATION, AND SUBSTANCE ABUSE AUTHORITY AND DR. TIMOTHY DAUGHTRY, IN HIS OFFICIAL CAPACITY AS AREA DIRECTOR OF GUILFORD AREA MENTAL ILLNESS, MENTAL RETARDATION AND SUBSTANCE ABUSE AUTHORITY, DEFENDANTS-APPELLEES

No. 338A94

(Filed 5 May 1995)

Hospitals and Medical Facilities or Institutions § 24 (NCI4th)— confidential mental health records—release to attorney

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion. Therefore, plaintiff is entitled to a declaratory judgment that N.C.G.S. § 122C-53(i) requires a mental health facility, upon the request of a client, to release to an attorney all confidential information relating to the client without restriction.

Am Jur 2d, Hospitals and Asylums § 43.

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals, 115 N.C. App. 75, 443 S.E.2d 761 (1994), affirming the judgment allowing defendants' motion for summary judgment entered by Rousseau, J., at the 7 December 1992 Civil Session of Superior Court, Guilford County. Heard in the Supreme Court on 11 April 1995.

Central Carolina Legal Services, Inc., by Janet McAuley-Blue, and N.C. Legal Services Resource Center, by Sorien K. Schmidt, for plaintiff-appellant.

Guilford County Attorney's Office, by J. Edwin Pons, Deputy County Attorney, for defendant-appellees.

Carolina Legal Assistance, Inc., by Deborah Greenblatt; and Governor's Advocacy Council for Persons with Disabilities, by Barbara A. Jackson, amici curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion of Judge (now Justice) Orr in the Court of Appeals, the decision of the Court of Appeals is reversed.

REVERSED.

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

IN RE: INQUIRY CONCERNING A JUDGE, NO. 181, GEORGE R. GREENE, RESPONDENT

No. 112A95

(Filed 5 May 1995)

Judges, Justices, and Magistrates § 36 (NCI4th)— censure of superior court judge—conduct prejudicial to administration of justice

A superior court judge is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute based upon comments made during the trial of two separate cases while he served as the presiding judge.

Am Jur 2d, Judges § 21.

This matter is before the Court upon a recommendation by the Judicial Standards Commission ("the Commission") entered 3 March 1995, and filed with this Court on 14 March 1995, that Judge George R. Greene, then a judge of the General Court of Justice, Superior 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, 2A, and 3A(3) of the North Carolina Code of Judicial Conduct. Calendared for argument in the Supreme Court 10 April 1995; determined without oral argument pursuant to N.C. R. App. P. 30(d).

No counsel for the Judicial Standards Commission or for the respondent.

ORDER OF CENSURE.

The matter came before the Judicial Standards Commission arising out of allegations of misconduct against the respondent. The subject matter of the allegations was based on certain comments made during the trial of two separate cases by respondent while serving as the presiding judge.

Respondent stipulated to the correctness of the factual bases of the allegations and further stipulated that the described conduct would be prejudicial to the administration of justice that brings the judicial office into disrepute. The Judicial Standards Commission, after making findings of facts and conclusions of law, recommended that respondent be censured. In his stipulation, respondent agreed to the Commission's recommendation.

After reviewing the record 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 (1989). The Court approves the recommendation of the Commission that the respondent be censured. Therefore, pursuant to N.C.G.S. § 7A-376, N.C.G.S. § 7A-377 (Supp. 1994) and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that Judge George R. Greene be, and he is hereby, censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Done by order of the Court in Conference, this the 4th day of May 1995.

s/Orr, J.
For the Court

STATE OF NORTH CAROLINA v. AARON DEMETRIUS BAYNES

No. 192A94

(Filed 5 May 1995)

Appeal by the State pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 114 N.C. App. 165, 442 S.E.2d 529 (1994). Judgments had been entered against defendant on his convictions of second-degree murder, five counts of felony child

abuse, and one count of misdemeanor child abuse on 30 January 1992, by Freeman, J., in Superior Court, Guilford County. The Court of Appeals remanded the case for an evidentiary hearing in the Superior Court, Guilford County. On 16 June 1994, this Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court 17 March 1995.

Michael F. Easley, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State-appellant and -appellee.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse and Mark D. Montgomery, Assistant Appellate Defenders, for defendant-appellant and -appellee.

PER CURIAM.

The issue raised by the dissent in the Court of Appeals has been determined by this Court's decision in *State v. House*, 340 N.C. 187, 196-97, 456 S.E.2d 292, 297 (1995). Accordingly, for the reasons stated in *House*, the decision of the Court of Appeals is reversed, and this case is remanded to the Court of Appeals for remand to the Superior Court for reinstatement of the judgments on defendant's convictions of second-degree murder, felony child abuse, and misdemeanor child abuse. As stated in *House*, this decision is without prejudice to this defendant's right to raise the issue of ineffective assistance of counsel based on *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), by filing a motion for appropriate relief in the Superior Court.

Further, we now determine that discretionary review of the additional issues was improvidently allowed.

PETITION FOR DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED; REVERSED AND REMANDED.

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

PAMELA A. BROWNING, GLENN BROWNING AND SHELBA BROWNING v. CAROLINA POWER & LIGHT COMPANY AND TONY LYNN GREGG

No. 225A94

(Filed 5 May 1995)

Appeal by defendant Carolina Power & Light Company 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. 229, 441 S.E.2d 607 (1994), finding error in a trial before Gray, J., at the 27 April 1992 Civil Session of Superior Court, Haywood County, and awarding a new trial. On 5 October 1994, this Court allowed plaintiffs' petition for a writ of certiorari as to issues not addressed in the dissenting opinion in the Court of Appeals. Heard in the Supreme Court 10 April 1995.

Hyler & Lopez, by George B. Hyler, Jr., and Robert J. Lopez, for plaintiffs.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Larry S. McDevitt and Michelle Rippon, and Lawrence F. Mazer, Associate General Counsel, for defendant Carolina Power & Light Company.

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.

COLLINS v. BECK

[340 N.C. 255 (1995)]

SHERRY BAXTER COLLINS AND EDWARD ABSHIRE COLLINS v. AARON (NMN) BECK

No. 409A94

(Filed 5 May 1995)

Appeal by plaintiffs pursuant to N.C.G.S.6 § 7A-30(2) from a divided panel of the Court of Appeals, 116 N.C. App. 128, 446 S.E.2d 610 (1994), affirming a judgment entered by Hairston, J., on 26 January 1993 in Superior Court, Davidson County. Heard in the Supreme Court 12 April 1995.

Barnes, Grimes & Bunce, by Linwood Bunce, for plaintiff-appellants.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Stephen W. Coles, for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

PATSY M. MISHOE AND LAWRENCE W. MISHOE v. MICKEY FRANKLIN SIKES

No. 422A94

(Filed 5 May 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, 115 N.C. App. 697, 446 S.E.2d 114 (1994), reversing the order of the trial court entered by Albright, J., on 9 June 1993 in Superior Court, Guilford County (High Point Division), and remanding this case for the trial court to determine the amount of attorney's fees to which defendant is entitled, representing the cost for prosecuting defendant's counterclaim. Heard in the Supreme Court 11 April 1995.

Wyatt Early Harris Wheeler & Hauser, by Kim R. Bauman, for plaintiff-appellees.

Frazier, Frazier & Mahler, L.L.P., by Torin L. Fury, for defendant-appellant.

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.

TIPTON & YOUNG CONSTRUCTION CO. v. BLUE RIDGE STRUCTURE CO.

[340 N.C. 257 (1995)]

TIPTON & YOUNG CONSTRUCTION CO., INC., PLAINTIFF v. BLUE RIDGE STRUCTURE CO., AND BALBOA INSURANCE COMPANY, DEFENDANTS AND BALBOA INSURANCE COMPANY, THIRD PARTY PLAINTIFF v. J. B. FAGAN, THIRD PARTY DEFENDANT

No. 447PA94

(Filed 5 May 1995)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 116 N.C. App. 115, 446 S.E.2d 603 (1994), affirming a judgment entered by Lamm, J., at the 10 May 1993 session of Superior Court, Yancey County. Heard in the Supreme Court 11 April 1995.

Ronald C. True for plaintiff-appellant.

Waggoner, Hamrick, Hasty, Monteith and Kratt, by S. Dean Hamrick, for defendant-appellee Balboa Insurance Company.

PER CURIAM.

AFFIRMED.

THOMASINE AVERY, Petitioner	)	
v.	)	ORDER
WAKE COUNTY, Respondent	)	

No. 93P95

(Filed 11 May 1995)

On 19 January 1995, Administrative Law Judge Sammie Chess, Jr. entered an order in this case requiring Wake County to reinstate the above named former employee pending the outcome of her personnel action brought at the Office of Administrative Hearings.

On 2 February 1995, Superior Court Judge Robert L. Farmer entered an order vacating the order of the Administrative Law Judge.

On 3 March 1995, the Court of Appeals, through its Clerk, John H. Connell, entered an order vacating the order of Judge Farmer, reinstating the order of Administrative Law Judge Chess, and remanding this matter to the Office of Administrative Hearings for further proceedings.

On 7 March 1995, respondent Wake County filed a petition in this Court in the cause designated "Petition for Writ of Certiorari" and a "Petition for Writ of Supersedeas" and "Motion for Temporary Stay." The petition for writ of certiorari is allowed for the limited purpose of entering the following order:

The order entered 3 March 1995 by the N.C. Court of Appeals through its Clerk, John H. Connell, is vacated; the order entered 2 February 1995 by Judge Robert L. Farmer vacating the order entered 19 January 1995 by Administrative Law Judge Sammie Chess, Jr., is reinstated and this matter is remanded to the Office of Administrative Hearings for further proceedings.

Respondent's Petition for Writ of Supersedeas is denied and the Order for Temporary Stay which was entered on 9 March 1995 is dissolved.

By order of the Court in Conference, this 11th day of May, 1995.

s/Orr, J.
For the Court

CROWDER v. WAKE COUNTY HEALTH DEPARTMENT

[340 N.C. 259 (1995)]

SABRINA CROWDER, Petitioner	)	
v.	)	ORDER
WAKE COUNTY/HEALTH DEPARTMENT, Respondent	)	

No. 94P95

(Filed 4 May 1995)

On 19 January 1995, Administrative Law Judge Sammie Chess, Jr. entered an order in this case requiring Wake County to reinstate the above named former employee pending the outcome of her personnel action brought at the Office of Administrative Hearings.

On 2 February 1995, Superior Court Judge Robert L. Farmer entered an order vacating the order of the Administrative Law Judge.

On 3 March 1995, the Court of Appeals, through its Clerk, John H. Connell, entered an order vacating the order of Judge Farmer, reinstating the order of Administrative Law Judge Chess, and remanding this matter to the Office of Administrative Hearings for further proceedings.

On 7 March 1995, respondent Wake County filed a petition in this Court in the cause designated "Petition for Writ of Certiorari" and a "Petition for Writ of Supersedeas" and "Motion for Temporary Stay." The petition for writ of certiorari is allowed for the limited purpose of entering the following order:

The order entered 3 March 1995 by the N.C. Court of Appeals through its Clerk, John H. Connell, is vacated; the order entered 2 February 1995 by Judge Robert L. Farmer vacating the order entered 19 January 1995 by Administrative Law Judge Sammie Chess, Jr., is reinstated, and this matter is remanded to the Office of Administrative Hearings for further proceedings.

Respondent's Petition for Writ of Supersedeas is denied and the Order for Temporary Stay which was entered on 9 March 1995 is dissolved.

By order of the Court in Conference, this 4th day of May, 1995.

s/Orr, J.
For the Court

CITY OF WINSTON-SALEM v. YARBROUGH

No. 43P95

Case below: 117 N.C.App. 340

Petition by defendants (Yarbroughs) for discretionary review pursuant to G.S. 7A-31 denied 6 April 1995.

DURHAM v. BRITT

No. 110P95

Case below: 117 N.C.App. 731

Petition by defendant (William J. Britt) for discretionary review pursuant to G.S. 7A-31 denied 4 May 1995.

GREEN v. ROUSE

No. 149P95

Case below: 116 N.C.App. 647

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 May 1995.

HAMILTON v. MEMOREX TELEX CORP.

No. 133P95

Case below: 118 N.C.App. 1

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 1995. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 May 1995.

HIX v. JENKINS

No. 127P95

Case below: 118 N.C.App. 103

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 May 1995.

IN RE GLENAIRE, INC.

No. 111P95

Case below: 117 N.C.App. 731

Motion by respondents to dismiss the appeal for lack of substantial constitutional question allowed 4 May 1995. Petition by petitioner (Wake County) for discretionary review pursuant to G.S. 7A-31 denied 4 May 1995.

IN RE THOMPSON

No. 104A95

Case below: 117 N.C.App. 731

Petition by petitioner (Wake County Dept. of Social Services) 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 4 May 1995.

LAUREL WOOD OF HENDERSON, INC. v.
N.C. DEPT. OF HUMAN RESOURCES

No. 102A95

Case below: 117 N.C.App. 601

Petition by petitioner 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 4 May 1995.

PITTMAN v. BARKER

No. 65P95

Case below: 117 N.C.App. 580

Petition by defendants (William E. Clark and Sarah Guy Pittman) for writ of supersedeas denied and temporary stay dissolved 4 May 1995. Petition by defendant (William E. Clark) for discretionary review pursuant to G.S. 7A-31 denied 4 May 1995.

SCARLETT v. RILEY

No. 135P95

Case below: 118 N.C.App. 174

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 May 1995.

STATE v. CHAPPELL

No. 101P95

Case below: 118 N.C.App. 174

Petition by defendant for writ of supersedeas denied and temporary stay dissvoled 4 May 1995. Notice of appeal by defendant (substantial constitutional question) dismissed 4 May 1995. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 May 1995.

STATE v. GRAHAM

No. 144P95

Case below: 118 N.C.App. 231

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 1995.

STATE v. ROBBINS

No. 136P95

Case below: 118 N.C.App. 175

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 1995. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 May 1995.

STATE v. SMITH

No. 134P95

Case below: 118 N.C.App. 175

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 May 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1995.

STATE v. THOMPSON

No. 137P95

Case below: 118 N.C.App. 33

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 1995.

STEWART v. KOPP

No. 129P95

Case below: 118 N.C.App. 160

Petition by plaintiff for writ of supersedeas denied and temporary stay dissolved 4 May 1995. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 May 1995.

STEWART v. PARISH

No. 96P95

Case below: 118 N.C.App. 175

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 May 1995.

THARPE v. FRIEDERMANN

No. 128P95

Case below: 118 N.C.App. 176

Petition by defendant (Newell Eugene Holt) for discretionary review pursuant to G.S. 7A-31 denied 4 May 1995.

WHITE v. N.C. DEPT. OF E.H.N.R.

No. 145P95

Case below: 117 N.C.App. 545

Petition by petitioner (Michael Darwin White) for discretionary review pursuant to G.S. 7A-31 denied 4 May 1995.

STATE OF NORTH CAROLINA v. SYLVIA IPOCK WHITE

No. 487A93

(Filed 2 June 1995)

1. Criminal Law § 286 (NCI4th)— noncapital first-degree murder—continuance—pending capital trial—continuance denied—no error

There was no violation of defendant's constitutional rights where defendant was tried noncapitally on an indictment charging her with the first-degree murder of her stepson in 1973, moved that this trial be continued until after the pending capital trial for the murder of her husband, and that motion was denied. Although defendant contended that she was forced to choose between testifying in her own behalf in this case and waiving her constitutional privilege against self-incrimination in the capital trial or waiving her constitutional right to testify in this trial to preserve her right against self-incrimination in her capital trial, the denial of the motion did not force defendant to choose between two constitutional rights but to make a purely tactical decision as to whether it would be more advantageous to testify in this trial, in the capital trial, in both trials, or not at all. She would have faced the same dilemma regardless of which case was tried first since any incriminating statements made at the first trial could be used against her at the second trial.

Am Jur 2d, Continuance § 60.

2. Criminal Law § 288 (NCI4th)— motion for continuance — denied—not supported by findings—no error

There was no abuse of discretion in a noncapital first-degree murder prosecution in the denial of defendant's motion for a continuance where the ruling was not supported by any findings or analysis indicating that the trial court seriously considered the motion or the factors listed in N.C.G.S. § 15A-952(g). The judge was not required to make specific findings of facts in denying the motion for a continuance because the facts presented in defendant's motion were not in dispute and the evidence before the court at the time the motion was heard clearly showed that none of the factors in N.C.G.S. § 15A-952(g) was present in this case.

Am Jur 2d, Continuance § 59.

3. Indigent Persons § 27 (NCI4th)— noncapital murder—motion for funds for private investigator—no ex parte hearing

There was no prejudice from the trial court's refusal to hold an *ex parte* hearing on defendant's pretrial motion for funds to hire an investigator in a noncapital first-degree murder prosecution where the court improperly based the denial of an *ex parte* hearing on defendant's failure to make a threshold showing of a particularized need, but defendant was not entitled as a matter of right to an *ex parte* hearing on her motion because the request for an investigator is more analogous to a request for fingerprint expert as in *State v. Phipps*, 331 N.C. 427, than to a request for a psychiatrist as in *State v. Ballard*, 333 N.C. 515.

Am Jur 2d, Criminal Law §§ 719, 771, 955, 1006.

Right of indigent defendant in criminal case to aid of state by appointment of investigator or expert. 34 ALR3d 1256.

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

4. Criminal Law § 762 (NCI4th)— noncapital first-degree murder—instruction during jury selection—reasonable doubt—moral certainty

There was no error in a noncapital first-degree murder prosecution where the court gave a "moral certainty" reasonable doubt instruction during jury selection which defendant contended reduced the State's burden of proof below the standard required by the due process clause. The reasonable doubt instruction given during jury selection, taken as a whole, correctly conveyed the concept of reasonable doubt to the jury; moreover, even if there was error in the preliminary instruction, the trial court's use of the pattern jury instruction in its charge to the jury before it retired for deliberation cured any possible defect in the earlier instruction.

Am Jur 2d, Evidence §§ 168, 170.

5. Jury § 132 (NCI4th)— noncapital first-degree murder—jury selection—questions concerning pretrial publicity

The trial court did not abuse its discretion during jury selection for a noncapital first-degree murder prosecution where the

court did not allow defendant to ask whether the publicity surrounding the case or fear of later criticism would affect their verdict or their ability to be fair. Whether the case would attract future media attention or might subject jurors to criticism was purely speculative. These questions were an attempt by defense counsel to stake out prospective jurors and were not likely to result in answers relevant to a juror's qualification to serve.

Am Jur 2d, Criminal Law § 688; Jury §§ 199, 208.

6. Criminal Law § 107 (NCI4th)— noncapital first-degree murder—witness—files as drug informant—not disclosed

There was no error in a noncapital first-degree murder prosecution where the trial court denied defendant's motion for disclosure of all files pertaining to a witness's activities as a drug informant. Defendant was aware that the witness had acted as a police informant in the past and was free to use that information for impeachment purposes.

Am Jur 2d, Depositions and Discovery § 443.

7. Evidence and Witnesses § 364 (NCI4th)— noncapital first-degree murder—other offense—chain of circumstances

The trial court did not err in a noncapital first-degree murder prosecution by admitting evidence of defendant's alleged involvement in another murder where defendant was charged with the 1973 murder of her four year old stepson following a 1991 conspiracy to kill her husband and her motion *in limine* to exclude the evidence of her alleged involvement in her husband's death from the trial for the murder of her stepson was denied. The trial court's findings of fact and conclusions of law make it clear that the evidence of defendant's confession to the witness was admitted for the purpose of refuting accident and that the interwoven evidence of defendant's participation in her husband's murder was admitted for the purpose of establishing the witness's credibility and the contextual basis for defendant's confession; the evidence was so intertwined that the trial court did not err in concluding that all the evidence was admissible under the chain of circumstances rule. Finally, the trial court did not abuse its discretion under N.C.G.S. § 8C-1, Rule 403 by concluding that the probative value of the interwoven evidence outweighed any prejudicial effect. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 326-327.

8. Criminal Law § 787 (NCI4th)— noncapital first-degree murder—instruction on lack of accident

The trial court did not err in the prosecution of defendant for the noncapital first-degree murder of her stepson by instructing the jury that it could consider evidence of defendant's involvement in her husband's murder to prove the absence of accident. The instruction was consistent with the trial court's findings of fact and conclusions of law in connection with the admission of this "other crimes" evidence. Furthermore, the trial court correctly limited the consideration of this evidence to the determination of the witness's credibility and absence of accident.

Am Jur 2d, Evidence § 340; Homicide § 112.

9. Evidence and Witnesses § 650 (NCI4th)— noncapital first-degree murder—motion in limine—no ruling

There was no error in a noncapital first-degree murder prosecution from the court's failure to rule on a motion *in limine* to prohibit the prosecutor from cross-examining defendant with allegedly inadmissible evidence of her involvement in her husband's murder where the "other crimes" evidence here had been properly ruled admissible pursuant to N.C.G.S. § 8C-1, Rule 404(b) under the "chain of circumstances" rule. A criminal defendant's decision not to testify based on the introduction of competent admissible evidence against her is purely a tactical decision that does not implicate any of her constitutional rights; as there was no threat that impermissible evidence would be used to cross-examine defendant, she was not impermissibly discouraged from testifying at trial.

Am Jur 2d, Evidence § 865.

10. Evidence and Witnesses § 1694 (NCI4th)— noncapital first-degree murder—photograph of victim in casket—admissible

The trial court did not err in a noncapital first-degree murder prosecution by admitting a photograph of the victim in his casket in a funeral home where no autopsy or criminal investigation was conducted at the time of the victim's death in 1973, no photographs were taken of the victim as he appeared at the time of his death other than this photograph, only the victim's bones remained when the body was exhumed, and this photograph was the only physical evidence to illustrate testimony about the con-

dition of the victim's body shortly after the time of his death. Moreover, the photograph and accompanying testimony were relevant to establish the *corpus delicti* of the crime.

Am Jur 2d, Evidence §§ 971, 974; Homicide §§ 416-417.

11. Evidence and Witnesses § 212 (NCI4th)— noncapital first-degree murder—victim's prior injuries—admissible

There was no error in a first-degree murder prosecution in the admission of evidence that the four year old victim had suffered from a skull fracture and severe burns on his leg and ankle several weeks before his death where a basis existed for the jury to infer that defendant was responsible for the prior injuries and the evidence that the victim suffered from a severe skull fracture and serious burns shortly before his death was relevant to the jury's determination of whether defendant was criminally negligent. Furthermore, this evidence was relevant and admissible under N.C.G.S. § 8C-1, Rule 404(b) as proof of defendant's preparation and planning for the commission of this crime and that the victim's death was not accidental.

Am Jur 2d, Evidence §§ 270-271; Homicide § 13.

12. Evidence and Witnesses § 84 (NCI4th)— noncapital first-degree murder—victim's life insurance—defendant as beneficiary

The trial court did not err in the prosecution of defendant for the noncapital first-degree murder of her four year old stepson by admitting evidence that her husband, an insurance agent, amended the victim's life insurance policy six days before his death to designate defendant as a co-beneficiary. Evidence of motive is relevant when it has a tendency to show that the defendant committed the crime at issue. The extent of defendant's knowledge about this insurance policy impacted only on the weight to be accorded the evidence.

Am Jur 2d, Homicide § 12; Evidence § 435.

13. Evidence and Witnesses §§ 2162, 2251, 2262 (NCI4th)— noncapital first-degree murder—child's death as accidental—nurses' testimony

The trial court did not err in a noncapital first-degree murder prosecution for the death of a four year old child by admitting tes-

timony from three nurses who were in the emergency room when the victim was brought in and who were present when a piece of plastic was removed from the victim's throat that the plastic could not have been accidentally swallowed by the victim. By overruling defendant's objections, the trial court implicitly accepted the nurses as expert witnesses and defendant waived her right to raise that issue on appeal by failing to specifically object to their qualifications at trial. Even if a challenge to their qualifications had been preserved, these nurses were in fact qualified to render their opinions as experts because they were in a better position than the jurors to know if it was physically possible for a piece of plastic the size of the one removed from the victim's throat to be accidentally swallowed or inhaled so deeply that it could not at first be seen. The use of the term "accident" by one nurse was not a legal term of art or an opinion as to the standard the jury should apply.

Am Jur 2d, Expert and Opinion Evidence § 365.

14. Evidence and Witnesses § 2890.5 (NCI4th)— noncapital first-degree murder—child's death—medical examiner—cross-examination as to reputation

The trial court did not err in the noncapital first-degree murder prosecution of defendant for the 1973 death of her four year old stepson by excluding evidence on cross-examination about the competency of the medical examiner who removed a piece of plastic from the victim's throat and who signed the 1973 death certificate stating that the death was accidental. The prosecutor did not open the door to the admission of the testimony about the medical examiner's general reputation in the medical community because the prosecutor had merely disputed the conclusion that this death was accidental. Moreover, the doctor's current standing in the medical community has no logical probative value on whether his twenty-year-old opinion about this murder was accurate and supported by an a thorough investigation. Finally, assuming that the doctor's reputation for competency as a doctor had been attacked, that evidence was not probative of character for truthfulness and would not have been admissible.

Am Jur 2d, Witnesses §§ 484 et seq.

15. Criminal Law §§ 380, 396 (NCI4th)— noncapital first-degree murder—remarks by judge—opening remark on State's burden of proof—comment to defense counsel

There was no reversible error in a noncapital first-degree murder prosecution where the trial court, in its preliminary remarks to prospective jurors, made a remark which defendant contends denigrated her plea of not guilty and suggested that the trial was a mere formality, but which in context accurately instructed the jury about defendant's presumption of innocence and the State's burden to prove every material element of its charges beyond a reasonable doubt; and where the court commented to defense counsel that "You can talk to her now . . ." when defense counsel was cross-examining a witness concerning her refusal to talk with defense counsel prior to trial. In context, the court's comment was intended to end defense counsel's badgering of the witness. The necessity for the court to intercede was created by defense counsel and the court's comment did not increase any prejudice to defendant arising from the conduct of her attorney.

Am Jur 2d, Trial § 92.

16. Criminal Law § 787 (NCI4th)— noncapital first-degree murder—instruction on accident—theory of acquittal—not in mandate—no plain error

There was no plain error in a noncapital first-degree murder prosecution for the murder of defendant's four year old stepson in 1973 where the court instructed on accident as a theory of acquittal but did not include "not guilty by reason of accident" in the final mandate.

Am Jur 2d, Trial § 726.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Griffin, J., at the 12 April 1993 Special Criminal Session of Superior Court, Martin County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 12 January 1995.

Michael F. Easley, Attorney General, by Thomas F. Moffitt, Special Deputy Attorney General, for the State.

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

PARKER, Justice.

Defendant was tried noncapitally on an indictment charging her with the first-degree murder of her stepson, Billy C. White, II ("victim"). The jury returned a verdict finding defendant guilty of first-degree murder, and defendant was sentenced to life imprisonment. For the reasons discussed herein, we conclude that defendant's trial was free of prejudicial error and uphold her conviction and sentence.

The State's evidence tended to show that in June 1973, defendant, Sylvia Ipock White, lived in Kinston, North Carolina, with her husband, Billy White, Sr. The Whites lived in an affluent part of Kinston with three of defendant's children from a previous marriage and four of her husband's children from a previous marriage. The victim was defendant's four-year-old stepson.

On 21 June 1973, the victim was at home with defendant while his brothers and sisters were at school. At approximately 3:00 p.m., defendant rushed the victim to the emergency room at Lenoir Memorial Hospital. The child's skin was extremely white, and he was pronounced dead upon arrival at the hospital. Peggy Chrisco and Susan Manning, two nurses on duty when the victim was brought into the emergency room, were informed that the child had swallowed a piece of plastic. They looked into the child's mouth using a tongue depressor or a laryngoscope but saw no foreign objects. Anita McGirt, the hospital's operating room manager, was passing through the emergency room at the time the child was brought into the hospital. McGirt went to look at the victim because she was a friend of the victim's father and knew the child. After the other nurses told McGirt that the child had swallowed a piece of plastic, she asked Dr. Sabiston, the medical examiner, to remove it from the child's throat.

Using a laryngoscope and a Kelly clamp, Dr. Sabiston extracted a large piece of a plastic laundry bag from the child's throat. McGirt testified that when the plastic was removed from the victim's throat, it was tightly wadded up and came out in one piece, but it unfolded "like a flower" into a "big handful." Chrisco testified that the piece of plastic was large enough to cover her hand and three-fourths of her arm. There were no torn edges, teeth imprints, or bite or chew marks on the plastic. Dr. Sabiston placed the plastic in Manning's hands, and she threw it in the sink. The piece of plastic was later thrown away as trash.

On the victim's original death certificate, Dr. Sabiston stated that the death was accidental. The emergency room report filed in connection with the victim's death did not contain any information about the piece of plastic removed from the child's throat. Manning testified at trial that the piece of plastic was too large to have been swallowed by a human being, much less a four-year-old child. Chrisco testified that the piece of plastic could not have been swallowed accidentally. McGirt testified that it would have been impossible for her to swallow a piece of plastic as large as the one removed from the victim's throat. Manning and Chrisco claimed that they thought the victim's death was suspicious at the time; but despite their misgivings, neither pursued any further investigation into the death.

The State's evidence further tended to show that defendant gave differing versions of the events the day the victim died. The night after the child's death, defendant told the victim's grandparents that she left him playing in the breakfast room and went to the garage to get some string beans. When she returned, the boy was making noise and choking on plastic. Years later, defendant claimed that the child liked to pull plastic from the garment bags and pretend it was chewing gum. She claimed that on the morning of his death, she took plastic out of his mouth and then went to another room to get dressed. When she returned, the child had his head on the table. She said that she tried to remove the piece of plastic stuck in his throat but was unable to do so.

The State's evidence further tended to show that beginning in the spring of 1991, defendant conspired with Lynwood Taylor and Ernest Basden to kill her husband, Billy White, Sr. She had at least six meetings with Taylor to discuss her husband's murder. During one of these meetings between Taylor and defendant, Taylor expressed hesitation about taking someone's life, and defendant encouraged Taylor to murder her husband. Taylor testified that defendant told him, "[I]t's not that hard to do. I had a step-child. I put a bag over it until it stopped breathing. It was better off."

After defendant's arrest for her involvement in her husband's murder, the body of the victim in this case was exhumed. An autopsy on the body was performed by Dr. John D. Butts, Chief Medical Examiner of the State of North Carolina and an expert in forensic pathology. This autopsy revealed that the child had suffered a large fracture to the back of his skull several weeks before his death, which could have resulted from a serious fall onto a hard surface from a

considerable distance or by the child being struck in the back of the head with a blunt object with considerable force. After Dr. Butts reviewed the victim's records and conducted this physical examination of the victim's remains, he filed a supplemental death certificate in which he stated that the child's death had been a homicide caused by a bag being forced down his throat. Dr. Butts testified at trial that a four-year-old child could not have voluntarily swallowed a piece of plastic from a laundry bag as large as the one removed from the victim's throat because "it's going to tend to initiate the gag reflex and it's going to be very difficult if not, in my opinion, essentially impossible to voluntarily swallow."

Dr. Richard Page Hudson, Jr. testified that he had formerly been the Chief Medical Examiner of the State of North Carolina and that in his opinion a piece of plastic the size of the one found in the victim's throat could not have been swallowed by a child. In his judgment the plastic had been forced down the child's throat, and the death was a homicide.

The State's evidence also tended to show that a few weeks before his death, the victim had suffered several burns on his leg and ankle. According to Barbara Paderick, a neighbor of defendant's in 1973, defendant told her that one afternoon when she was at home alone with the victim, the child slipped out of the house and ignited a can of gasoline, resulting in severe burns on his leg and ankle. Paderick testified that the child's burns were covered in bandages and plastic wrap from his hip to his ankles. She further testified that defendant told her that the child kept pulling the plastic off his bandages and that if the child swallowed the plastic, it could hurt him.

Dr. Frederick Payne Dale testified that he treated the victim for these burns on 15 and 19 June 1973 and recommended covering them with a light bandage. He did not recommend covering the bandages with plastic wrap, which he testified would have been contrary to accepted medical treatment and would have increased the risk of infection.

Finally, the State's evidence tended to show that just prior to the victim's death, defendant had been named as a co-beneficiary of a $15,000 life insurance policy taken out on the life of the victim. Billy White, Sr.'s first wife had previously been named as the co-beneficiary; but on 20 June 1973, the policy was amended to name defendant as the co-beneficiary. This change was effective retroactively as of 15 June 1973, six days prior to the murder.

Defendant put on no evidence at trial.

[1] Defendant first contends that the trial court abused its discretion by erroneously denying her motion to continue this trial until after her capital trial in Jones County, North Carolina, for the murder of her husband. Defendant claims the denial of her motion for a continuance forced her to choose between (i) testifying in her own behalf in the instant case and waiving her constitutional privilege against self-incrimination in her capital trial or (ii) waiving her constitutional right to testify in this trial to preserve her right against self-incrimination in her capital trial.

Defendant argues that this "Hobson's choice" caused her to concede this case and enabled the State to later use this conviction as an aggravating circumstance in her capital trial. She argues that a continuance until after her capital prosecution would have resolved this dilemma and that a short delay would not have prejudiced the State in its prosecution of this twenty-year-old murder case. For the following reasons, we reject defendant's arguments.

Ordinarily a motion for continuance is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of abuse of that discretion. *State v. Stager*, 329 N.C. 278, 318, 406 S.E.2d 876, 899 (1991). "If the motion raises a constitutional issue, the trial court's action involves a question of law which is fully reviewable upon appeal." *Id.* (citing *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982)). "The denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial only upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *Branch*, 306 N.C. at 104, 291 S.E.2d at 656.

A defendant cannot be required to surrender one constitutional right in order to assert another. *Simmons v. United States*, 390 U.S. 377, 394, 19 L. Ed. 2d 1247, 1259 (1968). A criminal defendant has a constitutional privilege against compulsory self-incrimination. U.S. Const. amend. V, XIV; N.C. Const. art. I, § 23. A criminal defendant further has a constitutional right to testify on her own behalf at trial if she so chooses. U.S. Const. amend. V, VI, XIV; N.C. Const. art. I, § 23. However, defendant's alleged "Hobson's choice" between asserting her privilege against self-incrimination and her right to testify on her own behalf is illusory. The trial court's denial of her motion for a continuance did not force defendant to choose between these two con-

stitutional rights but to make a purely tactical decision as to whether it would be more advantageous to testify in this trial, in her capital trial, in both trials, or not at all. Defendant would have faced the same dilemma regardless of which case was tried first since any incriminating statements made at the first trial could later be used against her at the second trial. The effect of the trial court's denial of her motion for a continuance was not a deprivation of one of these constitutional rights, but a deprivation of defendant's opportunity to select the order of her trials for her own tactical benefit.

[2] Defendant also argues that the trial court's summary denial of her motion was a miscarriage of justice and an abuse of discretion since the ruling was not supported by any findings or analysis indicating that the trial court had seriously considered the motion or the factors listed in N.C.G.S. § 15A-952(g). However, the facts presented in defendant's motion were not in dispute; therefore, the judge was not required to make specific findings of fact in denying defendant's motion for a continuance. *State v. Taylor*, 311 N.C. 266, 268, 316 S.E.2d 225, 226 (1984); *State v. Vaughn*, 296 N.C. 167, 175-76, 250 S.E.2d 210, 215-16 (1978), *cert. denied*, 441 U.S. 935, 60 L. Ed. 2d 665 (1979). The evidence before the trial court at the time the motion was heard clearly showed that none of the factors in N.C.G.S. § 15A-952(g) was present in this case. N.C.G.S. § 15A-952(g) (1992).

We conclude that the trial court did not abuse its discretion by denying defendant's motion for continuance or by its failure to make specific findings of fact to support denial of this motion.

[3] Next, defendant contends that the trial court erroneously refused to hold an *ex parte* hearing on her pretrial motions for funds to hire an investigator. In the order denying defendant's motion, the trial court made findings of fact as to the lack of a showing for particularized need and then concluded:

1. There being no threshold showing of a particularized need for an investigator, the Defendant is not entitled to an *Ex Parte* Hearing.
2. There being no threshold showing[,] the Court should not exercise its discretion to order an *Ex Parte* Hearing.

Defendant asserts that the trial court erred in concluding that she was not entitled to such an *ex parte* hearing on her motion because she had not first made a showing of particularized need for the assistance of a private investigator. She contends that she was entitled to an *ex*

parte hearing on a motion for funds to hire an investigator as a matter of right and that the trial court erred by failing to conduct such an *ex parte* hearing.

In *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), the United States Supreme Court recognized the right of an indigent criminal defendant to have an expert psychiatrist appointed to assist with his defense upon an "ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense." *Ake*, 470 U.S. at 82-83, 84 L. Ed. 2d at 66. This Court has followed *Ake* and has required for the appointment of other experts a threshold showing of a specific necessity or particularized need for expert assistance. *See State v. Moore*, 321 N.C. 327, 335, 364 S.E.2d 648, 652 (1988). To make a particularized showing of need for expert assistance, an indigent defendant must establish that "(1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that the expert assistance will materially assist him in the preparation of his case." *State v. Coffey*, 326 N.C. 268, 284, 389 S.E.2d 48, 58 (1990). The *Ake* "significant factor" test is satisfied when a defendant makes this particularized showing. *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992).

In *State v. Phipps*, 331 N.C. 427, 449, 418 S.E.2d 178, 190 (1992), this Court concluded that an *ex parte* hearing is not always constitutionally required for a defendant to make a threshold showing of particularized need for expert assistance. The decision to grant an *ex parte* hearing is within the trial court's discretion. *Id.*

> The primary justification for an *ex parte* hearing is that it allows an indigent defendant to make a detailed showing, sufficient to meet the *Ake* threshold, of his need for expert assistance without alerting the prosecution to vital trial strategy and theories of defense. Though this is a desirable advantage, and one available to both the State and nonindigent defendants, we conclude that its absence does not necessarily render the trial of an indigent defendant fundamentally unfair.

Id. at 450, 418 S.E.2d at 190. Unlike access to the "basic tools of an adequate defense," the need for an *ex parte* hearing on a motion for expert assistance is not a core requirement for a fundamentally fair trial. *Id.* This Court has recognized the right of an indigent defendant to an *ex parte* hearing on a request for a psychologist or psychiatrist. *State v. Bates*, 333 N.C. 523, 428 S.E.2d 693, *cert. denied*, —— U.S. ——,

126 L. Ed. 2d 438 (1993); *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 438 (1993). As stated in *Bates*,

> [b]oth psychologists and psychiatrists are trained to recognize and treat mental illness. Their training and expertise, and the fact that the subject of their study cannot be mechanically assessed, distinguishes them materially from such experts in physical evidence as fingerprint analysts. *See State v. Moore*, 321 N.C. 327, 348-49, 364 S.E.2d 648, 659 (1988) (Mitchell, J., concurring).

Bates, 333 N.C. at 527, 428 S.E.2d at 695.

Since the purpose of the *ex parte* hearing is for the trial court to determine whether defendant has made a threshold showing of a particularized need for an expert, we agree with defendant that the trial court improperly based the denial of the *ex parte* hearing on defendant's failure to make a threshold showing of a particularized need. We do not agree, however, with defendant's contention that the trial court erred in denying defendant's motion for an *ex parte* hearing. Applying the principles discussed above, we conclude that the request for an investigator is more analogous to a request for a fingerprint expert as in *Phipps* than to a request for a psychiatrist as in *Ballard*. We hold that defendant was not entitled as a matter of right to an *ex parte* hearing on her motion for funds to hire a private investigator. The trial court did not abuse its discretion by denying defendant's motion for an *ex parte* hearing or by considering her failure to make a showing of particularized need for the expert assistance without conducting such a hearing. Defendant has shown no prejudice from the denial of her motion, and we find no abuse of discretion on the part of the trial court.

[4] By her next assignment of error, defendant contends that the trial court committed plain error under *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990), by giving a reasonable doubt instruction during jury selection that reduced the State's burden of proof below the standard required by the Due Process Clause. Prior to trial, defendant requested that the prospective jurors be instructed on reasonable doubt pursuant to the North Carolina Pattern Instructions. Although defendant renewed this motion during jury selection, the trial court instructed the prospective jurors about reasonable doubt as follows:

> Members of the jury, let me tell you right now. Proof beyond a reasonable doubt is the standard in this case. It means that the State

> must satisfy you from the evidence it presents. Satisfy you beyond a reasonable doubt means to satisfy you to a moral certainty in the truth of the charge. It is not a vain, imaginary or fanciful doubt, but is a sane, rational doubt which arises out of the evidence or lack of evidence or from the insufficiency of the evidence. It's proof which fully satisfies you or entirely convinces you of a defendant's guilt.

Later during jury selection, the trial court reiterated this explanation of reasonable doubt. Although the trial court correctly instructed on reasonable doubt in accordance with the North Carolina Pattern Instructions during its final instructions to the jury, defendant contends that these later instructions were insufficient to cure the plain error arising from the trial court's initial erroneous instruction.

Based on the United States Supreme Court's decision in *Victor v. Nebraska*, 511 U.S. ——, 127 L. Ed. 2d 583 (1994), and this Court's decisions in *State v. Bryant*, 337 N.C. 298, 446 S.E.2d 71 (1994), and *State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994), we reject defendant's argument. The reasonable doubt instruction given during jury selection, when taken as a whole, correctly conveyed the concept of reasonable doubt to the jury. The trial court instructed the jury that it must be fully satisfied "to a moral certainty in the truth of the charge." As permitted by *Victor*, the rest of the court's instruction defined "moral certainty" and instructed the jury that its decision must be based on the evidence in the case. The instruction equated "moral certainty" with a "sane, rational doubt which arises out of the evidence or lack of evidence or from the insufficiency of the evidence." This instruction appropriately informed the jury that its decision must be based on the evidence in the case and put the term "moral certainty" in context. We conclude that there was no error, much less plain error, in the trial court's instruction on reasonable doubt during jury selection. Moreover, even if there were error in this preliminary instruction, the trial court's use of the pattern jury instruction in its charge to the jury before it retired for deliberation cured any possible defect in the earlier instruction.

[5] Next, defendant contends that the trial court erred as a matter of law by preventing her from exercising her right pursuant to N.C.G.S. § 15A-1214(c) to "personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge." N.C.G.S. § 15A-1214(c)

(1988). In particular, defendant claims she was prevented from asking the prospective jurors whether the publicity surrounding the case or fear of later criticism would affect their verdict or their ability to be fair.

During jury selection, defense counsel inquired whether any of the jurors had seen or heard any pretrial publicity concerning the case. Defense counsel asked the jurors whether any of them had formulated an opinion about the guilt or innocence of defendant based on this pretrial publicity. The following exchange then occurred:

> MR. WHITLEY [defense counsel]: O.K. The . . . I think by virtue of having ten out of twelve of you having seen or heard something about this case, it's obvious that this case has . . . has been the recipient of a great deal of news interest and news coverage. Would the fact that it would and perhaps even your decision about this case later may receive as much or more publicity, would . . . would that fact affect any of your ability to be completely fair and impartial to both sides in this case, including Mrs. White . . .
>
> MISS PATE [prosecutor]: Objection.
>
> MR. WHITLEY: . . . and if it . . .
>
> COURT: Sustained.
>
> MR. WHITLEY: Would any of you be . . . would all of you judge this case only on the evidence that's presented and not allow the fear of later criticism to affect your verdict? Would there any . . .
>
> MISS PATE: Objection.
>
> COURT: Sustained. I'll let them answer the first part of it.
>
> Members of the Jury, are there any of you who would not base your verdict solely upon the evidence in the Courtroom? That is the only consideration, that and the law that applies to the evidence that you hear, is the only consideration in this case. It's entirely appropriate for Mr. Whitley to ask you that. Any other consideration is inappropriate. Any of you have any problem with deciding this case fairly, solely upon the evidence presented and the law that applies to that evidence? If so, raise your hand. (No response from the jurors)

After this exchange, defense counsel proceeded with a different line of questioning.

Defendant claims these questions were highly relevant to the determination of whether jurors were capable of rendering a fair and impartial verdict, whether they would make their decisions solely from the evidence presented at trial and not from publicity or fear of criticism, and whether there was a basis for a peremptory or for-cause challenge. For the following reasons, we reject defendant's arguments.

The purpose of jury *voir dire* is to eliminate extremes of partiality and ensure that the jury's decision is based solely on the evidence presented at trial. *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). The extent and manner of a party's inquiry into a potential juror's fitness to serve is within the trial court's discretion. *Id.* "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. Jones*, 339 N.C. 114, 134, 451 S.E.2d 826, 835 (1994) (citing *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976)), *reconsideration denied*, 339 N.C. 618, 453 S.E.2d 188 (1995).

The questions posed here do not amount to a proper inquiry as to whether the jurors could base their decision solely on the evidence presented at trial. Whether the case would or would not attract future media attention or might subject jurors to criticism was purely speculative. Unlike pretrial publicity, which prospective jurors can evaluate, future publicity cannot be assessed. These questions were an attempt by the defense counsel to "stake out" the prospective jurors on how they would react to potential publicity during the trial and the possibility of facing critical public opinion if the verdict, either guilty or not guilty, was not popular. These questions were not likely to result in answers relevant to a juror's qualification to serve. The trial court did not abuse its discretion by sustaining the prosecutor's objections to defendant's questions. This assignment of error is overruled.

[6] By her next assignment of error, defendant asserts that the trial court erred in denying her motion for disclosure of all files pertaining to Lynwood Taylor's activities as a drug informant for the Lenoir County Sheriff's Department. Defendant filed a motion *in limine* for the disclosure of any files relating to Taylor's work as a drug inform-

ant for use in impeaching Taylor. The prosecutor confirmed that the Lenoir County Sheriff's Department had records relating to Taylor's activity as a drug informant but asserted that they should not be disclosed to defendant because the disclosure would be detrimental to ongoing police investigations. At a pretrial hearing, the trial court conducted an *in camera* review of these documents and determined that they did not contain any relevant, admissible, or impeaching evidence. The trial court sealed the records for appellate review. Defendant requests this Court to review these records and determine if they contain any relevant and impeaching evidence against Lynwood Taylor. We have reviewed the records thoroughly and have found no relevant, admissible, or impeaching evidence relating to Lynwood Taylor.

In *State v. Crandell*, 322 N.C. 487, 369 S.E.2d 579 (1988), this Court addressed a similar demand that the defendant be given access to information concerning a witness' activities as a police informant and past associations with law enforcement officers for impeachment purposes. This Court held that "[t]here is no statutory or other authority for the proposition that the information sought here is of the type properly subject to mandatory disclosure." *Id.* at 499, 369 S.E.2d at 586. As in *Crandell*, in this case defendant was aware that Taylor had acted as a police informant in the past and was free to use that information for impeachment purposes. This assignment of error is overruled.

[7] Next, defendant contends that the trial court erroneously and unconstitutionally admitted evidence of her alleged involvement in the murder of her husband in 1992. Defendant filed a pretrial motion *in limine* to exclude the evidence at trial of her alleged involvement in her husband's murder, on the grounds that admission of this evidence would violate Rules 404(b) and 403 of the North Carolina Rules of Evidence and defendant's constitutional right to due process of law. This motion was denied by the trial court.

The trial court held a *voir dire* to determine the admissibility of Lynwood Taylor's testimony concerning defendant's involvement in the murder of her husband. The trial court made the following findings of fact and conclusions of law:

> 8. Prior to the killing, in one of the meetings in the Food Lion parking lot in Kinston, the defendant White in an effort to motivate Taylor to carry out the incipient murder conspiracy, made statements that she had killed her step-son, Billy C. White, II, by

placing a plastic bag over his head until he stopped breathing, saying to Taylor, "It's not that hard to do."

9. These statements are relevant and highly probative evidence in the case at Bar.

10. These statements, if accepted by the jury, refute the defense of accident.

11. The statements are evidence which are completely out of the context of the events in which they were delivered and therefore would be difficult for the jury to understand without the historical details which gave rise to the statements.

12. The relationship of the witness Taylor to the defendant is essential if the jury is to be able to decide upon the credibility of the witness Taylor and the weight, if any, to be accorded his testimony.

13. It is impossible to develop this relationship with evidence without revealing some of the evidence of the conspiracy to murder Billy C. White, Sr.

14. The events and the evidence of the inculpatory statements are so intertwined as to make it impossible to redact the prejudicial portions.

15. The evidence of the other crime or crimes is not offered as character evidence to prove she acted in conformity therewith.

16. Some portions of the evidence of the other crime or crimes form[] an integral and material part of an account of the matter on trial and is necessary to complete the story for the jury.

17. The probative value of the evidence is not limited solely to tending to establish the defendant's propensity to commit a crime such as the one charged.

18. The probative value of this evidence outweighs any prejudicial effect it might have.

Upon the foregoing Findings, the undersigned concludes as a Matter of Law:

1. That the "chain of circumstances" rationale established before the adoption of G.S. 8C-1, Rule 404(b) survives and is applicable to this case, and the proffered evidence is admissible under this rule.

2. Notwithstanding, under Rule 404(b), the probative value of the proffered evidence is not limited to tending to establish the defendant's propensity to commit a crime such as the one charged or as character evidence to prove she acted in conformity therewith, but the evidence is admissible to establish the credibility of the witness Taylor and to refute the defense of accident.

3. Under Rule 403, the probative value of the proffered evidence outweights [sic] any prejudicial effect it might have.

At trial and over defendant's renewed objections and motion for a limiting instruction, Taylor testified about defendant's alleged involvement in her husband's murder. Taylor testified that he met defendant in the spring of 1991, when she first asked him to kill her husband. At that time, she told Taylor that she unsuccessfully tried to poison her husband. Taylor testified that he met with defendant approximately six times over the next ten months to discuss the murder of her husband. Taylor indicated that he finally agreed to arrange for the murder and that his uncle, Ernest Basden, agreed to commit the murder for defendant. Taylor also testified that during one meeting between defendant and Taylor, defendant confessed to the murder of her stepchild. Taylor testified that after he told defendant he could not take a person's life, defendant encouraged him to commit the murder of her husband by telling him, "[I]t's not that hard to do. I had a step-child. I put a bag over it until it stopped breathing. It was better off."

Defendant does not assign error to the admission of her statement to Lynwood Taylor that she killed her stepchild but contends that the trial court erred as a matter of law by admitting the other evidence about her alleged involvement in the conspiracy to murder her husband. Defendant contends that this evidence was inadmissible under Rule 404(b) of the North Carolina Rules of Evidence to show absence of accident or to establish Taylor's credibility under a "chain of circumstances" rationale. Further, she contends that the only probative value of this evidence was to show that she had the propensity to commit murder and that because she had conspired to murder her husband, she must also have murdered her stepson twenty years before.

Rule 404(b) of the North Carolina Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B, C, D, or E felony if committed by an adult.

N.C.G.S. § 8C-1, Rule 404(b) (1994). This rule is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54. The list of permissible purposes for admission of "other crimes" evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime. *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

Evidence of other crimes committed by a defendant may be admissible under Rule 404(b) if it establishes the chain of circumstances or context of the charged crime. *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990). Such evidence is admissible if the evidence of other crimes serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury. *Id.* (citing *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

In the instant case, the trial court found that the evidence of defendant's involvement in the conspiracy to murder her husband was necessary for the natural development of the facts and to complete the story of this murder for the jury, in particular, to explain the context of defendant's confession to Taylor that she murdered her stepchild by smothering him with a plastic bag. Her confession to Taylor would have been difficult to understand without the historical details and context giving rise to the statement. Absent evidence of defendant's relationship with Taylor, the jury would have been unable to determine Taylor's credibility or what weight to give his testimony. Even though the two incidents were separated by nineteen years, they were inextricably intertwined, and it would have been impossible to develop this relationship for the jury without revealing defend-

ant's participation in the conspiracy to murder her husband. This evidence was not merely probative of defendant's propensity to commit murder and was properly admitted under Rule 404(b).

Further, defendant's confession that she killed her stepchild by smothering him by placing a plastic bag over his head was an admission by a party opponent and therefore admissible as substantive evidence of her guilt and to refute her defense of accident. N.C.G.S. § 8C-1, Rule 801 (1992). Her incriminating statements were interwoven with the evidence of her participation in her husband's murder to such an extent that the prejudicial portions could not be redacted and her confession could not be understood without such evidence being presented to the jury. The trial court's findings of fact and conclusions of law make it clear that the evidence of defendant's confession to Taylor was admitted for the purpose of refuting accident and that the interwoven evidence of defendant's participation in her husband's murder was admitted for the purpose of establishing Taylor's credibility and the contextual basis for defendant's confession. This evidence was so intertwined that the trial court did not err in concluding that all the evidence was admissible under the "chain of circumstances" rule.

Defendant's reliance on *State v. Cashwell*, 322 N.C. 574, 369 S.E.2d 566 (1988), is misplaced. In *Cashwell*, the defendant made an inculpatory statement to his cellmate about the attempted murder of the defendant's girlfriend. *Id.* at 575, 369 S.E.2d at 567. A month later, the defendant made additional inculpatory statements to his cellmate about a different crime, a double murder, for which he was eventually tried. *Id.* At trial, the State introduced evidence of both statements on the theory that the first statement showed the relationship between the defendant and his former cellmate that led up to the inculpatory statement about the defendant's involvement in the double murders. *Id.* at 577, 369 S.E.2d at 568. This Court held that a month having passed between the making of the statements, the first statement was not necessary to show the context in which the second statement was made, and further, the first statement was not necessary to show a confidential relationship between the witness and the defendant. Hence, the statement was irrelevant and immaterial to the subsequent inculpatory statement. *Id.* at 578, 369 S.E.2d at 568.

Contrary to *Cashwell*, in the instant case knowledge of the relationship between Taylor and defendant was necessary in order for the jury to assess Taylor's credibility and determine what weight to give

his testimony concerning defendant's confession to this crime. Moreover, defendant's statement was inextricably intertwined with the evidence of defendant's alleged involvement in her husband's murder and could not be meaningfully isolated.

Defendant contends that even if this evidence was properly admitted under Rule 404(b), it was inadmissible under Rule 403 because any probative value of the evidence was outweighed by the danger of unfair prejudice to defendant. N.C.G.S. § 8C-1, Rule 403 (1992). "Whether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). "Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *State v. Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. We conclude that the trial court did not abuse its discretion under Rule 403 by concluding that the probative value of the interwoven evidence of defendant's confession and involvement in her husband's murder outweighed any prejudicial effect such evidence might have had against her.

[8] In a related argument, defendant contends that the trial court erroneously instructed the jury that it could consider the evidence of defendant's involvement in her husband's murder to prove absence of accident. Defendant contends that the instruction was erroneous as a matter of law, was not supported by the evidence, and violated Rule 105 of the North Carolina Rules of Evidence because it allowed the jury to consider the evidence for an improper substantive purpose. Defendant argues that the trial court's instruction authorized the jury to use the evidence of her involvement in her husband's murder to prove that this victim's death was not an accident; to prove that defendant murdered this victim; and to prove that defendant acted with intent to kill, premeditation, and deliberation.

The trial judge did not give a limiting instruction at the time Lynwood Taylor testified concerning defendant's involvement in her husband's murder but indicated that he would give the instruction at the appropriate time during the final jury instructions. At the charge conference, defendant submitted a request for a special instruction on the use of the evidence of her involvement in her husband's murder, which the trial judge indicated he would give to the jury. During the final jury mandate, the trial judge instructed the jury on this issue in accordance with defendant's request as amended by the trial judge

to include an instruction on the use of this conspiracy evidence in determining the absence of accident. The instruction actually given by the trial court was as follows:

> Now, evidence in this case has been received by which the State alleges that the defendant, Sylvia Ipock White, conspired with James Lynwood Taylor for the murder of Billy C. White. That evidence cannot be considered by you in any manner in determining the defendant's guilt in this case. This evidence was received solely for the purpose of explaining the alleged statement and determining the credibility of the witness . . . the testimony of James Lynwood Taylor, *and also the State contends to show the absence of accident.* That is the sole reason this evidence of some other crime or alleged crime was received in this case and it may not be considered by you for any other purpose except the purposes about which I've instructed you.

(Emphasis added.)

We find no error in the instruction as given by the trial court. A trial judge is required to correctly instruct the jury on the law arising from the evidence presented at trial. N.C.G.S. §§ 15A-1231, -1232 (1988). This instruction was consistent with the trial court's findings of fact and conclusions of law in connection with the admission of this "other crimes" evidence. Contrary to defendant's contention, this instruction did not authorize the jury to make an improper use of this evidence. As indicated above, the trial court properly admitted all the interwoven evidence of defendant's involvement in her husband's murder to establish Taylor's credibility and to refute the defense that this death was an accident. It is highly unlikely that the jurors were confused as to which portion of the evidence was relevant to Taylor's credibility and which portion was relevant to absence of accident.

Further, the trial court correctly limited the consideration of this evidence to the determination of Taylor's credibility and absence of accident. The trial judge specifically instructed the jury that it could not consider this evidence in any other manner in determining defendant's guilt, and defendant's contention that the instruction specifically authorized the jury to use this evidence to prove she acted with intent to kill, premeditation, and deliberation is without merit.

[9] In another related argument, defendant contends that the trial court erroneously refused to rule on her motion *in limine* to prohibit

the prosecutor from cross-examining her with the allegedly inadmissible evidence of her involvement in her husband's murder. Prior to trial, defendant filed a motion *in limine* to exclude all evidence of her involvement in her husband's murder, which was denied by the trial court. Defendant contends that this motion *in limine* explicitly encompassed a request to prohibit the prosecutor from cross-examining her about that evidence should she testify. Defendant renewed this argument at trial when the State sought to introduce this evidence through the testimony of Lynwood Taylor, and again the trial court refused to rule on whether the State would be able to cross-examine defendant about this "other crimes" evidence.

Defendant argues she would have testified at trial if the trial court had ruled on her motion. Relying on *State v. Lamb*, 321 N.C. 633, 365 S.E.2d 600 (1988), defendant contends that the trial court's failure to rule on her motion impermissibly chilled her exercise of her constitutional right to testify on her own behalf. We reject defendant's arguments.

In *State v. Lamb*, this Court held that a defendant's constitutional right to testify can be "impermissibly chilled" if, in response to a motion *in limine* to prohibit cross-examination about impermissible evidence of other crimes, she "never receive[s] any assurance that, should she testify, provided she [does] not open the door, she would be protected from impermissible evidence being used to impeach her." *Id.* at 649, 365 S.E.2d at 609.

Defendant's reliance on *State v. Lamb* is misplaced. In that case, this Court held that the trial court's failure to rule on a motion *in limine* to prohibit cross-examination about impermissible "other crimes" evidence violated the defendant's constitutional right to testify on her own behalf. *Id.* However, in the instant case, the "other crimes" evidence had been properly ruled admissible pursuant to Rule 404(b) under the "chain of circumstances" rule. A criminal defendant's decision not to testify based on the introduction of competent admissible evidence against her is purely a tactical decision that does not implicate any of her constitutional rights. As there was no threat that impermissible evidence would be used to cross-examine defendant, she was not impermissibly discouraged from testifying at trial. The State could have legitimately cross-examined defendant about her involvement in her husband's murder for impeachment purposes to the extent allowable under Rule 608(b) of the North Carolina Rules of Evidence to the extent such evidence was probative of defendant's

truthfulness or to the extent that defendant "opened the door" to such testimony. N.C.G.S. § 8C-1, Rule 608(b) (1992); *State v. Lamb*, 321 N.C. at 649, 365 S.E.2d at 609. Although this evidence was not probative of defendant's truthfulness and apparently inadmissible pursuant to Rule 608(b), the trial court could not know if defendant would "open the door" to cross-examination about her involvement in her husband's murder until defendant testified. There was no error in the trial court's refusal to rule on defendant's motion *in limine* to prohibit cross-examination about this "other crimes" evidence.

[10] Next, defendant contends that the trial court erred in admitting into evidence over defendant's objections a photograph depicting the victim lying in his casket in a funeral home shortly before his burial in 1973. This photograph was admitted during the testimony of Charles White, the victim's uncle, who testified that he saw the victim after his death in the funeral home, that the victim looked like he was asleep in peace, and that this picture fairly and accurately depicted what the victim looked like at that time. Defendant argues that the photograph was not relevant to any fact at issue in this case and was aimed solely at inflaming the jury against defendant. She further contends that even if relevant, this evidence should have been excluded because any slight probative value was outweighed by the danger of unfair prejudice to defendant. 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, a photograph of the victim's body depicting the condition of the body or its location when found is competent despite its portrayal of a gruesome scene; this is true even if the cause of death is uncontroverted. *State v. Harris*, 323 N.C. 112, 127, 371 S.E.2d 689, 698 (1988).

Based on the foregoing principles, this photograph of the victim's body was properly admitted by the trial court. This evidence was relevant and admissible to depict the condition of the victim's body near the time of his death. No autopsy or criminal investigation was conducted at the time of the victim's death in 1973, and no photographs were taken of the victim as he appeared at the time of his death, other than this photograph of the victim lying in his casket. When his body was exhumed in 1992, only his bones remained. This photograph was

the only physical evidence to illustrate the testimony of Charles White about the condition of the victim's body shortly after the time of his death.

Further, this photograph and the accompanying testimony were relevant to establish the *corpus delicti* of this crime. In any criminal case, the State has the burden to prove that a crime was committed and that the defendant committed it. The evidence that a crime was committed is referred to as the *corpus delicti*, and in addition to showing the criminal agency of the defendant, the State must produce the corpse or circumstantial evidence so strong that there can be no doubt of death. *State v. Dawson*, 278 N.C. 351, 180 S.E.2d 140 (1971). Other than the victim's death certificate, this photograph was the only physical evidence that a death had occurred.

The exclusion of photographic evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is generally left to the discretion of the trial court. *State v. Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. In light of the probative value of this photograph, we conclude the trial court did not abuse its discretion in admitting this evidence.

[11] Next, defendant contends that the trial court erroneously admitted evidence that the victim suffered from a skull fracture and severe burns on his leg and ankle several weeks before his death. Defendant argues that this evidence was irrelevant and inadmissible because the prior injuries were not medically related to the victim's death and there was no evidence that she was the person responsible for those prior injuries. She further argues that this evidence was not probative of any matter other than defendant's character for violence and that therefore its admission was prejudicial error under Rule 404(b) of the North Carolina Rules of Evidence. We reject defendant's arguments for the following reasons.

The evidence was sufficient for a reasonable juror to infer defendant's responsibility for the victim's skull fracture and serious ankle and leg burns. The evidence showed that the victim was severely burned on his leg and ankle at a time he was at home alone with defendant, when he allegedly slipped out of the house and ignited a can of gasoline. There was also evidence that defendant wrapped these burns in bandages and plastic wrap, contrary to accepted medical treatment. The victim suffered a severe skull fracture approximately two weeks before his death, at a time he would have been at home with defendant while recovering from his burns.

Hence, a basis existed for the jury to infer that defendant was responsible for these prior injuries.

The evidence the victim suffered from a severe skull fracture and serious burns shortly before his death was relevant to the jury's determination of whether defendant was criminally negligent. One of the lesser-included offenses of first-degree murder submitted to the jury as a basis for conviction was involuntary manslaughter based on recklessness or carelessness. Involuntary manslaughter has been defined as "the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Powell*, 336 N.C. 762, 767, 446 S.E.2d 26, 29 (1994) (citing *State v. Greene*, 314 N.C. 649, 336 S.E.2d 87 (1985)). Evidence that during the time he was home under defendant's sole supervision, the victim obtained matches and ignited a can of gasoline, resulting in severe burns on his leg and ankle, was relevant to the determination of whether defendant had a pattern of reckless or careless supervision of the child. The fact that the child suffered a severe skull fracture during the same time period and the fact that defendant wrapped the child's burns in plastic wrap, in spite of his alleged habit of putting the plastic in his mouth and her knowledge that the plastic could hurt him, were likewise relevant to the issue of defendant's criminal negligence.

Further, this evidence was relevant and admissible under Rule 404(b) as proof of defendant's preparation and planning for the commission of this crime and that the victim's death was not accidental. Rule 404(b) authorizes the admission of prior bad acts or other crimes for purposes other than proving defendant's character for committing such acts, including proof of preparation, plan, and absence of accident. N.C.G.S. § 8C-1, Rule 404(b). From the evidence that defendant continued to cover the victim's burns with plastic wrap even though she told a neighbor she knew he liked to chew on it and it could hurt him, the jury could reasonably infer that defendant was setting the stage for the victim to strangle to death on a piece of plastic, either by accident or with her assistance.

We conclude the trial court did not err in admitting the evidence that the victim suffered from a skull fracture and serious burns on his ankle and leg shortly before his death.

[12] Defendant next contends that the trial court committed reversible error by admitting irrelevant evidence concerning the vic-

tim's life insurance policy, in violation of her right to a fair trial. At trial, Bill McAmis, a Jefferson Pilot Life Insurance representative, testified that on 15 June 1973, six days before the victim's death, defendant's husband amended the victim's life insurance policy to designate defendant as a co-beneficiary. McAmis testified that the change of beneficiary was approved on 20 June 1973 and mailed to Billy White, Sr. at his office address. McAmis further testified that both defendant and her husband received periodic lump-sum payments from this insurance policy over the next five years. Defendant claims that this evidence was irrelevant to prove her motive for the crime and that its erroneous admission was highly prejudicial. She maintains that there was no direct evidence that she knew about the policy or its amendment to designate her as a beneficiary and that there was insufficient circumstantial evidence from which the jury could infer that she had such knowledge. We reject defendant's arguments.

Although the State is not required to prove motive as an element of first-degree murder, evidence of motive is relevant when it has a tendency to show that the defendant committed the crime at issue. *State v. Hightower*, 331 N.C. 636, 642, 417 S.E.2d 237, 240-41 (1992). "The prosecution may offer evidence of motive as circumstantial evidence to prove its case where the commission of the act is in dispute when '[t]he existence of a motive is, however, a circumstance tending to make it more probable that the person in question did the act[.]' " *Id.* (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 83 (3d ed. 1988)).

In the instant case, evidence that defendant became one of the beneficiaries of an insurance policy on the victim's life days before he was killed was relevant to show her motive for murdering her stepson. This evidence tended to prove that defendant murdered the victim, at least in part, to collect the insurance proceeds from the victim's life insurance policy.

The jury could reasonably infer from the evidence at trial that defendant had at least some knowledge of the change in the victim's insurance policy to name her as a co-beneficiary. Defendant's husband was a life insurance agent, and the jury could reasonably infer that defendant, as his spouse, knew that the lives of the family members were insured and that defendant's husband would have discussed with defendant the decision to name defendant as a co-beneficiary of the victim's life insurance policy in place of the child's natural mother.

All circumstances calculated to throw any light on the alleged crime are admissible, and the weight to be accorded such evidence is for the jury to decide. *State v. Mason*, 337 N.C. 165, 172, 446 S.E.2d 58, 62 (1994). The extent of defendant's knowledge about this insurance policy impacted only on the weight to be accorded the evidence by the jury and not its admissibility.

[13] Next, defendant contends that the trial court erroneously admitted the opinion testimony of three nurses who were in the emergency room when the victim was brought in and witnessed a piece of plastic being removed from the victim's throat. Peggy Chrisco and Susan Manning each testified that in her opinion, the piece of plastic could not have been accidentally swallowed by the victim. Anita McGirt testified that she did not think she personally could have swallowed a piece of plastic as large as the one removed from the victim's throat. Defendant contends that this opinion testimony was inadmissible under Rule 702 of the North Carolina Rules of Evidence for the following reasons. First, their testimony involved scientific, technical, and specialized knowledge; but the trial court never determined they were qualified to testify as expert witnesses, and they were never formally tendered by the State or accepted by the trial court as experts. Second, even if the trial court implicitly accepted them as expert witnesses, these nurses were not qualified to testify as expert witnesses. Third, even if these nurses were qualified to testify as experts, their evidence did not assist the jury in determining any fact in issue, and the jury was in a better position to determine if the victim's death was accidental. We do not find defendant's arguments persuasive.

Rule 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education[] may testify thereto in the form of an opinion.

N.C.G.S. § 8C-1, Rule 702 (1992).

While the better practice may be to make a formal tender of a witness as an expert, such a tender is not required. *State v. Mitchell*, 283 N.C. 462, 467, 196 S.E.2d 736, 739 (1973). Further, absent a request by a party, the trial court is not required to make a formal finding as to a witness' qualification to testify as an expert witness. *Id.* Such a finding has been held to be implicit in the court's admission of the testi-

mony in question. *Id.*; *see also State v. Perry*, 275 N.C. 565, 169 S.E.2d 839 (1969) (implicit finding of medical witness' qualification as an expert by admission of his testimony). Defendant must specifically object to the qualifications of an expert witness in order to preserve the objection. *State v. Riddick*, 315 N.C. 749, 758, 340 S.E.2d 55, 60 (1986). In this case, by overruling defendant's objections, the trial court implicitly accepted Chrisco, Manning, and McGirt as expert witnesses. By failing to specifically object to their qualifications at trial, defendant has waived her right to raise that issue on appeal.

Even if defendant had properly preserved this challenge to the nurses' qualifications, we conclude that these three nurses were in fact qualified to render their opinions as experts about the possibility that the victim accidentally swallowed the piece of plastic on which he choked to death. Nurses are qualified to render expert opinions as to the cause of a physical injury even though they are not licensed to diagnose illnesses or prescribe treatment, and there is no basis for any preference of licensed physicians for such medical testimony. *See Maloney v. Wake Hospital Systems, Inc.*, 45 N.C. App. 172, 178-79, 262 S.E.2d 680, 684, *disc. rev. denied*, 300 N.C. 375, 267 S.E.2d 676 (1980). All three witnesses were licensed nursing professionals in 1973, and each had specialized knowledge, skill, experience, training, and education that could help the jury understand relevant medical evidence. *See* N.C.G.S. § 8C-1, Rule 702. Each of these nurses was present when Dr. Sabiston removed the piece of plastic from the child's throat and had firsthand knowledge of the size of the plastic and the physical condition of the victim. These three nurses were in a better position than the jurors to know if it was physically possible for a piece of plastic the size of the one removed from the victim's throat to be accidentally swallowed or inhaled so deeply into the victim's throat that it could not be seen at first.

Additionally, defendant contends that Chrisco's testimony that the victim's death was not accidental was erroneously admitted because it did not address any factual issue in this case but constituted impermissible evidence that a particular legal standard had not been met. There are limits on the admissibility of expert witness testimony. "[U]nder the . . . rules of evidence, an expert may not testify that a particular legal conclusion or standard has or has not been met, at least where the standard is a legal term of art which carries a specific meaning not readily apparent to the witness." *State v. Ledford*, 315 N.C. 599, 617, 340 S.E.2d 309, 321 (1986) (error, but not prejudicial, to admit expert opinion that certain injuries were the "proximate

cause" of death). However, in the instant case, these three expert witnesses testified about the facts to be determined by the jury and did not render opinions as to the legal standard the jury should follow. Peggy Chrisco was the only witness who used the term "accident" in her testimony, and it is clear that she was using the term as a "shorthand statement of fact," rather than as a legal term of art or an opinion as to the legal standard the jury should apply. *See State v. Williams*, 319 N.C. 73, 78, 352 S.E.2d 428, 432 (1987). The trial court did not err by admitting this expert witness testimony.

[14] In her next assignment of error, defendant contends that the trial court committed reversible error by excluding evidence about the competency of Dr. Sabiston, the medical examiner who removed the piece of plastic from the victim's throat and signed the victim's original death certificate in 1973 stating that the death was accidental. Defendant sought to ask Anita McGirt, who had worked with Dr. Sabiston for twenty years, about Dr. Sabiston's general reputation among the medical community in Kinston, North Carolina. The prosecutor's objection to this testimony was sustained, and an offer of proof was made outside the jury's presence. During this offer of proof, Anita McGirt testified that Dr. Sabiston's reputation as a doctor was good. Neither the State nor defendant called Dr. Sabiston to testify during trial.

Defendant contends the trial court erred by excluding this testimony, which defendant argues was admissible under Rule 611(b) and Rule 806 of the North Carolina Rules of Evidence. The State allegedly opened the door to this evidence by introducing the original death certificate filed by Dr. Sabiston, upon which defendant's entire defense was based, and by attacking his credibility and competency throughout the trial. We reject defendant's arguments.

Rule 611(b) is a general rule relating to the scope of cross-examination and provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611(b) (1992).

Defendant contends that evidence of Dr. Sabiston's reputation was relevant because the State attacked his competency as a doctor and his medical conclusions about the cause of the victim's death. Defendant refers us to several places in the transcript where the prosecution allegedly attacked Dr. Sabiston's credibility or competency; however, an examination of these references reveals that the prosecution merely disputed his conclusion that this death was accidental

and offered the evidence of Peggy Chrisco, Susan Manning, and Anita McGirt in support of its contention that the victim's death was not accidental. Defendant also refers us to a portion of the prosecutor's final jury argument in which the prosecutor argued that Dr. Sabiston's opinion that this was an accidental death was under frontal attack. Again, we note that this argument was not an attack on Dr. Sabiston's credibility or competency but merely on his investigation and conclusions in this particular instance. Furthermore, this argument was based on reasonable inferences from the testimony of Peggy Chrisco, Susan Manning, and Anita McGirt and did not exceed the wide latitude allowed counsel in jury arguments. *See State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992). We conclude that the prosecutor did not open the door to the admission of testimony about Dr. Sabiston's general reputation in the medical community.

Additionally, we note that Dr. Sabiston's current general reputation for competency in the medical community has no logical probative value on whether his twenty-year-old opinion about this murder was accurate and supported by an adequate and thorough investigation. The trial court did not err by refusing to admit this evidence pursuant to Rule 611(b).

The evidence of Dr. Sabiston's good reputation in the medical community was also inadmissible under Rule 806, which provides that "[w]hen 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." N.C.G.S. § 8C-1, Rule 806 (1992). Assuming *arguendo* that Dr. Sabiston's statement on the original death certificate indicating this death was accidental is hearsay covered by this Rule, evidence of Dr. Sabiston's reputation for competency in the medical community was admissible only if this evidence would have been admissible to support his credibility if he had testified at trial. Pursuant to Rule 608(a) of the North Carolina Rules of Evidence, the credibility of a witness may be supported by reputation evidence only if it refers to the witness' character for truthfulness and only after the witness' character for truthfulness has been attacked. N.C.G.S. § 8C-1, Rule 608(a) (1992). Therefore, assuming Dr. Sabiston's reputation for competency as a doctor had been attacked in this case, this evidence of his competency was not probative of his character for truthfulness and would not have been admissible. The trial court did not err by refusing to admit this evidence pursuant to Rule 806.

[15] Defendant next contends that the trial court committed prejudicial error on two occasions when it improperly expressed its opinion against her and violated her right to a fair and impartial trial, in violation of N.C.G.S. § 15A-1222. A trial judge must be completely impartial and "may not express during any stage of the trial[] any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1988). "When remarks from the bench tend to belittle and humiliate counsel, defendant's case can be seriously prejudiced in the eyes of the jury." *State v. Frazier*, 278 N.C. 458, 462, 180 S.E.2d 128, 131 (1971). However, if a defendant is not prejudiced by a judge's remarks, they will be considered harmless. *State v. Weeks*, 322 N.C. 152, 158, 367 S.E.2d 895, 899 (1988). After examining the comments made by the trial court, we conclude there was no violation of N.C.G.S. § 15A-1222.

The first comment defendant contends was an improper expression of opinion against her occurred during the trial court's preliminary remarks to the prospective jurors. During these remarks, the trial judge stated that

> Mrs. White is here upon an accusation of murder in the first degree. This is an accusation which she denies. It's alleged to have happened on the 21st of June, 1973 and involves the death of one Billy C. White, II. As I said, she denies this charge, says it[']s not true, and she ought not to be here and will require the State to prove her guilt to twelve jurors from the evidence and beyond a reasonable doubt.

Defendant contends that the last sentence, which emphasized the heavy burden the State must bear to prove her guilt, improperly denigrated her plea of not guilty and suggested that her trial was merely a formality. Defendant argues that the jury could reasonably have deduced from this statement that the trial court believed that defendant was guilty and was placing improper demands on the State by pleading not guilty.

A fair reading of the trial court's entire statement in context reveals, however, that the trial court was accurately instructing the jury about defendant's presumption of innocence and the State's burden to prove every material element of its charges beyond a reasonable doubt. The trial court has a duty to inform the prospective jurors of the charge, the date of the alleged offense, the name of the victim, the defendant's plea, and any affirmative defense that will be raised at trial. N.C.G.S. § 15A-1213 (1988). These statements were accurate

statements of the law and were made in accordance with the trial court's obligation to inform the prospective jurors about the case pursuant to this statute.

The second statement by the trial court that defendant contends was an improper expression of opinion against her occurred during the cross-examination of State's witness, Susan Manning. On cross-examination, Manning admitted that she spoke with the police and the prosecutor about the victim's death but refused to speak with defense counsel. The following exchange then occurred:

> Q. Now, you met with the officers who investigated this case, did you not?
>
> A. Yes sir.
>
> . . . .
>
> Q. And we asked . . . we called you and asked if we could talk to you, didn't we?
>
> A. Yes sir.
>
> Q. And we . . . we told you that we would just like to ask you some questions about what you knew about the case and we told you that we'd be glad to meet you anywhere you'd like to and at any time, did we not?
>
> A. Right.
>
> Q. And you told us you didn't want to do that and you wouldn't talk to us. Isn't that right?
>
> A. No. I said I didn't want to discuss it any more. I had discussed it and it was just . . . I have a heart condition and I just didn't want to keep talking about it. I knew I had to go through this in Court and I wanted to do that and . . . but I . . . I just didn't want to keep talking about it with attorneys.
>
> Q. So you didn't talk to us?
>
> A. No, I did not.
>
> Q. You refused to talk to us, didn't you.
>
> A. I sure didn't.
>
> COURT: You can talk to her now, Mr. Whitley.
>
> MR. WHITLEY: Yes sir . . .

COURT: All you want to.

Outside the presence of the jury, defense counsel argued that the trial court's comment had disparaged him in front of the jury thereby prejudicing defendant. The trial judge then recalled the jury and resumed trial without any further discussion of his comment.

Defendant claims the trial court's comment invoked sympathy for the witness, belittled and humiliated defense counsel, blocked legitimate cross-examination, and was nothing less than an improper endorsement of Manning's credibility in a calculated attempt to prejudice defendant.

In light of the context in which the trial court's comment was made, we hold that the trial court's comment did not constitute error. The trial court has a duty to control the examination of witnesses, both for the purpose of conserving the trial court's time and for the purpose of protecting the witness from prolonged, needless, or abusive examination. *See State v. Frazier*, 278 N.C. at 462, 180 S.E.2d at 131. In performing this duty, the trial court must not intimate any opinion about the witness or her credibility. *Id.* The trial court's remark in this case was intended to end defense counsel's badgering of the witness about her refusal to talk to the defense prior to trial. Defense counsel's badgering of this witness created the necessity for the trial court to intercede to cut off this questioning, and the trial court's comment did not increase any prejudice to defendant arising out of the conduct of her own attorney. Defendant had already successfully placed all the evidence of Susan Manning's refusal to talk to the defense and her possible bias before the court. We conclude that the trial judge's comment does not constitute reversible error.

[16] Next, defendant contends that the trial court committed plain error by failing to include the alternative option of "not guilty by reason of accident" in its final mandate to the jury. As defendant failed to object to the trial court's failure to include such an instruction in its final mandate or request that such an instruction be given, plain error analysis applies. *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected. *Id.* at 62, 431 S.E.2d at 193. We conclude there was no error, much less plain error, in the trial court's instructions.

Although the trial court did not submit the option of finding defendant "not guilty by reason of accident" to the jury in its final mandate, it did instruct the jury on accident as a theory of acquittal. The trial court instructed as follows:

> If the victim died by accident or misadventure, that is, without any wrongful purpose or criminal negligence on the part of the defendant, the defendant would not be guilty. The burden of proving accident is not on the defendant. Her assertion of accident is merely a denial that she has committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt, thus that the death was not a result of accident or misadventure. Failing this it would be your duty to return a verdict of not guilty.

The substance of this instruction was accurate and free from error. The instruction was provided as a theory of acquittal after the trial court's discussion of involuntary manslaughter. This instruction immediately preceded the final mandate, which included an instruction on a possible verdict of not guilty for each crime of which defendant could have been convicted.

This Court rejected a similar argument in *State v. Joplin*, 318 N.C. 126, 347 S.E.2d 421 (1986), in which the trial court had instructed on accident as a theory of acquittal but had not repeated the instruction in its final mandate to the jury. This Court held:

> Inasmuch as the jury found defendant guilty of first degree murder and the trial court instructed on accident as a theory of acquittal, we are not convinced the result of this trial would have been different had the trial court repeated the theory of acquittal by accident in his first mandate. This omission, even if error (a point we do not decide), is obviously not plain error.

Id. at 132-33, 347 S.E.2d at 425. We conclude that in the instant case, the trial court did not err, much less commit plain error, by failing to repeat during the final jury mandate the theory of accident as a basis for acquittal.

We hold that defendant received a fair trial free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. RANDALL JACKSON

No. 95A94

(Filed 2 June 1995)

1. Evidence and Witnesses § 2302 (NCI4th)— expert testimony—capacity to plan and form specific intent

An opinion by an expert in psychology that defendant's capacity to calmly function and plan was severely impaired because he was intoxicated, was under stress from a previous altercation with the victim, and had a low IQ, if clearly and cogently presented, would be relevant in a first-degree murder trial to show that defendant acted without premeditation and deliberation and could not form the specific intent to kill.

Am Jur 2d, Expert and Opinion Evidence §§ 193, 194, 362, 363.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction. 16 ALR4th 666.

2. Evidence and Witnesses § 2302 (NCI4th)— expert in psychology—defendant's capacity to form specific intent to kill—opinion excluded

The trial court did not err by excluding a psychologist's expert opinion testimony in a first-degree murder trial that defendant's voluntary intoxication on the night of the murder rendered him incapable of forming the specific intent to kill and of carrying out plans because the psychologist's testimony was, at best, contradictory and equivocal and could not have been helpful to the trier of fact in determining whether defendant specifically intended to kill the victim where evidence presented during a *voir dire* hearing showed that the witness formulated his opinion as to defendant's intoxication without interviewing the officers who were in contact with defendant after his arrest on the morning of the murder; the opinion of the witness could not have been with adequate consideration of defendant's formal confession to the police in which defendant stated that, after he had engaged in a fight, he obtained his shotgun, drove around searching for those with whom he had fought, and took aim with the shotgun and shot the victim because he was the main one who had hit defendant, since the confession was not made available to

the witness until the morning of his testimony; the witness arrived at his opinion without taking into account an officer's testimony that he overheard a telephone conversation by defendant on the morning of his arrest during which defendant said that he had killed a man and meant to kill him; the witness was not aware of a statement made by defendant to a friend shortly before the shooting that "someone is going to die tonight"; and the witness concluded his *voir dire* testimony by admitting that his opinion as to defendant's capacity to form a specific intent to kill would have been different had he been aware of defendant's confession to the police and statements to others before making his assessment.

Am Jur 2d, Expert and Opinion Evidence §§ 193, 194, 362, 363.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction. 16 ALR4th 666.

3. Evidence and Witnesses § 2967 (NCI4th)— denial of witness recall to show bias

The trial court did not abuse its discretion when it refused to allow defendant to recall a detective to show he was biased in his previous testimony in this first-degree murder trial because he had been disciplined in 1990 for an incident involving the brother of defendant's girlfriend where the detective testified on *voir dire* that he did not know defendant's girlfriend and knew of no relationship between her brother and defendant. The impeachment value of the proffered testimony regarding the unrelated incident was slight if not entirely nonexistent.

Am Jur 2d, Witnesses § 549.

4. Evidence and Witnesses § 1496 (NCI4th)— pipe found under victim's car—irrelevancy—exclusion from evidence

A chrome bar or pipe recovered from underneath a murder victim's automobile at the scene of the shooting was not relevant in this murder prosecution and was properly excluded as an exhibit where the pipe itself did not impeach eyewitness testimony that no one saw the pipe until after the shooting; defendant did not contend that he acted in self-defense but relied upon the defense that he had no specific intent to kill because he could not premeditate and deliberate; and the fact that the chrome pipe was

underneath the victim's automobile did not tend to make it more or less probable that defendant had no specific intent to kill the victim.

Am Jur 2d, Evidence §§ 304, 307, 308.

5. Constitutional Law § 346 (NCI4th)— exclusion of chrome pipe—right of confrontation not violated

Defendant's right of confrontation was not affected in this first-degree murder case by the trial court's exclusion of a chrome pipe found beneath the victim's automobile where defendant was able to cross-examine the State's witnesses thoroughly concerning the pipe, the pipe was depicted in photographs admitted into evidence, and defense counsel was able to refer to the pipe during closing argument.

Am Jur 2d, Constitutional Law §§ 847-849.

6. Criminal Law § 113 (NCI4th)— discovery violation—failure to suppress defendant's statement

The trial court did not err by failing to suppress defendant's statement during a telephone conversation that he had killed a man and meant to kill him as a sanction for the State's violation of discovery by failing to reveal the statement to defense counsel until the fourth day of defendant's murder trial, which was some twenty months after it was overheard by a police detective, where the detective testified that he had not related the statement to anyone before the trial because it was essentially a repetition of defendant's confession which the detective had heard only minutes before the telephone conversation; the State immediately relayed the statement to the defense upon learning of it; and the trial court allowed a continuance in the trial from Thursday until Monday to allow the defense to prepare for the detective's testimony as to this statement. N.C.G.S. § 15A-903(a)(2).

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

Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection. 73 ALR2d 12.

7. Criminal Law § 101 (NCI4th)— telephone statement by defendant—State's failure to reveal before trial—use to impeach expert—no error

A telephone statement by defendant that he meant to kill the victim was not impermissibly used to impeach defendant's expert

in psychology because it was not revealed to the defense until the fourth day of defendant's murder trial where defendant had made substantially the same statement in his formal confession; defendant had a copy of the confession one and one-half years before trial but elected to keep this information from his expert; by the time the expert testified, the defense was aware of the telephone conversation and had relayed its contents to the expert; and the admission and use of the telephone statement thus did not in any way hinder defendant's defense.

Am Jur 2d, Depositions and Discovery §§ 428 et seq.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 ALR3d 181.

8. Evidence and Witnesses § 877 (NCI4th)— statement by defendant—hearsay—state of mind exception inapplicable

Defendant's statement to his girlfriend, when she told him she had heard he had shot someone, that he had shot a gun but had not shot anyone was not admissible under the state of mind exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 803(3) since the statement referred to defendant's actions rather than his state of mind.

Am Jur 2d, Evidence §§ 556 et seq.

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.

9. Evidence and Witnesses § 930 (NCI4th)— statement by defendant—hearsay—excited utterance exception inapplicable

Defendant's statement to his girlfriend, when she told him she had heard he had shot someone, that he had shot a gun but had not shot anyone was not admissible under the excited utterance exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 803(2) since the girlfriend's comment to defendant was not a sufficiently startling event, and defendant's response cannot be considered spontaneous because the statement was made five hours after the shooting, and defendant had ample time for reflection and preparation for any confrontation regarding his prior activities.

Am Jur 2d, Evidence §§ 658 et seq.

10. Evidence and Witnesses § 979 (NCI4th)— statement by defendant—hearsay—residual exception inapplicable

Defendant's statement to his girlfriend, when she told him she had heard he had shot someone, that he had shot a gun but had not shot anyone was not admissible under the residual exception to the hearsay rule found in N.C.G.S. § 8C-1, Rule 803(24) since the statement did not possess equivalent guarantees of trustworthiness in that it was a self-serving declaration, was not part of the *res gestae*, and was not available for corroborative purposes because defendant did not testify.

Am Jur 2d, Evidence §§ 658 et seq.

11. Evidence and Witnesses § 1357 (NCI4th)— defendant's statement to girlfriend—not admissible as part of confession

Defendant's hearsay statement to his girlfriend on the same day he confessed to the police that he had shot a gun but had not shot anyone was not admissible under the principle that, when the State offers part of a confession, the accused may require the entire confession to be admitted into evidence where defendant's statement to his girlfriend was not made at the same time as the confession and was not a part of the confession, and the State did not attempt to introduce testimony concerning defendant's self-serving declaration and thus did not open the door to its admission.

Am Jur 2d, Evidence §§ 658, 659.

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 Barefoot (Napoleon B., Sr.), J., at the 7 December 1992 Criminal Session of Superior Court, New Hanover County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 13 January 1995.

Michael F. Easley, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

LAKE, Justice.

Defendant was tried capitally for the first-degree murder of Kenneth Marese Murphy. The jury returned with a guilty verdict and recommended a sentence of life imprisonment. We find no prejudicial error and accordingly leave defendant's first-degree murder conviction undisturbed.

At trial, the State presented evidence tending to show that in the early morning hours of 27 April 1991, Kenneth Marese Murphy was fatally shot in the chest outside "Faces" nightclub in Wilmington. Earlier that night, Murphy and his friend, Craig Bonds, went to the campus of the University of North Carolina at Wilmington (UNC-W) to attend a dance. George Bragg, who was acquainted with both the defendant and Murphy, testified that after the dance a fight began between Edward DuBose and Javon Elder in the parking lot. When defendant came outside, he pushed Murphy and they also began to fight. Murphy clearly landed the heavier blows. Murphy attempted to walk away, but defendant followed him and they resumed fighting, again with Murphy getting the better of defendant. Security was called, and the fights were broken up. Bragg further testified that after the fighting ended, he went to McDonald's and while he was there, defendant came in, bloody-faced, asking about Murphy's whereabouts. Someone yelled he was at "Faces," and defendant left.

Meanwhile, Javon Elder, Reggie Flowers, Murphy and Bonds sat in or around their cars in the parking lot of "Faces." Defendant drove past and parked his car. He walked toward the four friends, saying, "Ya'll tried to jump me, ya'll tried to jump me." Murphy offered to fight again, but neither he nor the other men advanced toward the defendant and none had a weapon. Defendant ran back to his car and returned with a shotgun. Upon realizing defendant had a gun, Murphy hid behind the front wheel of Elder's Subaru.

As defendant walked toward them, Herbert Randolph, who considered himself a friend to both sides, stopped his yellow pickup truck between the defendant and the foursome. Randolph testified he thought defendant was angry but he could not tell if defendant was intoxicated. He asked defendant to put the gun away, and defendant responded, "One of them is going to die." Just then, Murphy stood up from behind the Subaru, and defendant shot him in the chest. After the shot was fired, Flowers picked up a chrome pipe and he and Bonds considered rushing the defendant but, afraid defendant was reloading, thought the better of it. Defendant turned, jogged to his car

and drove away, obeying the traffic laws as he left. Bonds, Flowers and Elder put Murphy in the car and drove to the hospital emergency room.

Dr. Walter Gable, a pathologist, testified the gunshot pellets went through the left side of the heart, the stomach, the pancreas and the bowels. It was Dr. Gable's opinion that the victim, with these types of injuries, could have survived only four or five minutes.

Defendant surrendered to police and was arrested outside his girlfriend's apartment at approximately 9:00 a.m. on 27 April 1991. After being advised of his rights, defendant gave a confession. He related that after the fight at UNC-W, he drove to his girlfriend's house to get his shotgun. After retrieving his gun, he set out to find Murphy, first looking at McDonald's and then at "Faces." Defendant told officers he parked his car, confronted Murphy and his friends and then went back to his car, loaded one shell into the shotgun, and walked back toward Murphy. He talked briefly with Herbert Randolph and "then took aim with the shotgun and shot the guy who was standing on the other side of the car. I shot that one because he was the main one who hit me the most times out at UNC-W." At trial, defendant objected to the admission of the confession. The trial court made findings of fact which included that defendant was read his *Miranda* rights; that defendant indicated he understood his rights but chose to waive them; that he was not intoxicated, confused or sleepy; that he was coherent and rational; and that he was calm and showed no remorse for the killing. Thus, the trial court concluded as a matter of law that defendant's confession and waiver were made freely, voluntarily and understandingly. Accordingly, the trial court denied defendant's motion to suppress his confession.

After providing officers with his confession, defendant was escorted to jail by Officer Rodney Simmons, who was present during the confession. En route to the jail, defendant was allowed to place one telephone call. Officer Simmons overheard defendant tell the other party on the telephone that he was at the police station, that he had killed a man, that he meant to kill him, and that no one should worry about coming to get him out of jail because that was where he belonged. Officer Simmons did not reveal this information to prosecutors until the fourth day of trial, explaining he did not do so earlier because the statement was essentially a repetition of defendant's confession, which was, of course, known to defendant and disclosed to his counsel months before trial. When the telephone statement was

brought to their attention, prosecutors immediately informed the defense. The trial court allowed Officer Simmons to testify as to this telephone statement, over defendant's objection, after providing a three-day continuance to allow the defendant time to prepare for the testimony.

Evidence on behalf of the defendant tended to show that Audrey Barnes was at the dance at UNC-W on 26 April 1991. She saw the fight between defendant and Murphy, but not from its beginning. She stated that there were "a lot of other guys" dragging and kicking defendant, who was helped by only one companion. Similarly, Tareka Caison testified that close to five men jumped defendant that night. Barron Bowens testified that as he and defendant left the party, they noticed one of defendant's friends arguing with someone. As defendant walked toward them, he was hit in the face by another man. Defendant fell down, got back up and tried to walk toward the parking lot. Five other men jumped defendant and started fighting him. Bowens became embroiled in the fight himself when he intervened on defendant's behalf.

Edward DuBose testified he and defendant spent the day of 26 April 1991 together and began drinking around 11:30 a.m. By 4:00 p.m., defendant had consumed from six to nine beers. Defendant drank four or five more beers and close to half a flask of gin by the end of the dance. DuBose testified he argued with Murphy and Bonds outside the dance and that Murphy and Bonds hit defendant when he came to intervene.

Further testimony for the defendant came from Regina Clark, his girlfriend and mother of his son. She saw him around 9:30 p.m. on 26 April 1991 and knew he was drinking because he was "passionate" when he drank. About 2:00 a.m. on 27 April 1991, Clark let defendant into her apartment. He ran upstairs, so she went back to bed and later heard him leave. At 3:00 a.m., after letting defendant in again, Clark heard him moaning in the bathroom and checked on him. His mouth was bleeding, and he had wounds on his hands and other parts of his face. There was blood in the sink. Clark further testified that when she took out the garbage that morning, she noticed a uniformed police officer. She so informed defendant. Defendant dressed and went outside to surrender himself. Clark felt that defendant was still intoxicated.

Dr. Howard Grotsky, a psychologist, testified for the defense that he administered several tests to defendant and obtained a history of

the shooting from defendant, Clark and DuBose. Dr. Grotsky testified it was his opinion that defendant was intoxicated and under stress at the time of the shooting. Following the prosecutor's objection to any testimony by Dr. Grotsky regarding defendant's ability to form the specific intent to kill, a *voir dire* was conducted, after which the trial court sustained the prosecutor's objection and suppressed the balance of the expert's testimony.

Defendant brings forward five assignments of error.

I.

In his first assignment of error, defendant contends the trial court committed reversible error when it suppressed that portion of the opinion testimony of Dr. Grotsky which related to defendant's ability to formulate and carry out plans on the night of the murder. Defendant argues that this expert's testimony in this area was critical to his defense and should have been allowed on the basis that the objection to it more properly went toward weight rather than admissibility. He contends he was thus deprived of the right to present a defense in violation of the state and federal constitutions and our Rules of Evidence. The State counters that this portion of this expert's testimony was so convoluted, contradictory and equivocal that it would confuse rather than aid the jury and was thus properly excluded.

Dr. Grotsky was tendered as an expert witness and was so accepted by the trial court without objection. During direct examination, Dr. Grotsky testified that in developing his clinical evaluation of defendant, he examined him on three separate occasions and administered an intelligence test as well as a personality measure. Dr. Grotsky also interviewed the policemen in contact with defendant at the jail; the defendant's girlfriend, Regina Clark; and defendant's friend, Edward DuBose. The intelligence test revealed defendant had a full scale IQ of 77, placing him, according to Dr. Grotsky, in the borderline category of intelligence between average and retarded. Further, Dr. Grotsky relayed to the jury that he learned defendant had been drinking before the murder and concluded defendant was under stress at the time of the murder. When defense counsel attempted to question Dr. Grotsky as to his opinion on whether defendant's voluntary intoxication rendered him incapable of forming the specific intent to kill, the State requested and was granted a *voir dire*. Upon conclusion of the *voir dire*, the trial court granted the State's motion to suppress that portion of the testimony of Dr. Grotsky relating to

defendant's ability to formulate specific intent and to carry out plans, and defendant objected and excepted.

In order to gain a conviction for first-degree murder, the State must prove beyond a reasonable doubt that defendant killed the victim with malice, after premeditation and deliberation. N.C.G.S. § 14-17 (1993); *State v. Keel*, 333 N.C. 52, 423 S.E.2d 458 (1992), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 147 (1995). Deliberation means "an intent to kill, carried out in a cool state of blood in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *State v. Barts*, 316 N.C. 666, 687, 343 S.E.2d 828, 842 (1986).

The admissibility of evidence is first governed by Rule 401 of the Rules of Evidence, which defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Rule 702 sets the standard for the admissibility of expert opinion testimony, specifying that a witness qualified as an expert may testify as to scientific, technical or other specialized knowledge *if* such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702 (1992).

[1] As an expert witness in the field of psychology, Dr. Grotsky was, by education and training, in a better position than the trier of fact to evaluate whether defendant could formulate a specific plan or intent to kill. *See State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978). Any opinion held by Dr. Grotsky, as an expert, to the effect that the defendant's capacity to calmly function and plan was severely impaired because he was intoxicated, was under stress from the previous altercation with Murphy, and had a low IQ, would be evidence which arguably would tend to show defendant acted without premeditation and deliberation and could not form the specific intent to kill. *See State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). Such testimony, if clearly and cogently presented, would be plainly relevant in a first-degree murder trial. The determining factor then, as to this issue, is whether Dr. Grotsky adequately demonstrated to the trial court on *voir dire* that, through his appropriate consideration of relevant data, he was able to form *and hold* an opinion as to defendant's

capacity and then *articulate* that opinion in such manner that it could "assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702.

[2] During the *voir dire*, the State first showed that the doctor formulated his opinion as to defendant's intoxication without interviewing the officers who were in contact with defendant on the morning of his arrest. Instead, the doctor's opinion was based upon conversations with the defendant; his girlfriend, Regina Clark; and his friend, Edward DuBose. Dr. Grotsky acknowledged that speaking with the arresting officers would have influenced his opinion on defendant's intoxication and its impact on defendant's capacity to form specific intent.

Second, the *voir dire* revealed the doctor arrived at his opinion without fully considering statements made by defendant evidencing that indeed defendant did possess a specific intent to kill Murphy. Dr. Grotsky's opinion did not take into account Officer Simmons' testimony that he overheard defendant's telephone conversation the morning of his arrest during which defendant said that he had killed a man, that he meant to kill him, and that no one should worry about coming to get him out of jail because that was where he belonged. Dr. Grotsky acknowledged that if these statements were indeed made by defendant, this would alter his opinion.

Additionally, the *voir dire* revealed that Dr. Grotsky was not aware of the statement made by defendant to Herbert Randolph, the friend who tried to intervene just before defendant shot Murphy, that "someone is going to die tonight," and further that Dr. Grotsky's opinion could not have been formed with adequate consideration of defendant's formal confession to police, since the confession was not made available to the doctor by defense counsel until the morning of his testimony. In his confession, defendant acknowledges that after the fight, he first went to Clark's house and got his shotgun and then drove around in his car searching for the people with whom he had fought. After locating these people and walking up to them, the confession states: "I then took aim with the shotgun and shot the guy who was standing on the other side of the car. I shot that one because he was the main one who hit me the most times out at UNC-W." Dr. Grotsky explained that while that portion of the confession certainly appeared to be indicative of specific intent, this was contradictory to defendant's explanation of the shooting during their interviews. He

testified that defendant had told him he shot in a "knee-jerk" fashion to the movement of Murphy suddenly standing up from behind the car.

In the *voir dire*, defense counsel attempted to rehabilitate Dr. Grotsky, who indicated that, notwithstanding all the information he had not considered coupled with his concern about defendant's truthfulness in their interviews, his initial opinion concerning defendant's ability to form the specific intent to kill was unchanged. The doctor testified that "[defendant's] ability to function and to think through and plan was severely impaired." He further stated:

> What I am trying to say is that he was severely impaired, unable to understand the implications of his actions, unable to formulate or think logically.

In response to defense counsel's question as to whether, in his opinion, defendant suffered from a diminished mental capacity such that he could not specifically intend to kill, Dr. Grotsky responded:

> I would say that there is a strong probability that's true. I don't know that for a hundred percent. No one knows that for a hundred percent.

Regarding defendant's capacity to carry out plans, the doctor stated:

> Well, he could, obviously think about plans because obviously, there was a series of actions that he followed. What I feel he wasn't able to do is understand the consequences of those plans.

When asked by defense counsel whether defendant's mind and reason were so completely overthrown by his voluntary intoxication as to render him utterly incapable of forming *the specific intent* to kill, Dr. Grotsky's response was:

> I think that is a very strong possibility that he was *unable to think rationally and logically* on that evening.

(Emphasis added.)

When asked by the district attorney if he was engaging in speculation, the doctor replied:

> I don't know if it is speculation. It is based on my talking with Mr. Jackson, and also talking with his girlfriend, Regina Clark, who described his behavior as he was intoxicated.

Toward the end of the *voir dire*, Dr. Grotsky testified as follows:

Q. You talk about impairing his judgment. We are talking about the capacity to form the specific intent to kill. Do you understand that?

A. Okay.

Q. We are not talking about whether his decision making was good or bad. Are you talking about his decision making ability?

A. Let me try. The capacity, was he capable of premeditating, was he capable of . . . .

Q. Was he capable of forming the specific intent to kill somebody?

A. Certainly that's a possibility. I can't say he wasn't capable. Given the facts you gave me today, it makes it a mere more likely than not that he was capable.

A short while later, the trial court interjected the following:

THE COURT: Doctor, let me see if I understand exactly what you're saying. Your opinion is based on the information that you had?

A. Correct.

THE COURT: If you had other information that you have here this morning, such as the confession and so forth, then your opinion would probably be different?

A. Significantly different.

This witness concluded his testimony on *voir dire* by admitting that his opinion as to defendant's capacity to form the specific intent to kill would have been different had he been aware of defendant's confession to the police before making his assessment. It is clear from Dr. Grotsky's testimony that he doubted his own opinion.

In light of the foregoing, we conclude that this expert opinion testimony, at best, was contradictory and equivocal and could not have been helpful to the trier of fact in making the determination of whether defendant specifically intended to kill the victim. It is analogous to that expert opinion testimony which this Court found was properly excluded in *State v. Clark*, 324 N.C. 146, 160, 377 S.E.2d 54,

62-63 (1989). Even assuming, *arguendo*, some slight probative value in this testimony, in light of defendant's unequivocal confession and the additional overwhelming evidence that he not only thought about killing Murphy but tracked him down and would let no one dissuade him from his purpose, we find the suppression of this portion of Dr. Grotsky's testimony to be harmless beyond a reasonable doubt. This assignment of error is overruled.

II.

[3] Defendant next argues that the trial court erred when it refused to allow defendant's recall of Detective Simmons as a witness for the purpose of attempting to show that the detective was biased in his previous testimony, because of a prior disciplinary measure resulting from his assault on the brother of Regina Clark, defendant's girlfriend. We cannot agree.

Detective Simmons had testified, as a witness for the State, that on the morning of defendant's arrest, just after defendant made a formal confession, he overheard defendant's telephone conversation in which he related that he had killed a man, that he meant to do it, and that no one should worry about getting him out of jail because that was where he belonged. During defendant's case-in-chief, the defense requested they be allowed to recall Simmons to question him about a prior disciplinary measure against him, indicating to the trial judge that they were unaware of the incident when Simmons testified earlier. A *voir dire* was held, and Detective Simmons related he once arrested a man named Corey Clark for felonious possession of cocaine. In January of 1990, Simmons removed Clark, unhandcuffed, from jail. When Clark broke free, an altercation occurred between the two, and Simmons struck Clark in the face. As discipline, Simmons was given two days' unpaid leave for unprofessional conduct. Simmons further testified he had not seen Corey Clark since 1990, that he knew of no relationship between Clark and defendant, and that he did not know Regina Clark. The trial court declined to allow this testimony before the jury.

Evidence tending only slightly to prove bias may be admitted; however, rejecting such evidence is within the discretionary power of the trial court. 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 157 (4th ed. 1993). It is clear from the *voir dire* of Detective Simmons that the impeachment value of the proffered testimony regarding this unrelated incident is slight, if not entirely nonexistent. Simmons testified he had no contact with Corey Clark

after 1990 and was unaware of the relationship between Corey and Regina Clark and the defendant. This very relationship is what defendant claims provides the source for bias. As the link between Corey Clark and defendant is speculative at best, we conclude this evidence was properly excluded. *See State v. Baker*, 320 N.C. 104, 357 S.E.2d 340 (1987); *State v. Porth*, 269 N.C. 329, 153 S.E.2d 10 (1967). This assignment of error is without merit.

III.

[4] In his third assignment of error, defendant contends the trial court erred by refusing to admit into evidence a chrome bar or pipe recovered from underneath Murphy's automobile at the scene of the shooting. Defendant contends this pipe was admissible as an exhibit to impeach the State's witnesses regarding their testimony of events at the time of the shooting. We disagree.

Murphy's friends at the scene of the shooting testified as eyewitnesses for the State and denied they had taken part in the fight at UNC-W between defendant and Murphy. Defendant's witnesses testified that defendant was beaten by four or five men. During defendant's cross-examination of Murphy's friends, each admitted to seeing a chrome bar; but each denied seeing it at the time of the shooting, and each denied picking up or using the bar before the shooting. Reggie Flowers testified the pipe was lying underneath Murphy's car, and he picked it up after defendant shot Murphy because he thought about rushing defendant but decided against this since defendant still held the shotgun. The pipe was visible in the State's photograph exhibits which were admitted into evidence showing the position of the automobiles at the time of the shooting.

The fact that a pipe, which according to the State's eyewitnesses was neither used nor noticed by anyone prior to the shooting, was on the ground under the victim's automobile does not serve to establish that these eyewitnesses were part of the earlier fight at UNC-W or that it had any relevance with respect to the events which occurred at the time of the shooting. The pipe itself, as an exhibit, does nothing to impeach the eyewitness testimony that no one saw the pipe until after the shooting. The defendant did not testify, and his defense did not in any way hinge upon a theory of self-defense. Rather, it was premised upon the contention that defendant, for various reasons, had no specific intent to kill. No witness, for the State or the defense, put the pipe in the hands of anyone prior to the shooting. The fact that the chrome pipe was underneath Murphy's automobile before the

shooting does not tend to make it more or less probable that defendant had no specific intent to kill Murphy because he could not premeditate and deliberate. Furthermore, this fact does nothing to impeach the testimony of the eyewitnesses who said they had no weapon of any kind at the time of the shooting. Thus, the pipe itself was not relevant and was properly excluded as an exhibit. Evidence not relevant is not admissible. N.C.G.S. § 8C-1, Rule 402; *State v. Cashwell*, 322 N.C. 574, 369 S.E.2d 566 (1988).

[5] Finally, defendant's right of confrontation was not affected by the exclusion of the pipe as an exhibit. Defendant acknowledges he was able to cross-examine each of the State's witnesses thoroughly concerning the pipe. Further, the pipe was depicted in photographic evidence which was admitted, and defense counsel was able to refer to the pipe during closing argument. Thus, the exclusion of the pipe did not implicate defendant's right to confrontation of witnesses, but merely prevented defense counsel from holding the pipe in front of the jury during closing argument. We conclude there is no reasonable possibility that a different result would have been reached at trial had this pipe been received as an exhibit. N.C.G.S. § 15A-1443(a) (1988). This assignment of error is without merit.

IV.

[6] As a fourth assignment of error, defendant argues it was error for the trial court to allow the State to introduce Detective Simmons' testimony concerning the statement he overheard defendant make on the telephone after his confession, and later to allow the use of this testimony for the impeachment of Dr. Grotsky. Defendant contends the telephone statement should have been suppressed, at least as to its use in impeaching the testimony of his expert, as a sanction for the State's violation of discovery in not revealing the statement until the fourth day of trial, some twenty months after it was made.

Defendant made his formal confession on the morning of his arrest. Detective Simmons was present. After defendant had gone through his confession twice with the officers, Simmons escorted him to jail. En route, defendant asked to place a telephone call. Simmons overheard defendant's part of the conversation which was, in essence, that defendant had killed a man and that he meant to kill him. Simmons testified that he had not considered the statement on the telephone important, and so had not bothered to relate it to anyone earlier because it was essentially a repetition of defendant's confession which he had heard only minutes before. It occurred to him

during the trial that it might be important, and he then related it to the prosecutor who, in turn, notified defense counsel. The trial court allowed a continuance in the trial from Thursday until Monday to allow the defense to prepare for the testimony of Detective Simmons as to this statement and overruled defendant's objections to the testimony.

The discovery statute, N.C.G.S. § 15A-903(a)(2), in pertinent part, requires that upon motion by a defendant, the trial court must order the prosecutor to divulge the substance of any relevant oral statement made by the defendant when the existence of such statement is known or becomes known to the prosecutor "prior to or during the course of trial." N.C.G.S. § 15A-903(a)(2) (1988). Determining whether the State failed to comply with discovery is a decision left to the sound discretion of the trial court. *State v. McClintick*, 315 N.C. 649, 340 S.E.2d 41 (1986). Sanctions, if any, for failure to comply with discovery requests are left to the sound discretion of the trial court and are not reviewable on appeal absent abuse of discretion. *State v. Weeks*, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988).

While the trial court issued no formal findings of fact and conclusions of law concerning whether N.C.G.S. § 15A-903(a)(2) was in fact violated, the record is sufficient to show that the trial court considered defendant's arguments in light of the discovery statute. On at least two instances, references were made to N.C.G.S. § 15A-910, which contains a listing of appropriate sanctions for noncompliance with the discovery article. The trial court also referred to the fact that the defendant's telephone conversation was "just corroborating what the [defendant] already said upstairs five minutes before" and further stated that "[the D.A.] was almost in a trot to let you know that this man made this statement to [the officer]." Since the State immediately relayed the substance of the statement to the defense upon learning of it, we find no abuse of discretion by the trial court in refusing the requested sanctions and no error in the admission of the testimony.

Even assuming *arguendo* that the State failed at least technically to comply with the discovery statute, N.C.G.S. § 15A-910(2) allows the trial court, in its discretion, to grant a continuance in such cases. The trial court did grant the defendant a continuance from Thursday until Monday to allow the defense time to prepare for testimony concerning the telephone conversation. Under these circumstances, the trial court afforded the defense opportunity to meet this evidence.

[7] Defendant further contends the telephone statement was impermissibly used to impeach his expert witness, Dr. Grotsky. During his formal confession, made just a short while before his telephone conversation, defendant revealed that he meant to kill Murphy. Defendant had a copy of his formal confession approximately one and one-half years before trial but, for reasons best known to him, elected to keep this information from his own expert. During *voir dire*, Dr. Grotsky stated that he first read the content of the confession the morning he was to testify. Because the two statements were identical in substance, defendant has no basis for now arguing that the admission and use of the telephone statement in any way hindered his defense. Defendant simply failed to adequately prepare his expert with the relevant information that had been in his possession for twenty months. A defendant is not prejudiced by any error which may have resulted from his own conduct. N.C.G.S. § 15A-1443(c). Furthermore, by the time the expert testified, the defense was aware of the telephone conversation and, according to Dr. Grotsky's *voir dire* testimony, had relayed its cumulative contents to Dr. Grotsky. This assignment of error is without merit.

V.

Finally, as his fifth assignment of error, defendant contends the trial court erred by refusing to allow defendant's girlfriend, Regina Clark, to testify concerning a conversation the two had about the shooting, apparently just prior to his arrest the morning of the shooting. We do not agree.

On *voir dire*, Regina Clark testified that she received a telephone call about the shooting at approximately 8:00 a.m. on 27 April 1991. Clark testified that when she told defendant she heard he had shot someone, he looked stunned and replied that he had shot a gun, but that he had not shot anyone. It is this statement that defendant contends was improperly excluded. We note in this regard that Clark also testified that she thought defendant was still intoxicated when he walked out of her apartment to surrender to police at 9:00 a.m.

While conceding that this proffered testimony would be hearsay, particularly since he elected not to testify himself, defendant asserts it constitutes admissible hearsay under an assortment of three exceptions to the hearsay rule. We find that none of these are applicable to the defendant's statement.

[8] First, defendant urges that his remark meets the then-existing state of mind exception in N.C.G.S. § 8C-1, Rule 803(3). We conclude,

however, that defendant's statement did not reference a state of mind but rather referred to his actions. Defendant did not state that he did not mean or intend to shoot anyone, but rather, he simply remarked that he did not shoot anyone. His state of mind is neither revealed nor implicated in this straightforward recantation of events.

[9] Next, defendant contends the statement meets the excited utterance exception in N.C.G.S. § 8C-1, Rule 803(2). We are not so persuaded. Clark's questioning comment to defendant that she heard he had shot someone was not a sufficiently startling event, and defendant's response cannot be considered spontaneous. *See State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). Murphy was killed at approximately 2:30 a.m., and defendant allegedly made his statement around 8:00 a.m. Defendant was with Clark during several of these intervening five hours, yet he said nothing about shooting a gun. The trial court could properly conclude that defendant had ample time for reflection and preparation for any confrontation regarding his prior activities. In the context in which it was made, more than five hours after the event, we decline the invitation to characterize this statement as a response to a startling event or as an excited utterance.

[10] With respect to his third proposition, defendant submits the statement qualifies for admission under the residual hearsay exception found in N.C.G.S. § 8C-1, Rule 803(24). Again, we disagree since the statement, in the context made, does not possess the equivalent guarantees of trustworthiness that must form the bedrock of this exception. The statement was a self-serving declaration, not part of the *res gestae*, and it was not available for corroborative purposes since defendant did not testify. *State v. Pearce*, 296 N.C. 281, 250 S.E.2d 640 (1979); *State v. Taylor*, 280 N.C. 273, 185 S.E.2d 677 (1972).

[11] In addition to these three asserted hearsay exceptions, defendant now further proposes that the hearsay statement was admissible because the State introduced the defendant's confession which was made on the same day. Defendant's argument in this regard appears to invoke the principle that when the State offers a part of a confession, the accused may require the entire confession to be admitted into evidence. *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296, *death sentence vacated*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976). However, the difficulty with this proposition is that while the confession and the statement allegedly made to Clark were made on the same day, they were not made at the same time. The alleged statement to Clark was not a part of the confession. For such a contended premise to exist,

the State must open the door to the later self-serving statement in order for it to gain admission. *Weeks*, 322 N.C. at 168, 367 S.E.2d at 905. After a thorough review of the record, we are satisfied that the State did not attempt to introduce testimony concerning the self-serving declaration at any time. The cross-examination of Regina Clark concerning defendant's activities after the shooting is insufficient to open the door, as it failed even to touch upon the statement. This assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. WILLIE ERIC PORTER

No. 22A94

(Filed 2 June 1995)

1. Criminal Law § 427 (NCI4th)— prosecutor's statements during closing argument—not comments on defendant's failure to testify

The prosecutor's reference in his closing argument in a trial for arson and three murders to when defendant "comes and tries to hide" was not an improper comment on defendant's failure to testify but was a reference to defendant's attempt to escape from the scene of the crimes and to avoid the police. Moreover, the prosecutor's statement that only the three victims and the perpetrator knew exactly what happened inside the mobile home was the statement of a truism and not a comment on defendant's failure to testify, and his statement that "you haven't heard anything about any accident" was merely a permissible comment on defendant's failure to produce evidence and not a comment on defendant's failure to testify.

Am Jur 2d, Trial §§ 577-587.

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, supp sec. 1.

2. Criminal Law § 496 (NCI4th)— jury question about evidence—no evidence on point—no discretion to review evidence

Where the jury sent the trial judge a question as to what time of day defendant's car was spotted by the police, but no direct evidence had been introduced on this point, the trial court could not exercise its discretion as to whether to allow the jury to review evidence on this point, and the trial court did not err by instructing the jurors that it could not answer their question and that they must rely on their own recollection of the evidence. N.C.G.S. § 15A-1233(a).

Am Jur 2d, Criminal Law §§ 918 et seq.

3. Criminal Law § 398 (NCI4th)— instruction to alternate juror—no expression of opinion

The trial court's instruction to an alternate juror in a capital case, in the presence of the twelve jurors who decided the case and just before they retired to deliberate, that the alternate must remain available because he might be needed further did not constitute an expression of opinion that the evidence justified verdicts of guilty of first-degree murder which might necessitate the alternate juror's presence at a capital sentencing proceeding. N.C.G.S. § 15A-1222, 15A-1232.

Am Jur 2d, Criminal Law §§ 918 et seq.

4. Homicide § 476 (NCI4th)— instructions—intent to kill—consideration of nature of assault—evidence of assault

There was sufficient evidence of an assault upon three murder victims to support the trial court's instruction that the jury could consider "the nature of the assault" on the issue of intent to kill where the evidence tended to show that defendant had previously threatened the occupants of a mobile home; defendant poured a large amount of gasoline into the mobile home, which was heated by kerosene space heaters; the gasoline ignited; defendant was seen exiting the smoking mobile home with his clothes on fire; and the mobile home then exploded into flames. The intentional pouring of a large amount of a highly volatile and flammable liquid such as gasoline into living quarters heated by kerosene space heaters certainly would have put a person of reasonable firmness in fear of immediate personal injury.

Am Jur 2d, Criminal Law §§ 918 et seq.

5. Criminal Law §§ 574, 879 (NCI4th)— deadlocked jury—requiring jury to deliberate further—length of deliberations—denial of mistrial—verdict not coerced

The trial court in a prosecution for arson and three counts of first-degree murder did not err by denying defendant's motions for a mistrial based on the jurors' reports that they were deadlocked and on the length of deliberations and did not coerce a verdict by giving the jury additional instructions where the jury began deliberating on Thursday at 3:00 p.m.; the jury recessed from Friday afternoon until Monday; the jury foreman reported at midmorning on Monday that the jury was deadlocked; the trial court directed the jury to continue to deliberate without giving the instructions contained in N.C.G.S. § 15A-1235(a) and (b); before the lunch recess on Monday, the foreman told the court that, although the jurors had not reached a unanimous verdict, they were "going to continue one more time"; after lunch, the trial court instructed the jury in accord with § 15A-1235(a) and (b); the trial court inquired later on Monday afternoon whether further deliberations would be worthwhile, and after being informed that progress was at a standstill, asked the jury to return to the jury room to consider whether additional deliberations would be fruitful; the jury returned after ten minutes and responded that further deliberations were worthwhile; the jury reached some verdict or verdicts by the end of the day but did not reach verdicts as to all charges; after an overnight recess, the jury deliberated for an hour and ten minutes on Tuesday and returned verdicts finding defendant guilty of all charges; the jury deliberated over four days for a total of fourteen hours and twenty minutes; and nothing in the record suggests any expression by the trial court that it was displeased with the jurors and would hold the jury until it reached a verdict.

Am Jur 2d, Trial §§ 573 et seq.

6. Criminal Law § 881 (NCI4th)— deadlocked jury—court's statements not coercive

The trial court's statements that "we've got all the time in the world" and "we've got all week" did not convey the meaning that the court would force the jury to deliberate until a verdict was reached, no matter how long it took.

Am Jur 2d, Trial § 1602.

7. Criminal Law § 876 (NCI4th)— deadlocked jury—further deliberations—discretion not to give statutory instructions

It was within the trial court's discretion to require the jury to deliberate further without giving the instructions contained in N.C.G.S. § 15A-1235(a) and (b). N.C.G.S. § 15A-1235(c).

Am Jur 2d, Trial §§ 1054 et seq.

8. Criminal Law § 572 (NCI4th)— motion for mistrial—length of deliberations—time required for evidence not considered

The trial court did not err by denying defendant's motions for a mistrial based on the jury's deliberations for four days when only two days were used for the presentation of evidence, since no rule will be adopted as to how long the jury should be allowed to deliberate based on the time required for the State to present evidence. Rather, it is left to the discretion of the trial court to decide if jury agreement as to a verdict is reasonably possible. N.C.G.S. § 15A-1235(d).

Am Jur 2d, Trial §§ 1493 et seq.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment entered by Griffin, J., on 2 July 1993, in the Superior Court, Hertford County, sentencing defendant to four consecutive sentences of life imprisonment for three counts of first-degree murder and one count of first-degree arson. Defendant's motion to bypass the Court of Appeals on the arson conviction was allowed 12 October 1994. Heard in the Supreme Court on 10 January 1995.

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

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

MITCHELL, Chief Justice.

Defendant, Willie Eric Porter, was tried capitally upon proper indictments for first-degree arson and for three counts of first-degree murder at the 21 June 1993 Criminal Session of Superior Court, Hertford County. The jury returned verdicts finding defendant guilty of first-degree arson and guilty of three counts of first-degree murder

on the basis of premeditation and deliberation and under the felony-murder rule.

At the end of the capital sentencing proceeding, the jury recommended a sentence of life imprisonment for each of the three first-degree murder convictions. The trial court imposed sentences of life imprisonment for the three murders and a fourth sentence of life imprisonment for first-degree arson. All of the sentences are to be served consecutively. Defendant appeals to this Court as a matter of right pursuant to N.C.G.S. § 7A-27(a) from the judgments in the murder cases. His motion to bypass the Court of Appeals on his appeal from the judgment in the first-degree arson case was allowed by this Court on 12 October 1994.

The evidence presented at defendant's trial tended to show the following: Mr. Clifton Lassiter lived in Wise's Mobile Home Park in Murfreesboro and dated Ms. Dorothy Porter, defendant's mother. Mr. Lassiter was blind and was aided by Ms. Porter. On 6 February 1992 Minnie Fleetwood, a neighbor, took Mr. Lassiter and Ms. Porter to the grocery store in Mr. Lassiter's car. Ms. Fleetwood then took them back to Mr. Lassiter's mobile home, where they put away the groceries. Defendant and Ms. Daphine Boone arrived, and defendant asked Ms. Porter for money. When his mother told him she did not have any money, defendant began cursing and insulting her. He then took off one of Ms. Porter's shoes and used it to beat her on the head. Ms. Porter pled with her son to stop. He stopped and threw the shoe out the door of the mobile home. When his mother asked him to return the shoe, defendant went outside, brought the shoe in, and threw it at her. At this point Ms. Fleetwood left the trailer because of "the way [defendant] was beating on . . . his mother and the way he cursed God." It was approximately 8:30 p.m.

Although the testimony was unclear at trial as to the precise sequence of events, witnesses testified that defendant continued to quarrel with Ms. Porter and Ms. Boone. At one point defendant kicked open the front door. This action prompted Mr. Lassiter to pick up a knife and chase defendant out of the mobile home. Mr. Lassiter, being blind, was assisted in his efforts by Ms. Boone. After being chased out of the mobile home by the knife-wielding Mr. Lassiter, defendant apologized. However, when hostilities again arose, defendant left, saying, "[T]hat's all right, I'll be back . . . . I'll get your ass."

Later that evening Mr. Eugene Ely and Mr. Dale Hicks were driving home after a night of bowling with Mr. Hicks' sister and a friend.

Mr. Ely saw defendant's car parked beside the road with the hood open as Mr. Hicks turned his car into the mobile home park. The defendant's car door was open, and he was standing by it with a white five-gallon plastic pail beside him. The pail was filled with a liquid, some of which had spilled on the ground.

Mr. Hicks drove through the mobile home park to take his sister to her mobile home. After they stopped, Mr. Ely saw defendant running out the door of Mr. Lassiter's mobile home. Defendant's back was on fire, and black smoke was coming from the mobile home. Defendant ran toward his car, but stopped, dropped, and rolled to extinguish the fire on his back. As defendant was rolling on the ground, Mr. Lassiter's mobile home burst into flames. The windows blew in as the fire consumed the front of the mobile home. The fire was reported to police at 11:30 p.m.

After extinguishing the fire on his back, defendant jumped up and got in his car. Mr. Ely attempted to stop defendant by grabbing the handle of his car door, but defendant pulled away at a high rate of speed. Defendant drove further into the mobile home park and then turned his car around and drove past the fire for a second time. This time Mr. Hicks attempted to thwart defendant's escape by hurling a brick at his car; other witnesses shouted for defendant to stop. Undeterred, defendant drove out of the mobile home park.

After the fire was extinguished, Mr. Ely and Mr. Hicks showed Officer Rodney Pennington, a sergeant of the Hertford County Sheriff's Department, where the plastic bucket had been placed and the location of the spill. All three agreed that the spilled liquid smelled like gasoline.

Dennis Honeycutt, special agent with the State Bureau of Investigation, entered the burned mobile home. Most of the fire damage had occurred in the center of the structure. The bodies of Ms. Dorothy Porter, Mr. Clifton Lassiter, and Ms. Daphine Boone were located in the living room of the mobile home. All three victims had died from fire inhalation, and their bodies were badly burned. Although kerosene heaters were used to heat the home, the tanks which held the fuel were intact and had not ruptured. None of the heaters were in the area of the point of origin of the fire.

At approximately 5:00 a.m. on 7 February 1992, Officer Pennington was dispatched from the scene of the fire to investigate a report that defendant's car had been seen in a ditch along the side of

a dirt road not far from the mobile home park. When Officer Pennington found the car, defendant was sitting in the front seat. The car's front right tire was flat, and a bumper jack had been applied to the car. The officer did not testify as to the time when he found defendant.

Subsequent laboratory tests of carpet and debris samples taken from the living area of the mobile home revealed the presence of gasoline. The tests showed that the defendant's sweatshirt and shoes also bore trace amounts of gasoline.

Defendant presented no evidence during the guilt-innocence phase of the trial.

[1] In an assignment of error, defendant argues that the trial court committed reversible error by overruling his objection to the prosecutor's reference to his decision not to testify. During closing arguments, the prosecutor argued:

> Using your own reason and your own common sense, ladies and gentlemen of the jury, I submit to you, when you go back to the jury room that you will find the defendant guilty of first degree murder on the basis of malice . . . . No accident, ladies and gentlemen of the jury, that he came up and did what he did in the way that he did, cold, calculated murder.
>
> And then when he comes, ladies and gentlemen of the jury, *when he comes and tries to hide*, that's no accident. And you haven't heard anything about any accident.
>
> Ladies and gentlemen of the jury, *the evidence* in this case is *there are only three folks that can tell what happened, you know what, those three folks are dead and the person who did it.*
>
> You know what happened before and you know what he did afterwards, and ladies and gentlemen of the jury, that's what the evidence is in this case.

(Emphasis added.) At this point, defendant objected and moved to strike. The trial court overruled the objection. The prosecutor then resumed his argument that "the evidence is uncontradicted."

On appeal the defendant contends that the prosecutor's argument deprived him of rights guaranteed by the Constitution of North Carolina. Article I, Section 23 of the Constitution of North Carolina states that a defendant in a criminal case cannot "be compelled to

give self-incriminating evidence." N.C. Const. art. I, § 23. This proscription is mirrored in N.C.G.S. § 8-54, which provides that a defendant in a criminal trial cannot be compelled to testify or "answer any question tending to incriminate himself." N.C.G.S. § 8-54 (1986). Even before the Supreme Court of the United States held in *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106, *reh'g denied*, 381 U.S. 957, 14 L. Ed. 2d 730 (1965), that a reference to a defendant's failure to testify violates the accused's constitutional right to remain silent, this Court held that N.C.G.S. § 8-54 prohibited comment on a defendant's failure to testify. *See, e.g., State v. Humphrey*, 186 N.C. 533, 120 S.E. 85 (1923).

We have stated that "the purpose behind the rule prohibiting comment on the failure to testify is that *extended reference* by the court or counsel concerning this would nullify the policy that the failure to testify should not create a presumption against the defendant." *State v. Randolph*, 312 N.C. 198, 206, 321 S.E.2d 864, 869 (1984) (emphasis added). In *Randolph*, we emphasized the fact that "[a]ny reference to the failure to testify was so brief and indirect as to make improbable any contention that the jury inferred guilt from the failure of defendants to testify." *Id.* at 206, 321 S.E.2d at 869-70. We have emphasized that "[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.' " *State v. Rouse*, 339 N.C. 59, 95-96, 451 S.E.2d 543, 563 (1994) (quoting *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973), *aff'd*, 417 U.S. 211, 41 L. Ed. 2d 20 (1974)).

In the present case, the prosecutor's argument did not exhibit a manifest intent to comment on defendant's failure to testify. The prosecutor's meaning when using the words "tries to hide" is not absolutely clear, but it seems to have been a reference to defendant's ill-planned and ill-fated escape from the scene of the fire. In no way can we conclude that "tries to hide" must be construed as an extended reference to defendant's failure to testify rather than a reference to his attempt to escape and avoid police.

The defendant contends that the instant case is on all fours with *State v. McLamb*, 235 N.C. 251, 69 S.E.2d 537 (1952). In *McLamb*, defendant also did not testify, but his wife and three other women did. During his closing argument, the prosecutor said that defendant was "hiding behind his wife's coat tail." This Court held that the statement was "tantamount to comment on his failure to testify" and awarded a

new trial. *Id.* at 257, 69 S.E.2d at 541. In *McLamb*, the contested statement could have had no other meaning than that defendant was relying on his wife's testimony to present his case rather than testify himself. However, in the case *sub judice*, "tries to hide" has a literal meaning in the context of the evidence presented; defendant fled and tried to hide after the fire to avoid apprehension by the police. Consequently, except for the similarity of the contested phrase itself, the two cases are distinguishable.

We also conclude from the evidence presented in this case that the prosecutor's statement that only the three victims and the perpetrator knew exactly what happened inside the mobile home simply was the statement of a truism, i.e., when only four people are present at an event, only those four people can know exactly what happened. This comment did not prejudice the defendant. To the contrary, the prosecutor's comment underscored the fact that if the defendant was not the perpetrator, he would not know what had happened, and his failure to testify would be entirely consistent with his innocence. Finally, with regard to this assignment, we note that the prosecutor's statement that "you haven't heard anything about any accident" was merely a permissible comment on the defendant's failure to produce evidence. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). For the foregoing reasons, we conclude that this assignment of error is without merit.

[2] Defendant also assigns error to the trial court's failure to exercise its discretion in determining the proper response to a question asked by the jury during its deliberations. Following the trial court's jury instructions, and after an hour and fifteen minutes of jury deliberations, the trial court informed counsel that the jury had a question. Addressing the parties, the trial court said:

> I have brought y'all back in because Mr. Twine [the bailiff] came into chambers and said that the jury had handed him a note. And I have just unfolded it and looked at it, and it asks a question about what some of the evidence showed.
>
> And I quote, I'm going to make this Court's Exhibit Number 1 and put it in the record. "What time of day was the defendant's car spotted by police?"
>
> I don't guess there's any way of answering that question, I'll just have to tell them to rely on their recollection of the evidence.
>
> Mr. Twine, bring the jury in.

Before you do that, I don't think—I don't think it's any practical way to go back and fish this—let them hear some transcript of the—I believe there is no practical way to do it with this particular question.

Anyway, bring the jury back.

(JURY RETURNS TO COURTROOM.)

Members of the jury, I have received your question and have brought you back in to tell you I'm not able to answer it. I will just have to instruct you to be guided by your own recollection of the evidence, y'all have heard it and we don't have any practical way to do that and it would be inappropriate obviously for me to undertake to tell the jury anything about what the evidence is since y'all are the sole judges of the weight and the credibility of the evidence.

So I'll just have to ask you to be guided by your own recollection of the evidence with regard to this matter. You may retire and continue your deliberations.

At this point, the jurors returned to their deliberations.

Defendant contends that the trial court in the instant case erred by failing to exercise its discretion. We disagree.

The decision to grant or deny a jury request for a review of evidence is committed to the discretion of the trial court. N.C.G.S. § 15A-1233(a) (1988); *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985). We have held that the trial court errs where it does not exercise its discretion in determining whether the jury should be allowed to review the evidence introduced at trial. *Ashe*, 314 N.C. 28, 331 S.E.2d 652. However, we conclude that this principle has no applicability here.

In the present case, the trial court read the jury's question into the record. Then the trial court stated, "I don't guess there's any way of answering that question." Before summoning the jury, the trial court concluded that "there is no practical way" to answer the jury's inquiry. When the jurors were brought back into the courtroom, the trial court instructed them that it could not answer their question and that they must rely on their own recollection.

Although one witness, Officer Pennington, testified that he was dispatched at approximately 5:00 a.m. to go to Rural Paved

Road 1300, where defendant and his car were located, the officer did not testify at what time he actually first encountered defendant's car or who first saw the car. The transcript is devoid of any testimony as to exactly when the police first saw the car. Therefore, the jury's question related to a point for which no direct evidence had been introduced. The trial court could not exercise its discretion as to whether to allow the jury to review evidence on a point, when no such evidence had been introduced. The trial court did not err in its ruling, and this assignment of error is without merit.

[3] In another assignment of error, defendant contends that the trial court committed reversible error by instructing an alternate juror, in the presence of the twelve jurors who decided his case and just before they retired to deliberate, that the alternate must remain available because he might be needed further. Specifically, the trial court said:

> *I'm not going to discharge you because we may need you further in this case.* So you might have to sit around and twiddle your thumbs, if you'll step out into that jury room, I'll let the original twelve go to the jury room.

The defendant did not object at trial to this statement to the alternate juror.

On appeal defendant asserts that the trial court's comments patently intimated to the jurors that the trial court believed the evidence to justify verdicts of guilty of first-degree murder, which might necessitate the alternate juror's presence at a capital sentencing proceeding. We disagree.

Judicial expression of opinion regarding the evidence is statutorily prohibited under N.C.G.S. §§ 15A-1222 and -1232. "A remark by the court is not grounds for a new trial if, when considered in the light of the circumstances under which it was made, it could not have prejudiced defendant's case." *State v. King*, 311 N.C. 603, 618, 320 S.E.2d 1, 11 (1984) (citing *State v. Green*, 268 N.C. 690, 693-94, 151 S.E.2d 606, 609 (1966)). The burden rests upon defendant to show that the trial court's remarks were prejudicial. *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985). With these principles in mind, we do not find that the trial court's statement expressed any opinion regarding the evidence or its sufficiency. Further, the trial court made it clear that it had no such opinion by informing the jury that:

> The law as it should requires a presiding judge to be impartial. Do not draw any inference from any ruling that I've made, or any inflection in my voice or expression on my face or any question that I might have asked a witness or anything else that I might have said or done during this trial, that I have an opinion or that I have tried to intimate to the jury an opinion as to whether part of the evidence ought to be believe [sic] or disbelieved or as to whether any facts have been proved or not proved or as to what your findings ought to be.

We conclude that the trial court's comment did not constitute prejudicial error. This assignment of error is without merit.

[4] Defendant next assigns error to the trial court's instruction to the jury that it could consider "the nature of the assault" on the issue of intent to kill. Defendant contends that the trial court erred in this regard by giving the following jury instruction regarding the first-degree murder charges:

> Intent is a mental attitude which is seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.
>
> An intent to kill may be inferred *from the nature of the assault, the manner in which it was made,* the conduct of the parties and other such relevant circumstances.

Where jury instructions are given without supporting evidence, a new trial is required. *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975). Defendant contends that there was no evidence introduced at trial tending to show an assault in the present case. We disagree.

In the present case, evidence tended to show that defendant was seen immediately before the fire with a five-gallon bucket of gasoline. Having previously threatened the occupants of the mobile home with the words, "I'll get your ass," defendant deposited the gasoline in the mobile home, which immediately ignited. Witnesses then saw defendant exit the smoking mobile home with his clothes on fire. The mobile home then exploded into flames.

The word "assault" has been defined as an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury. *State v. Roberts*, 270 N.C. 655, 155 S.E.2d 303 (1967). The intentional pouring of a large

amount of highly volatile and flammable liquid such as gasoline into living quarters heated by kerosene space heaters certainly would put a person of reasonable firmness in fear of immediate personal injury. Therefore, the evidence in the present case does tend to show an assault upon the victims. Consequently, the jury instruction on intent in this case was proper. This assignment of error is without merit.

[5] In another assignment of error, defendant contends that the trial court committed reversible error requiring a new trial when it denied defendant's motions for mistrial based on the jurors' repeated reports that they were deadlocked and based on the length of the deliberations. The jury deliberated for more than fourteen hours over a period of four days, including a weekend recess.

The jury began deliberating Thursday at approximately 3:00 p.m. Defendant moved for a mistrial during the jury's lunch recess on Friday, but the motion was denied by the trial court. The trial court allowed the jury to recess from Friday afternoon until Monday. After the jury had begun its deliberations on Monday morning, the trial court called the jury into the courtroom to inquire of the foreman, Mr. Spears, as follows:

> THE COURT: You've been out for about an hour and forty minutes, I thought I'd give you a recess so that you can refresh yourself.
>
> Let me inquire, Mr. Spear [sic], is the jury making any progress?
>
> MR. SPEARS: We're at a standstill right now, sir.
>
> THE COURT: You want to continue to deliberate, you think further deliberations will bear fruit? Y'all were out all day Friday.
>
> MR. SPEARS: According to the ones who—
>
> THE COURT: (Interposing) I don't want to know what your situation is at all. I just want to—.
>
> MR. SPEARS: At thie [sic] time, no, I don't think—.
>
> THE COURT: Let me do this. Let me give you a recess, let y'all refresh yourselves, come back in fifteen minutes and have your seats. I'll let you go out and I'll let y'all discuss it a little bit further and then you come back in and let me know what—y'all make some decision about, whether or not you think you can make further progress. There is no rush.

I don't want to pursue anybody to do anything. I'll be guided by y'all's assessment of what you think the situation is. I don't want to interfere in it. So take fifteen minutes, cease your deliberations and remember my instructions about your conduct.

Come back and have your seats and we'll do that.

After fifteen minutes, the jury was returned to the courtroom. During its absence, defendant renewed his motion for a mistrial. It was denied.

When the jury was reconvened, the trial court again addressed the jurors:

THE COURT: All right, Mr. Spears, I'm going to let you all again retire, and I want you to understand, all the jurors to understand, that we're here, we've got plenty of time, there's no rush, y'all take whatever time you feel is necessary in this matter.

If you feel that you're reached an impossible impasse, if you'll let me know about that, we'll discuss it further.

So I'm going to return the verdict sheets to you and let you continue and let me know what your situation is.

Again, the jury retired to deliberate. After an hour and twenty minutes, the trial court returned the jury to the courtroom and asked if the jury had arrived at a unanimous verdict. The foreman responded that it had not but that the jury would "continue one more time." The trial court then called a lunch recess.

After lunch and before sending the jury to the jury room, the trial court gave the following instruction:

Members of the jury, before you continue your deliberations, let me say this to you. First, jurors have a duty to consult with one another, and to deliberate with a view of reaching an agreement, if it can be done without violence to individual judgment.

Of course, each juror must decide the case for himself, but only after impartial consideration of the evidence with his fellow jurors. During the course of deliberations, the juror should not hesitate to reexamine his own views and change his opinion if he's convinced it is erroneous.

No juror should, of course, surrender his honest conviction as to weight or effect of the evidence solely because of the opin-

ion of his fellow jurors or for the mere purpose of returning a verdict.

After another hour and twenty minutes, the trial court had the jury returned to the courtroom, and the following dialogue took place:

THE COURT: Mr. Spears, let me make an inquiry again, without asking you how you're divided or anything of that kind, I'd just like to know if you feel the jury is making any progress towards reaching a verdict.

MR. SPEARS: No, sir.

THE COURT: Again, we've got all the time in the world, and I'm not rushing you, don't want you to feel rushed or anything of that kind.

My question is, do you feel that if we stay longer that the jury will make any progress, if you will give me a straight-up assessment as best you can?

MR. SPEARS: No, sir.

THE COURT: You don't believe you will?

Let me ask, is anybody on the jury who dissents from what Mr. Spears said?

If you do raise your hand or let me put the question another way. If there is anyone on the jury who feels that we can make progress, that the jury can make progress if you continue deliberations.

(No response.)

THE COURT: Again, I don't want you to feel rushed, but if there is anybody who feels like we can make progress, I think we ought to continue to try, if you can, but if all of you honestly are satisfied that you've done all you can do, and there is no need to continue, I need to know that.

I need to know what y'all's feeling is. Let me ask you, I was going to give you a recess, let me ask you to do this. Having the questions I've put to you, do you want to—let me let you retire for just a moment and discuss the questions of whether or not you think further deliberations with the other folks and give y'all's . . . honest assessment of what you think the prospects are, and if

the honest prospect is you can't make any—you know, are not able to make any progress, just tell me that.

I don't want to keep you here unnecessarily but again, if you feel you can make progress, we've got all week, take whatever time you need. Let me let y'all—I was going to give you a break, but let me do that, let me ask you to step back and consider the questions I just put to you, and I'll bring you back. Knock on the door when you're ready to answer those propositions.

After ten minutes in the jury room, the jury returned and reported that it wished to deliberate further. After an additional hour of deliberations, the jury reported that it had arrived at some verdict or verdicts but that it had not reached verdicts as to all of the charges. The trial court then sent the jury home for an overnight recess. The next morning, the jury deliberated for another hour and ten minutes before returning verdicts of guilty as to all of the charges. The jury had deliberated for a total of fourteen hours and twenty minutes, spanning four days.

In deciding whether the trial court coerced a verdict by the jury, the appellate court must look to the totality of the circumstances. *State v. Patterson*, 332 N.C. 409, 420 S.E.2d 98 (1992). Some of the factors considered are whether the trial court conveyed an impression to the jurors that it was irritated with them for not reaching a verdict and whether the trial court intimated to the jurors that it would hold them until they reached a verdict. *State v. Beaver*, 322 N.C. 462, 464, 368 S.E.2d 607, 608 (1988).

In the present case, defendant contends that the trial court intimated that it was unhappy with a report of a deadlocked jury and would hold the jury until it reached a verdict. Defendant contends that the various exchanges between the trial court and the foreman could only have communicated the court's displeasure. We find no merit in this argument. Nothing in the record suggests an expression by the trial court that it was displeased with the jurors.

[6] Defendant also refers to the trial court's statements that "we've got all the time in the world" and "we've got all week." He argues that those statements conveyed the meaning that the trial court would force the jury to continue to deliberate until a verdict was reached, no matter how long it took. We do not agree.

Guidelines for instructing a potentially deadlocked jury are contained in N.C.G.S. § 15A-1235, which states:

(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 (1988). It is clearly within the sound discretion of the trial court to determine whether to give an instruction pursuant to subsection (c) of this statute. *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986).

[7] In this case, it was within the trial court's discretion to require the jury to continue its deliberations without giving the instructions contained in subsections (a) and (b). N.C.G.S. § 15A-1235(c). This was the action taken by the trial court when the jury did not return a verdict by midmorning Monday, the second full day of deliberations. After that instruction to continue to deliberate, and before the lunch

recess on Monday, the foreman told the trial court that although the jurors had not reached a unanimous verdict, they were "going to continue one more time." This statement evinces the jury's own assessment that an agreement could be reached.

After lunch, the trial court instructed the jury in accord with N.C.G.S. § 15A-1235(a) and (b). That afternoon, the trial court inquired whether further deliberations would be worthwhile. After being informed by the foreman that progress was at a standstill, the trial court asked the jury to return to the jury room to consider simply whether additional deliberations would be fruitful. After ten minutes in the jury room, the jury returned and responded that further deliberations were worthwhile. By the end of that day, the jury had reached some verdict or verdicts but had not reached verdicts as to all charges. After an overnight recess, the jury deliberated further and returned verdicts finding defendant guilty of all charges.

The statements of the jury and its subsequent actions validate the trial court's determination that further deliberations were worthwhile. The jury decided in the privacy of the jury room that it could come to agreement and did so within a few hours. Considering the totality of the circumstances and giving proper deference to the trial court's exercise of discretion, we can only conclude that the trial court did not abuse its discretion by denying defendant's motion for a mistrial and giving additional jury instructions. The decision to convict a man of arson and three counts of first-degree murder is a particularly heavy one; considerable deliberation is warranted. Here, the trial court facilitated that deliberation, but it did not force a verdict.

[8] Moreover, we find no merit in defendant's argument that the deliberations were too long, in light of the time needed for the actual trial. Although the jury deliberated for four days, while only two days were used for the presentation of evidence, we decline to adopt any rule as to how long the jury should be allowed to deliberate which is based on the time required for the State to present evidence. It is left to the discretion of the trial court to decide if jury agreement as to a verdict is reasonably possible. N.C.G.S. § 15A-1235(d). Here, the trial court did not abuse its discretion. Therefore, we find no merit in this assignment of error.

The defendant received a fair trial free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. ANTONIO RIDDICK

No. 458A94

(Filed 2 June 1995)

1. Homicide § 689 (NCI4th)— unlawful conduct—instruction on accident not required

The trial court was not required to instruct the jury on the defense of accident in a first-degree murder prosecution by defendant's evidence that he fired one shot into the air to scare the victim, the gun went off a second time accidentally and fired the fatal shot when he was startled by a loud noise, and he only intended to scare the victim and not to hurt him where the evidence was uncontroverted that defendant was engaged in unlawful conduct and acted with a wrongful purpose when the killing occurred in that defendant sought out the victim armed with a loaded gun; an altercation ensued during which defendant assaulted the victim, who was unarmed; defendant admitted that he fired the gun once intentionally; and the gun was in defendant's hand when the fatal shot was fired.

Am Jur 2d, Homicide §§ 482-535.

2. Homicide § 704 (NCI4th)— refusal to instruct on accident—error cured by first-degree murder verdict

Even if the trial court erred by refusing to instruct the jury on the defense of accident in a first-degree murder trial, this error was rendered harmless by the jury's verdict finding defendant guilty of first-degree murder where the trial court correctly instructed the jury as to possible verdicts of murder in the first and second degrees and involuntary manslaughter, and the jury found defendant guilty of first-degree murder on the theory of premeditation and deliberation, since an accidental killing, like involuntary manslaughter, is an unintentional killing; in reaching its verdict convicting defendant of first-degree murder, the jury necessarily found that defendant had the specific intent to kill the victim; and the verdict finding defendant guilty of first-degree murder and not the unintentional act of involuntary manslaughter precludes the possibility that the same jury would have accepted defendant's claim that the shooting was accidental had it been given the requested instruction.

Am Jur 2d, Homicide §§ 529 et seq.

Supreme Court's views as to what constitute harmless errors or plain errors, under Rule 52 of Federal Rules of Criminal Procedure. 84 L. Ed. 2d 876.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Brown (Frank R.), J., at the 31 May 1994 Criminal Session of Superior Court, Edgecombe County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 12 May 1995.

Michael F. Easley, Attorney General, by Simone E. Frier, Attorney at Law, and Ellen B. Scouten, Assistant Attorney General, for the State.

Eugene W. Muse for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 14 February 1994 for the first-degree murder of Michael Fitzgerald Smith. The defendant was tried noncapitally, and the jury found defendant guilty of first-degree murder on the theory of premeditation and deliberation. By judgment and commitment dated 1 June 1994, Judge Brown sentenced defendant to a term of life imprisonment.

At trial, the State presented evidence tending to show that Michael Smith died sometime during the evening of 3 December 1993. Mr. Smith was found at 211 First Street, lying face down in a pool of blood, by an officer from the Princeville Police Department. The officer observed a gunshot wound to the back of the victim's neck as well as wounds to the face. Dr. Robert Zipf performed an autopsy which showed that a single bullet entered the victim's body through the back of the neck and cut through the victim's spinal cord causing death.

Veronica Fleming, Smith's girlfriend, testified that she lived at 211 First Street. On 29 November 1993, the defendant came to her home looking for the victim. The defendant was looking for Smith because Smith had allegedly taken fifty dollars worth of drugs from the defendant's girlfriend. When Ms. Fleming told the defendant that the victim was not there, the defendant replied, "If you see him, tell him I'm going to kill him."

Ms. Fleming further testified that the victim came to her house shortly after 8:00 p.m. on the evening of 3 December 1993. While she

and the victim were sitting in the living room, the defendant knocked on her door. Ms. Fleming opened the door, and the defendant came in and began screaming at the victim. Ms. Fleming stated that when she asked the defendant to leave her house, he suddenly backed up, reached into his pants and pulled out a gun. The defendant tried to get Smith to go outside but Smith refused. Ms. Fleming testified that the defendant then put the gun to her head and said to the victim, "If you're not going to move I'll kill her first." Smith then agreed to go outside with the defendant.

Ms. Fleming further testified that when Smith got to the screen door, Danny Harris, a codefendant, pulled Smith the rest of the way through the door. As the two men started to fight, the defendant ran out of the house and began hitting the victim about the head with his gun. Ms. Fleming watched the fight from a window in her house. According to Ms. Fleming, as the victim tried to run away, the defendant fired the gun. Ms. Fleming saw the victim fall. She then testified that the defendant ran to the victim, stood over him and shot him in the back of the head.

The State's evidence further showed that shortly after 8:00 p.m. on 3 December 1993, Vincent Draughn saw the defendant drive by in a white, two-door Cavalier. The defendant was driving in the direction of First Street. Approximately twenty minutes later, he heard two gunshots. Mr. Draughn testified that he immediately thought to go to First Street because the defendant had told him that he was going to kill Smith, and he knew Smith was in that area.

Lonnie Everette lived at 222 First Street on 3 December 1993. Mr. Everette testified that he heard two gunshots during the evening of 3 December 1993. Mr. Everette further testified that when he looked in the direction of the sound, he saw someone fall in the yard of 211 First Street and then saw two black males run toward a white, two-door Cavalier that was parked at the curb.

The defendant's evidence tended to show that the defendant knew the victim and Ms. Fleming and that he saw both of them on the evening of 3 December 1993 sometime after 8:00 p.m. The defendant testified that he had been looking for Smith but never told anyone that he was going to kill Smith. The defendant stated that he pulled out his gun when confronting Smith only because Smith was "big." Ms. Fleming then asked the defendant to "take it outside." The defendant testified that the victim went out the door and "barreled"

into Danny Harris. The defendant then hit the victim once with his gun.

The victim jumped off the porch and began to run away. The defendant testified that he fired once into the air to scare the victim. The defendant stated that after he fired the first shot into the air, he heard a door slam behind him. The loud noise from the slamming door, according to defendant, startled him and caused him to fire a second shot. The defendant said that when he looked up, he saw the victim fall to the ground, but he did not know the victim had been shot.

On cross-examination, the defendant admitted that he was looking for the victim, that he knew where to find the victim and that he intended to confront the victim. He also stated that he pulled the gun out even though the victim did not have a weapon.

Danny Harris similarly testified for the defense that the defendant fired "up in the air" and that he heard a second shot after hearing a loud noise behind him and the defendant which caused him to "jump and look back."

[1] In his sole assignment of error, the defendant contends that the trial court erred by denying his request to instruct the jury on the defense of accident. The pattern jury instruction on accident reads as follows:

> Where evidence is offered that tends to show that the victim's death was accidental, and you find that the killing was in fact accidental, the defendant would not be guilty of any crime, even though his acts were responsible for the victim's death. A killing is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence. A killing cannot be [premeditated] (or) [intentional] (or) [culpably negligent] if it was the result of an accident. When the defendant asserts that the victim's death was the result of an accident, he is, in effect, denying the existence of those facts which the State must prove beyond a reasonable doubt in order to convict him. Therefore, the burden is on the State to prove those essential facts and in so doing, disprove the defendant's assertion of accidental death. The State must satisfy you beyong [sic] a reasonable doubt that the victim's death was not accidental before you may return a verdict of guilty.
>
> *Note Well. Add to final mandate at end:*

> Now members of the jury, bearing in mind that the burden of proof rests upon the State to establish the guilt of the defendant beyond a reasonable doubt, I charge that if you find from the evidence that the killing of the deceased was accidental, that is, that the victim's death was brought about by an unknown cause or that it was from an unusual or unexpected event from a known cause, and you also find that the killing of the deceased was unintentional, that at the time of the homicide the defendant was engaged in the performance of a lawful act without any intention to do harm and that he was not culpably negligent; if you find these to be the facts, remembering that the burden is upon the State, then I charge you that the killing of the deceased was a homicide by misadventure and if you so find, it would be your duty to render a verdict of not guilty as to this defendant.

N.C.P.I.—Crim. 307.10 (1986).

The defendant argues that the evidence presented by defendant and corroborated by Danny Harris, when taken in the light most favorable to the defense, was sufficient for the jury to find that the fatal shooting occurred by accident. In support of this argument, the defendant points to testimony tending to show that he fired one shot into the air to scare the victim, that the gun went off a second time accidentally when he was startled by a loud noise, and that he only wanted to scare the victim and did not intend to hurt the victim. The defendant further argues that even though conflicting evidence was presented by the State, it was the province of the jury, not the judge, to resolve such conflict after receiving the proper instructions. We cannot agree under the circumstances presented.

A killing will be excused as an accident when it is unintentional and when the perpetrator, in doing the homicidal act, did so without wrongful purpose or criminal negligence while engaged in a lawful enterprise. *State v. Faust*, 254 N.C. 101, 112, 118 S.E.2d 769, 776, *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961). "The defense of accident 'is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another.' " *State v. Turner*, 330 N.C. 249, 262, 410 S.E.2d 847, 854 (1991) (quoting *State v. Lytton*, 319 N.C. 422, 425, 355 S.E.2d 485, 487 (1987)). However, the evidence does not raise the defense of accident where the defendant was not engaged in lawful conduct when the killing occurred. *Faust*, 254 N.C. at 113, 118 S.E.2d at 776.

In the case *sub judice*, the evidence clearly showed that the defendant voluntarily created the volatile situation which resulted in the victim's death. The defendant testified that he deliberately went looking for the victim armed with a loaded gun. The defendant stated that he intended to confront the victim. When the defendant arrived at Ms. Fleming's home, he threatened Ms. Fleming and the victim with his gun. An altercation ensued during which defendant assaulted the victim. Both Ms. Fleming and the victim were unarmed. Two witnesses testified that the defendant had previously threatened to kill the victim. Furthermore, the defendant admits that he fired the gun once intentionally and that the gun was in his hand when the fatal shot was fired.

The evidence is thus undisputed that the defendant sought out the victim, that the defendant intentionally confronted the victim with a loaded firearm, that the defendant assaulted the victim, and that the gun was in the defendant's hand when two bullets, one of which entered the victim's body, were fired from it. "The fact that the defendant claims now that he did not intend the shooting does not cleanse him of culpability and thus give rise to a defense of accident." *Lytton*, 319 N.C. at 426, 355 S.E.2d at 487. Where, as here, the evidence is uncontroverted that the defendant was engaged in unlawful conduct and acted with a wrongful purpose when the killing occurred, the trial court does not err in refusing to submit the defense of accident.

[2] Even assuming, *arguendo*, that the trial court erred in this regard, the error was harmless because the defendant has failed to show he was prejudiced by the trial court's refusal to submit the requested instruction. The trial judge gave the jury correct instructions as to possible verdicts of murder in the first and second degrees and of involuntary manslaughter. The jury found the defendant guilty of first-degree murder on the theory of premeditation and deliberation.

Murder in the first degree is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 337 (1986). Involuntary manslaughter is the "unlawful killing of a human being without malice, without premeditation and deliberation, and without [the] intention to kill or inflict serious bodily injury." *State v. Powell*, 336 N.C. 762, 767, 446 S.E.2d 26, 29 (1994). An accidental killing, like involuntary manslaughter, is an unintentional killing. Thus, with respect to lack of intent, a proper instruction on involuntary

manslaughter is the functional equivalent of the requested instruction on accident.

The jury in the present case was instructed that it could not return a verdict finding the defendant guilty of first-degree murder unless it found beyond a reasonable doubt that the defendant specifically intended to kill the victim. In reaching its verdict convicting the defendant of first-degree murder, the jury found that the defendant had the specific intent to kill Michael Smith and, necessarily, rejected the possibility that the killing was unintentional. Therefore, the jury verdict finding the defendant guilty of first-degree murder, and not the unintentional act of involuntary manslaughter, precludes the possibility that the same jury would have accepted the defendant's claim that the shooting was accidental even if it had been given the requested instruction. This assignment of error is without merit and, accordingly, is overruled.

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

NO ERROR.

KRAFT FOODSERVICE, INC. v. CHARLIE L. HARDEE

No. 325PA94

(Filed 2 June 1995)

1. Guaranty § 14 (NCI4th)— special guaranty—when assignable

Rights under a special guaranty—that is, a guaranty addressed to a specific entity—are assignable unless: assignment is prohibited by statute, public policy, or the terms of the guaranty; assignment would materially alter the guarantor's risks, burdens, or duties; or the guarantor executed the contract because of personal confidence in the obligee.

Am Jur 2d, Guaranty §§ 34-36.

2. Guaranty § 14 (NCI4th)— personal guaranty addressed to corporation—enforcement by assignee

Defendant's personal guaranty addressed to Seaboard Foods, Inc. in which he promised to pay amounts owed for goods and

merchandise sold and delivered on open account to Quick Fill, Inc., a company of which he was the president, could be enforced by plaintiff as Seaboard's assignee where the terms of the guaranty do not prohibit assignment; no statute or public policy precludes assignment; and the record contains no evidence that defendant executed the guaranty out of a personal confidence in Seaboard Foods, Inc. but contains a forecast of evidence that he executed it as a means of obtaining a credit account for the sale of goods to his company. Neither the use of the words "you" and "yours" in the text of the guaranty nor identification of Seaboard Foods, Inc. as the addressee renders the guaranty unassignable in the absence of a personal confidence in the obligee.

Am Jur 2d, Guaranty §§ 34-36.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 114 N.C. App. 811, 443 S.E.2d 106 (1994), reversing an order of summary judgment for plaintiff entered 7 December 1992 by Watts, J., in Superior Court, Nash County, and remanding for the entry of summary judgment for defendant. Heard in the Supreme Court 9 May 1995.

Fields & Cooper, by John S. Williford, Jr., for plaintiff-appellant.

Hardee & Hardee, by Charles R. Hardee and G. Wayne Hardee, for defendant-appellee.

WHICHARD, Justice.

Defendant was the president of Quick Fill, Inc., which operated convenience stores in Pitt County under the trade name Kash & Karry. On 11 June 1984 Quick Fill submitted an application to Seaboard Foods, Inc., of Rocky Mount to purchase restaurant supplies and other merchandise on an open account. Defendant signed a personal guaranty for the account in which he promised to pay amounts owed by Quick Fill for goods sold and delivered on the open account. Seaboard sold merchandise to Quick Fill on an open account after it received the credit application and the personal guaranty.

Seaboard sold and assigned substantially all of its assets, including its Rocky Mount warehouse and defendant's personal guaranty, to Kraft, Inc., on 30 December 1985. Kraft continued to sell merchandise to Quick Fill on the open account guaranteed by defendant's personal

guaranty, just as Seaboard had. In 1989 Kraft merged with General Foods, Inc., to form Kraft General Foods, Inc. On 29 December 1990 certain corporate assets, including the guaranty at issue, were vested in plaintiff, Kraft Foodservice, Inc., as a result of two internal reorganizations. None of these corporate changes affected Quick Fill's ability to buy supplies on the open account guaranteed by defendant.

On 26 January 1991 Quick Fill filed a petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code. At that time Quick Fill owed $18,120.44 on the open account for merchandise sold to it by Kraft General Foods on 23 December 1990 and by plaintiff between 1 May and 26 December 1991. On 7 February 1992 plaintiff filed this action seeking to enforce defendant's personal guaranty. On 7 December 1992 the trial court granted plaintiff's motion for summary judgment. The Court of Appeals reversed and remanded for entry of summary judgment for defendant. It concluded that the personal guaranty executed by defendant "was a special guaranty extended only to Seaboard Foods, Inc., and was not enforceable by plaintiff as Seaboard's assignee or successor." *Kraft Foodservice v. Hardee*, 114 N.C. App. 811, 814, 443 S.E.2d 106, 107 (1994). We hold that the personal guaranty was assignable and accordingly reverse the Court of Appeals.

Defendant's personal guaranty provides:

PERSONAL GUARANTY CONTRACT

TO: SEABOARD FOODS, INC.

In consideration of your granting credit to the person(s), firm(s), or corporation(s) (herein called customer) shown on the foregoing credit application for purchasing restaurant supplies and related items from time to time from you on an open account, I (we) the undersigned do hereby personally and unconditionally guarantee without notice the payment of all sums that shall become due from the customer to you for goods sold and delivered at all locations of the customer, regardless of trade style.

This obligation and liability on the part of the undersigned shall be a primary, not a secondary obligation and liability, payable immediately upon demand without recourse first having been had against the customer or any person, firm, or corporation. This is an unconditional guaranty of payment for which the

undersigned agree[s] to become jointly and severally liable, and the undersigned expressly waive[s] [presentment], demand, protest, and notice of dishonor.

The undersigned shall be responsible for and shall reimburse you for all costs and expenses (including reasonable attorney fees) incurred by you in connection with the collection of the open account or the enforcement of this guaranty.

The primary liability of the guarantor(s) under this instrument shall not exceed, however, the amount of [$25,000] as to each guarantor herein. This limitation shall not apply to interest, attorney fees, court costs and expenses which may be incurred to collect on the open account or enforce this guaranty.

The undersigned further acknowledges that this guaranty shall remain in full force and effect until cancelled by delivering written notice by registered mail to you at your office in Rocky Mount, North Carolina. Cancellation shall not relieve a guarantor of liability for debts of customer that accrued prior to the date you received notice of cancellation. This guaranty shall bind the heirs, executors, legal representatives, successors and assigns of the undersigned.

The Court of Appeals concluded that this constituted a special guaranty, which is not assignable, for three reasons: it is "specifically addressed to Seaboard Foods, Inc."; "makes reference to 'you' and 'your' repeatedly"; and "specifically states that it is assignable by defendant, but makes no mention of assignability by Seaboard Foods." *Kraft*, 114 N.C. App. at 814, 443 S.E.2d at 107. Thus the court concluded that only Seaboard, not Seaboard's successors or assignees, could enforce the guaranty. We do not agree that these features of the contract preclude its enforcement by plaintiff.

Guaranties are divided into two classes, general and special, with respect to their enforcement. A general guaranty is addressed to all persons generally and may be enforced by anyone who acts on the faith of it. 38 Am. Jur. 2d *Guaranty* § 20 (1968). If, on the other hand, a guaranty names as obligees certain definite persons, it is a special guaranty; only the persons intended to be protected by a special guaranty may enforce it. *Id.* A special guaranty "usually contemplates a trust in the person to whom it is addressed." 38 C.J.S. *Guaranty* § 41(b)(1), at 1186 (1943). State courts have split on the issue of whether a guaranty addressed to a corporation may be enforced by

the corporation's successor. 38 Am. Jur. 2d *Guaranty* § 117; W.J. Dunn, Annotation, *Who May Enforce Guaranty*, 41 A.L.R.2d 1213 § 10[a]-[c] (1955).

In *Trust Co. v. Trust Co.*, 188 N.C. 766, 125 S.E. 536 (1924), this Court allowed a successor corporation to enforce a guaranty specifically addressed to its predecessor, holding that the defendant bank acquired the right to enforce a guaranty when it took over the assets of the bank to which the guaranty was extended. That result accords with general principles of contract law, which allow the assignment of contract rights unless prohibited by statute, public policy, or the terms of the contract, or where the contract is one for personal services or is entered into out of personal confidence in the other party to the contract. *See, e.g., R.R. v. R.R.*, 147 N.C. 368, 61 S.E. 185 (1908); 3 Samuel Williston, *A Treatise on the Law of Contracts* § 412 (Walter H.E. Jaeger ed., 3d ed. 1960). In a prior case, the Court of Appeals observed these general principles when it implicitly recognized that whether a guaranty contract is assignable depends upon whether the guarantor executed the contract on the basis of his or her personal confidence in the obligee. *Gillespie v. DeWitt*, 53 N.C. App. 252, 262, 280 S.E.2d 736, 743, *disc. rev. denied*, 304 N.C. 390, 285 S.E.2d 832 (1981). Under that analysis, a guaranty executed because of such a personal confidence is not assignable. *See, e.g.*, 38 Am. Jur. 2d *Guaranty* § 35.

[1] From the foregoing, we conclude that rights under a special guaranty—that is, a guaranty addressed to a specific entity—are assignable unless: assignment is prohibited by statute, public policy, or the terms of the guaranty; assignment would materially alter the guarantor's risks, burdens, or duties; or the guarantor executed the contract because of personal confidence in the obligee. This rule is consistent with the common law of contracts, accommodates modern business practices, and fulfills the intent of parties to ordinary business agreements.

[2] We further conclude that plaintiff, as Seaboard's assignee, could enforce the guaranty here. The terms of the contract do not prohibit assignment; likewise, no statute or public policy precludes such action. The record contains no evidence that defendant executed his guaranty out of personal confidence in Seaboard Foods, Inc. Rather, it contains a forecast of evidence indicating that he executed it as a means of obtaining a credit account for the sale of goods to his company. Neither use of the words "you" and "yours" in the text of the

contract nor identification of Seaboard Foods, Inc., as the addressee renders this guaranty unassignable in the absence of such a confidence.

To the extent this result conflicts with language in *Palm Beach, Inc. v. Allen*, 91 N.C. App. 115, 117-18, 370 S.E.2d 440, 441-42 (1988), that language is disapproved.

Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Nash County, for reinstatement of its order entering summary judgment for plaintiff.

REVERSED AND REMANDED.

NAEGELE OUTDOOR ADVERTISING INC., D/B/A NAEGELE OUTDOOR ADVERTISING COMPANY OF THE TRIAD v. CITY OF WINSTON-SALEM

No. 158A94

(Filed 2 June 1995)

Limitations, Repose, and Laches § 86 (NCI4th); Zoning § 24 (NCI4th)— municipal sign ordinance—inverse condemnation—accrual of claim

Plaintiff's inverse condemnation claim for the taking of its advertising signs by the enforcement of defendant city's zoning ordinance regulating signs accrued on the date the ordinance was enacted, not at the end of the seven-year amortization period when the nonconforming signs were required to be removed. Therefore, plaintiff's claim was barred by the statute of limitations, whether the applicable statute was the nine-month period in N.C.G.S. § 160A-364.1 or the two-year period in N.C.G.S. § 40A-51, where it was filed more than seven years after the enactment of the ordinance.

Am Jur 2d, Zoning and Planning §§ 322 et seq.

Appeal pursuant to N.C.G.S. § 7A-30(2) from a divided decision of the Court of Appeals, 113 N.C. App. 758, 440 S.E.2d 842 (1994), affirming the order entered 14 August 1992 by Webb, J., in Superior Court, Forsyth County. Heard in the Supreme Court 8 May 1995.

Smith Helms Mullis & Moore, L.L.P., by William Sam Byassee and J. Donald Hobart, Jr., for plaintiff-appellant.

City Attorney's Office, by Ronald G. Seeber, City Attorney, and Charles C. Green, Jr., Assistant City Attorney; and Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., for defendant-appellee.

PER CURIAM.

On 15 April 1985 the Winston-Salem Board of Aldermen adopted a zoning ordinance regulating signs. The part of the ordinance which is the subject of this appeal is the portion dealing with "off-premise grounded signs," defined in the ordinance by reference to size, zones, height, spacing, setback, distance from residential zones, number of faces, measurement, illumination, and view corridors. All signs not in compliance with this portion of the ordinance were required to be removed or brought into compliance within a seven-year amortization period from the date the ordinance was adopted.

By letters dated 22 November 1991 and 22 April 1992, plaintiff was notified to remove its nonconforming signs. Criminal sanctions were threatened for noncompliance with the zoning ordinance. On 11 May 1992 plaintiff filed this action against defendant seeking damages arising out of the enactment of this zoning ordinance regulating signs within the City of Winston-Salem. On defendant's motion pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), the trial court dismissed plaintiff's action for the reason that it was time-barred by the statute of limitations. On 1 March 1994 a divided panel of the Court of Appeals affirmed the decision of the trial court. On 24 March 1994 plaintiff filed a notice of appeal with this Court.

Plaintiff contends that its cause of action did not arise until 15 April 1992, the end of the amortization period when the signs were required to be removed, and that the statute of limitations began to run on that date. We disagree.

In light of this Court's holding in *Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, 446 S.E.2d 289, *reh'g denied*, 337 N.C. 807, 449 S.E.2d 566 (1994), applying *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), *cert. denied*, 504 U.S. 931, 118 L. Ed. 2d 593 (1992), we conclude that plaintiff's cause of action based on an alleged regulatory taking accomplished by enactment of the Winston-Salem zoning ordinance arose on 15 April 1985, the date

the zoning ordinance at issue was enacted. *Capital Outdoor Advertising v. City of Raleigh* and *National Advertising Co. v. City of Raleigh* were brought pursuant to 42 U.S.C. § 1983 and not pursuant to state law. However, assuming without deciding that the zoning ordinance constituted a taking, we conclude the holding of those cases, that a cause of action for an alleged regulatory taking pursuant to a zoning ordinance accrues upon the enactment of the ordinance, is equally applicable to this action alleging a taking and seeking damages for inverse condemnation pursuant to N.C.G.S. § 40A-51. Any injury to plaintiff's property occurred at the time the statute was enacted. Enactment of the zoning ordinance made plaintiff's billboards nonconforming, thereby subjecting them to removal after the amortization period of seven years. As of 15 April 1985, the consequences of the existence of nonconforming billboards were conclusively set, and the expected useful life of plaintiff's billboards was shortened. We also conclude, contrary to plaintiff's contention, that the sign regulation ordinance was not a project within the meaning of N.C.G.S. § 40A-51.

Having determined that plaintiff's cause of action accrued on 15 April 1985, we do not reach the question whether the nine-month statute of limitations found in N.C.G.S. § 160A-364.1 or the two-year statute of limitations found in N.C.G.S. § 40A-51 applies. Plaintiff did not file suit until 11 May 1992, over seven years after the enactment of the zoning ordinance at issue. Therefore, regardless of which statute is applied, plaintiff's action is barred.

For the reasons stated herein, the decision of the Court of Appeals is affirmed.

AFFIRMED.

PEAL v. SMITH

[340 N.C. 352 (1995)]

REGINA ANNETTE PEAL, INCOMPETENT, BY HER GENERAL GUARDIAN, JAMES WALTER PEAL, JR., PLAINTIFF-APPELLEE v. HOWARD THOMAS SMITH, DEFENDANT, AND CIANBRO CORPORATION AND WILLIAMS BROTHERS CONSTRUCTION COMPANY, INC., A JOINT VENTURE D/B/A CIANBRO-WILLIAMS BROS., DEFENDANTS-APPELLANTS

No. 398PA94

(Filed 2 June 1995)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 115 N.C. App. 225, 444 S.E.2d 673 (1994), affirming a judgment for plaintiff entered by Allsbrook, J., at the 22 July 1991 Special Civil Session of Superior Court, Washington County. Heard in the Supreme Court 11 May 1995.

Hornthal, Riley, Ellis & Maland, L.L.P., by L.P. Hornthal, Jr., M.H. Hood Ellis, and Michael P. Sanders, for plaintiff-appellee.

Maupin Taylor Ellis & Adams, P.A., by James A. Roberts, III, M. Keith Kapp, and Richard N. Cook, for defendant-appellants Cianbro Corp. and Williams Bros. Constr. Co.

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.

CONE MILLS CORP. v. ALLSTATE INSURANCE COMPANY

[340 N.C. 353 (1995)]

CONE MILLS CORPORATION v. ALLSTATE INSURANCE COMPANY

No. 311PA94

(Filed 2 June 1995)

On discretionary review pursuant to N.C.G.S. § 7A-31 from a unanimous opinion of the Court of Appeals, 114 N.C. App. 684, 443 S.E.2d 357 (1994), affirming a judgment entered on 3 September 1992 by Cornelius, J., in Superior Court, Guilford County. Heard in the Supreme Court 8 May 1995.

Smith Helms Mulliss & Moore, L.L.P., by James A. Medford and Larissa Jones Erkman, for plaintiff-appellee.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Urs R. Gsteiger, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

CONE MILLS CORPORATION v. ALLSTATE INSURANCE COMPANY

No. 355PA94

(Filed 2 June 1995)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an unpublished decision of the Court of Appeals, 115 N.C. App. 173, 444 S.E.2d 703 (1994), dismissing the defendant's appeal from an order of Albright, J., entered at the 1 February 1993 session of Superior Court, Guilford County, denying the defendant's motion to dismiss this action pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). Heard in the Supreme Court 8 May 1995.

Smith Helms Mulliss & Moore, L.L.P., by James A. Medford and Larissa Jones Erkman, for plaintiff-appellee.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Urs R. Gsteiger, for defendant-appellant.

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

VICKI HILL v. R.W. MORTON, AREA DIRECTOR, FORSYTH-STOKES AREA MENTAL HEALTH, MENTAL RETARDATION AND SUBSTANCE ABUSE AUTHORITY

No. 368PA94

(Filed 2 June 1995)

On discretionary review pursuant to N.C.G.S. 7A-31 of a unanimous decision of the Court of Appeals, 115 N.C. App. 390, 444 S.E.2d 683 (1994), vacating the judgment and order entered by John, J., on 7 January 1993 in Superior Court, Forsyth County. Heard in the Supreme Court 9 May 1995.

Robert Winfrey for plaintiff-appellant.

Office of Forsyth County Attorney, by Bruce E. Colvin, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

McARDLE CORP., PLAINTIFF V. S. ALLEN PATTERSON AND WIFE, KRISTIN L. PATTERSON, DEFENDANTS

No. 372A94

(Filed 2 June 1995)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals, 115 N.C. App. 528, 445 S.E.2d 604 (1994), affirming the judgment of Stephens, J., at the 6 July 1993 Civil Session of Superior Court, Wake County. Heard in the Supreme Court on 12 May 1995.

Brown & Bunch, by M. LeAnn Nease and Scott D. Zimmerman, for plaintiff-appellee.

S. Allen Patterson, II, pro se, for defendant-appellants.

PER CURIAM.

AFFIRMED.

FLOWERS v. BLACKBEARD SAILING CLUB

[340 N.C. 357 (1995)]

WILLIAM L. FLOWERS AND WIFE, ELIZABETH R. FLOWERS; WALTER L. FLOWERS AND WIFE, SUSAN L. FLOWERS v. BLACKBEARD SAILING CLUB, LTD., A NORTH CAROLINA CORPORATION

No. 383PA94

(Filed 2 June 1995)

On discretionary review of an opinion of the Court of Appeals, 115 N.C. App. 349, 444 S.E.2d 636 (1994), affirming in part and vacating in part an order entered by Barefoot (Napoleon B., Sr.), J., in Superior Court, Craven County, on 10 May 1993. Heard in the Supreme Court 10 May 1995.

Ward, Ward, Willey & Ward, by A.D. Ward, for plaintiff-appellants.

Ward and Smith, P.A., by I. Clark Wright, Jr., for defendant-appellee.

Michael F. Easley, Attorney General, by Robin W. Smith, Assistant Attorney General, on behalf of the State, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTY ALLOWED.

AIR-A-PLANE CORP. v. N.C. DEPT. OF E.H.N.R.

No. 175P95

Case below: 118 N.C.App. 118

Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

ASSOCIATED MECHANICAL CONTRACTORS v. PAYNE

No. 141PA95

Case below: 118 N.C.App. 54

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 1 June 1995.

BABB v. HARNETT COUNTY BD. OF EDUCATION

No. 197P95

Case below: 118 N.C.App. 291

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995. Motion by the defendant to dismiss the appeal for lack of substantial constitutional question allowed 1 June 1995.

BOWDEN v. LATTA

No. 130P95

Case below: 117 N.C.App. 731

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

CRATT v. PERDUE FARMS, INC.

No. 153P95

Case below: 118 N.C.App. 173

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

HAMILL v. CUSACK

No. 131P95

Case below: 118 N.C.App. 82

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

JAMES v. CLARK

No. 169P95

Case below: 118 N.C.App. 178

Petition by defendant (Yoco, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

KENNEDY v. SCHOOLER

No. 161P95

Case below: 117 N.C.App. 732

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 June 1995.

McGEE v. McGEE

No. 139P95

Case below: 118 N.C.App. 19

Petition by plaintiff intervenors (the State of N.C.) for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

REGAN v. AMERIMARK BUILDING PRODUCTS

No. 170P95

Case below: 118 N.C.App. 328

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

RICH v. R. L. CASEY, INC.

No. 152P95

Case below: 118 N.C.App. 156

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

RITTER v. DEPT. OF HUMAN RESOURCES

No. 182P95

Case below: 118 N.C.App. 564

Petition by petitioner (Thomas A. Ritter) for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

SASSER v. SOUTHERLAND

No. 147P95

Case below: 117 N.C.App. 732

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 June 1995.

SENJAN v. N.C. DEPT. OF TRANSPORTATION

No. 204P95

Case below: 118 N.C.App. 585

Petition by petitioner (Senjan) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 June 1995.

SIMS v. DRAVO CORP.

No. 119P95

Case below: 118 N.C.App. 174

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

STATE v. CAREY

No. 168P95

Case below: 118 N.C.App. 338

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

STATE v. CHOI

No. 172P95

Case below: 118 N.C.App. 338

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 1 June 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

STATE v. HUGHES

No. 187P95

Case below: 118 N.C.App. 573

Petition by plaintiff for temporary stay allowed 8 May 1995 pending receipt and determination of a timely filed petition for discretionary review.

STATE v. JOHNSON

No. 115P95

Case below: 117 N.C.App. 733

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 1 June 1995.

STATE v. KELLY

No. 200P95

Case below: 118 N.C.App. 589

Petition by the Attorney General for temporary stay allowed 22 May 1995 pending receipt and determination of a timely filed petition for discretionary review.

STATE v. MURPH

No. 151P95

Case below: 118 N.C.App. 176

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 1 June 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

STATE v. MYERS

No. 186P95

Case below: 118 N.C.App. 452

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

STATE v. SMITH

No. 125A95

Case below: 118 N.C.App. 106

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 June 1995. Petition by Attorney General for writ of supersedeas allowed 1 June 1995.

STATE v. SNYDER

No. 210P95

Case below: 118 N.C.App. 540

Petition by the Attorney General for temporary stay allowed 17 May 1995.

STATE v. WILSON

No. 201P95

Case below: 118 N.C.App. 616

Petition by the Attorney General for temporary stay allowed 22 May 1995 pending receipt and determination of a timely filed petition for discretionary review.

TINNEN v. UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

No. 181P95

Case below: 118 N.C.App. 586

Petition by respondent (Univ. of NC-CH) for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

TURBYFILL v. DEPT. OF HEALTH, ENVIR. & NAT. RES.

No. 132P95

Case below: 118 N.C.App. 176

Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

WHITLEY v. CAROLINA CLINIC, INC.

No. 177P95

Case below: 118 N.C.App. 523

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

WINANS v. DENSON

No. 155P95

Case below: 118 N.C.App. 177

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 June 1995.

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

PETITIONS TO REHEAR

CHARLOTTE-MECKLENBURG HOSPITAL AUTH.

No. 21PA94

Case below: 340 N.C. 88

Petition by defendants to rehear pursuant to Rule 31 denied 1 June 1995.

POTTS v. TUTTEROW

No. 257A94

Case below: 340 N.C. 97

Petition by defendants to rehear pursuant to Rule 31 denied 1 June 1995.

MOTION FOR RECONSIDERATION

STATE v. SOLOMON

No. 233A93

Case below: 340 N.C. 212

Motion by defendant for temporary stay and reconsideration dismissed 25 May 1995.

STATE OF NORTH CAROLINA v. WARREN ROBERT GREGORY

No. 232A93

(Filed 28 July 1995)

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

The trial court did not err in the denial of defendant's motion for change of venue of his murder, kidnapping and rape trial based on pretrial publicity because defendant failed to meet his burden of showing that pretrial publicity precluded him from receiving a fair and impartial trial in the county where newspaper articles submitted in support of the motion related to the facts of the crimes, defendant's arrest, his subsequent escape attempt, and a petition circulated by one victim's family seeking a speedy disposition of defendant's trial; none of these articles was shown to be inflammatory or biased against defendant; the testimony of two attorneys and a private investigator indicated only that the trial had received media and word-of-mouth publicity in the county but failed to establish that this publicity was inflammatory or prejudicial against defendant; and each juror and alternate juror on defendant's jury unequivocally answered in the affirmative when asked if he or she could put aside any previous opinions about this case and decide the case solely upon the evidence presented at trial.

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. Jury § 203 (NCI4th)— pretrial publicity—denial of challenge for cause

A defendant on trial for murder, kidnapping and rape was not prejudiced by the trial court's denial of his challenge for cause of a prospective juror based on pretrial publicity where the juror was exposed only to general pretrial publicity about the case and was unfamiliar with any details other than the location of the victims' bodies when they were discovered; and although the juror expressed some initial concern with the difficulty of setting aside pretrial information, he established that he could do so when he

informed defense counsel that he could be fair to defendant even if it was difficult and informed the trial court that he could and would set aside any previous opinions he may have had about defendant's case.

Am Jur 2d, Jury § 294.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 ALR3d 172.

3. Evidence and Witnesses § 1695 (NCI4th)— photographs of victims' decomposed and mutilated bodies—denial of pretrial motion to exclude

The trial court did not abuse its discretion in the denial of defendant's pretrial motion to exclude two photographs of the bodies of two murder and rape victims depicting enlarged wounds caused by decomposition and small animals where the photographs were in black and white and showed the condition and location of the victims' bodies at the time they were found; the photographs illustrated the testimony of the forensic pathologist who conducted the autopsies about the injuries inflicted on the victims, including testimony that it was impossible to determine from the autopsy whether the victims had been strangled or sexually assaulted due to decomposition of the bodies; and there was no evidence that the photographs were used excessively and solely to inflame the passions and prejudices of the jury against defendant.

Am Jur 2d, Evidence §§ 960-974.

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

4. Jury § 92 (NCI4th)— capital case—jury voir dire not unduly restricted

The trial court did not unduly restrict defendant's voir dire of potential jurors in a capital case where the trial court allowed inquiry into views that would render a juror unable to be fair to defendant, to consider the evidence, and to follow the law, inquiry into the exposure of prospective jurors to pretrial publicity and the effect such publicity would have on their ability to give defendant a fair trial, and inquiry as to whether a juror would

automatically vote to impose the death penalty regardless of the facts and circumstances of defendant's case; these questions were sufficient to reveal any bias that a prospective juror might have and to ensure defendant a fair and impartial jury and a nonarbitrary, individualized sentencing proceeding; and the majority of defendant's questions to which objections were sustained were irrelevant, improper in form, attempts to stake out jurors, questions to which the answer was admitted in response to other questions, or questions that contained an incomplete statement of the law.

Am Jur 2d, Jury §§ 205-207.

5. Jury § 215 (NCI4th)— capital case—jury selection—death penalty views—denial of defendant's challenges for cause

The trial court did not err in the denial of defendant's challenge for cause of three prospective jurors in a capital trial on the ground that they expressed a predisposition to vote for the death penalty in this case where one of the jurors was initially confused by defendant's questioning about the death penalty, but upon further questioning by the court, clearly stated that he would not automatically vote to impose the death penalty but would listen to the evidence and follow the law by weighing any aggravating circumstances against any mitigating circumstances; the second juror initially stated that if a person was proven guilty of the crime, he should suffer the full extent of the law, which he understood to be the death penalty, but after the sentencing procedure was explained to him, this juror stated that he would not automatically vote for the death penalty but would weigh the aggravating circumstances against the mitigating circumstances to determine if another penalty was appropriate in this case; and although the third juror had informed the court on the first day of jury selection that he had already formed an opinion as to what sentence defendant should receive, after the capital sentencing procedure was explained to him, he clearly stated that he would be able to set aside his former opinion as to the appropriate sentence and base his decision solely on the evidence presented at trial and in accordance with the law as given to him by the trial court.

Am Jur 2d, Jury § 279.

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

6. Jury § 215 (NCI4th)— capital case—jury selection—death penalty views—initial denial of defendant's challenges for cause—subsequent dismissal of jurors—absence of prejudice

Defendant was not prejudiced by the trial court's denial of defendant's challenges for cause of two prospective jurors on the ground that they were predisposed to vote for the death penalty where both jurors were thereafter excused from the jury for cause by the trial court.

Am Jur 2d, Jury § 279.

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

7. Jury § 226 (NCI4th)— capital case—jury selection—death penalty views—excusal for cause without rehabilitation

The trial court did not abuse its discretion in excusing three prospective jurors for cause based on their death penalty views or in denying defendant's request to rehabilitate each of them where each juror's responses to the prosecutor's questions revealed that the juror had personal and religious beliefs against the death penalty and would be unable to recommend a sentence of death regardless of the facts and circumstances of the case, and defendant made no showing that additional questioning would have resulted in different answers.

Am Jur 2d, Jury § 279.

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

8. Jury § 258 (NCI4th)— capital case—peremptory challenges of blacks—insufficient showing of purposeful discrimination

Defendant failed to make a prima facie showing of purposeful discrimination by the prosecutor's peremptory challenges of five black prospective jurors in this capital trial where the victims are white women and defendant is a black male; defendant's jury consisted of nine white jurors and three black jurors; twelve of the sixty-one potential jurors were black; the prosecutor exercised a total of ten peremptory challenges, five against whites and

five against blacks; the State's primary witness against defendant was a black male; nothing in the prosecutor's questions or his statements in the exercise of his peremptory challenges revealed any discriminatory motive; the prosecutor did not ask any questions of a racial nature; there was no discernable difference in the prosecutor's method of questioning any black prospective jurors from the method of questioning the rest of the jury venire; and facts revealed during jury selection established the following nondiscriminatory reasons for the challenges: one juror informed the court that she realized the seriousness of the case and did not want to sit on the jury unless she had no other choice; the second juror did not drive, had to be brought to the courthouse by the Sheriff's Department each day, and informed the court that she felt hassled by members of the Sheriff's Department because some of them were giving her a difficult time about driving her to court each day; the third juror informed the court that he would have to drop out of college for the current quarter if he sat on the jury because he would miss several tests and registration for other classes; the fourth juror's son had felony charges currently pending against him in the same county; and a charge of carrying a concealed weapon against the fifth juror had been dismissed by one of the prosecutors in defendant's case.

Am Jur 2d, Jury § 244.

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.

Supreme Court's views as to use of peremptory challenges to exclude from jury persons belonging to same race as criminal defendant. 90 L. Ed. 2d 1078.

9. Evidence and Witnesses § 2468 (NCI4th)— codefendant's plea agreement—testimony against defendant—no violation of public policy or due process

A plea agreement between the State and a codefendant did not violate public policy or defendant's due process rights because the codefendant agreed to testify truthfully in defendant's trial in accordance with the codefendant's earlier statements to the police. It is clear from the context of the plea agreement

that it was conditioned only on the codefendant's truthful testimony at defendant's trial and did not unconstitutionally bind the codefendant to testify consistent with his earlier statements even if they were not truthful. N.C.G.S. § 15A-1054.

Am Jur 2d, Criminal Law §§ 221, 222.

Enforceability of agreement by law enforcement officials not to prosecute if accused would help in criminal investigation or would become witness against others. 32 ALR4th 990.

10. Evidence and Witnesses §§ 1113, 1229 (NCI4th)— fantasy statements to another inmate—admission of party opponent

A "fantasy statement" made by defendant to another inmate while he was in Central Prison awaiting trial which detailed defendant's participation in the shooting of the male victim and the kidnapping, rape and murder of each of the two female victims was admissible as an admission of a party opponent. N.C.G.S. § 8C-1, Rule 801(d)(A). Defendant's statement to the inmate clearly implicated defendant in the crimes charged, and his attempt to couch this confession in terms of make believe and fantasy does not render his inculpatory statement inadmissible hearsay. Furthermore, the statement was relevant under N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Evidence §§ 760-764.

Admissibility, in criminal prosecution, of evidence obtained by electronic surveillance of prisoner. 57 ALR3d 172.

11. Criminal Law § 390 (NCI4th)— capital sentencing—court's question to witness—expression of opinion on credibility—error cured by instructions—mistrial properly denied

The trial judge improperly expressed an opinion on the credibility of defendant's only expert witness in violation of N.C.G.S. § 15A-1222 when he asked the witness, "Are you telling the truth now or were you telling the truth then?" However, any possible prejudice to defendant was cured when (1) the judge subsequently instructed the jury that he had no opinion about the witness's truthfulness or veracity and his question should not be interpreted as indicating any such opinion; (2) the court again

instructed during the final charge that the jurors were the sole judges of the credibility of each witness and must decide for themselves whether to believe or disbelieve the testimony of any witness; and (3) further questioning of the witness by the prosecutor resolved any confusion from the apparently inconsistent statements made by the witness. Since any possible prejudice to defendant from the trial judge's question was cured, the trial court did not abuse its discretion by denying defendant's motion for a mistrial based on this question.

Am Jur 2d, Trial §§ 299-301.

Prejudicial effect of trial judge's remarks, during civil jury trial, disparaging the litigants, the witnesses, or the subject matter of the litigation. 83 ALR2d 1128.

12. Evidence and Witnesses § 2916 (NCI4th)— expert witness—inconsistency of statements by defendant and codefendant—cross-examination relevant for impeachment

Where defendant's expert witness (a psychiatrist) testified in a capital sentencing proceeding that in performing a psychiatric evaluation, "you rely on as many records as you can get," and further testified that he reviewed statements made by the codefendants and by defendant when conducting his evaluation of defendant but that he did not rely on them as a basis for his opinion concerning defendant's mental condition, evidence elicited by the prosecutor on cross-examination of the witness about his reasons for reviewing these statements but not using them as a basis for his opinion testimony, including evidence that he knew the codefendants' statements contained versions of the events on the night of the murders different from defendant's statements, was relevant under Rule 611(b) to impeach the witness's expert testimony. N.C.G.S. § 8C-1, Rule 611(b).

Am Jur 2d, Witnesses § 965.

Necessity and admissibility of expert testimony as to credibility of witness. 20 ALR3d 684.

13. Criminal Law § 1338 (NCI4th)— first-degree murders—aggravating circumstance—purpose of avoiding arrest—sufficiency of evidence

The evidence was sufficient to support the trial court's submission of the aggravating circumstance that two murders were

committed for the purpose of avoiding or preventing a lawful arrest where a codefendant testified that shortly after defendant choked and snapped the neck of one victim until she was dead, defendant told a codefendant that he killed her "so we never have to go to prison," and there was evidence that after the other victim screamed, defendant told the second codefendant to "take care of business" and instructed him to use a shotgun instead of a pistol "because if you use the pistol you are going to have to shoot her three or four times." N.C.G.S. § 15A-2000(e)(4).

Am Jur 2d, Criminal Law §§ 598, 599.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like—post-*Gregg* cases. 64 ALR4th 755.

14. Criminal Law § 1340 (NCI4th)— first-degree murders—aggravating circumstances—commission during rapes and kidnappings

The trial court did not err by submitting the aggravating circumstances that each murder was committed while defendant was engaged in the commission of a rape, and also while he was engaged in the commission of a kidnapping, although defendant was convicted of two counts of rape and two counts of kidnapping, where defendant was convicted on two counts of first-degree murder upon both the theory of premeditation and deliberation and the theory of felony murder. When a defendant is convicted under both theories and both are supported by the evidence, submission of the underlying felony as an aggravating circumstance is proper. N.C.G.S. § 15A-2000(e)(5).

Am Jur 2d, Criminal Law §§ 598, 599.

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 § 1343 (NCI4th)— first-degree murder—especially heinous, atrocious, or cruel aggravating circumstance—constitutional instruction

The trial court's pattern jury instruction on the especially heinous, atrocious, or cruel aggravating circumstance provided constitutionally sufficient guidelines to the jury where it included the phrases "pitiless crime which was unnecessarily torturous to the victim" and "the level of brutality exceeds that normally present in first-degree murder."

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.

16. Criminal Law § 1347 (NCI4th)— first-degree murder—course of conduct aggravating circumstance—sufficiency of evidence

The evidence was sufficient to support the trial court's submission of the "course of conduct" aggravating circumstance in a capital sentencing proceeding where it showed that defendant kidnapped the two murder victims from the side of the road and then raped and murdered them, and that defendant shot and seriously wounded a male companion of the murder victims shortly before he kidnapped the victims. N.C.G.S. § 15A-2000(e)(11).

Am Jur 2d, Criminal Law §§ 598, 599.

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.

17. Criminal Law § 1363 (NCI4th)— capital sentencing proceeding—codefendant's lesser sentence under plea bargain—inappropriate mitigating circumstance

The trial court in a capital sentencing proceeding did not err by refusing to submit as a mitigating circumstance for each of two first-degree murders that a codefendant would not receive the death penalty for his participation in these crimes pursuant to a plea bargain with the State because (1) the fact a codefendant

received a lesser sentence under a plea agreement is irrelevant and inappropriate for the jury's consideration as a mitigating circumstance, and (2) evidence of the codefendant's plea bargain was before the jurors, who were free to deem it to have mitigating value and consider it under the catchall mitigating circumstance set forth in N.C.G.S. § 15A-2000(f)(9).

Am Jur 2d, Criminal Law § 599.

18. Criminal Law § 680 (NCI4th)— capital case—mitigating circumstances—peremptory instructions—inadequate request

The trial court did not err by denying defendant's request to give peremptory instructions on twenty-three mitigating circumstances where defendant conceded that he was not entitled to peremptory instructions on four of his proposed nonstatutory mitigating circumstances because they were not supported by uncontroverted evidence; evidence supporting five other proposed nonstatutory mitigating circumstances was also controverted; defendant did not specify for the trial court which nonstatutory mitigating circumstances were supported by uncontroverted evidence; and the trial court was not required to sift through all the evidence and determine which of defendant's proposed mitigating circumstances entitled him to a peremptory instruction. Further, defendant's request for peremptory instructions was inadequate because defendant did not clearly specify that he was seeking a different instruction for statutory and nonstatutory mitigating circumstances and did not propose a different peremptory instruction for the nonstatutory mitigating circumstances.

Am Jur 2d, Criminal Law § 599.

19. Criminal Law § 1325 (NCI4th)— capital sentencing—mitigating circumstances—use of may in instructions—constitutionality

The trial court's use of the word "may" in the instructions for the consideration of mitigating evidence in Issue Three and Issue Four in a capital sentencing proceeding did not unconstitutionally make the consideration of mitigating evidence discretionary with the jury during sentencing and did not allow jurors who found mitigating circumstances to exist in Issue Two to disregard them at Issues Three and Four.

Am Jur 2d, Trial §§ 840, 841.

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

The trial court's capital sentencing instructions were not improper because they failed to require each juror to consider every mitigating circumstance found by at least one juror.

Am Jur 2d, Trial §§ 840, 841.

21. Criminal Law § 1325 (NCI4th)— capital sentencing—instructions—nonstatutory mitigating circumstances—finding of mitigating value

Defendant's constitutional rights were not violated by the pattern jury instructions in a capital sentencing proceeding which allowed jurors to determine in Issue Two whether a nonstatutory mitigating circumstance had mitigating value.

Am Jur 2d, Trial §§ 840, 841.

22. Criminal Law § 1362 (NCI4th)— capital sentencing—age as mitigating circumstance—sufficiency of instruction

The trial court's instruction to the jury in a capital sentencing proceeding that "[t]he 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" did not limit the consideration of the age of defendant as a mitigating circumstance solely to chronological age but allowed the jurors to consider all the facts and circumstances related to age that they found from the evidence, and the court did not err by failing to instruct that the age of defendant as a mitigating circumstance is not limited to his chronological age but includes other factors such as his mental and emotional development, his judgment and maturity, and his prior experiences.

Am Jur 2d, Criminal Law §§ 598, 599.

23. Constitutional Law § 371 (NCI4th); Criminal Law § 1298 (NCI4th)— first-degree murders—codefendant's plea bargain—defendant's death sentences not arbitrary

Sentences of death imposed upon defendant for two first-degree murders were not arbitrary and capricious because the State permitted a codefendant to plead guilty to noncapital offenses for his participation in these crimes in return for his truthful testimony against defendant and another codefendant

since disparity in sentences imposed upon codefendants does not result in cruel and unusual punishment and is not unconstitutional; the details of the plea bargain between the codefendant and the State were before the jury, and the codefendant was cross-examined about the sentence he would receive for testifying against defendant; and the jury was free to consider this evidence under the catchall mitigating circumstance in N.C.G.S. § 15A-2000(f)(9).

Am Jur 2d, Criminal Law §§ 625-628.

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 § 468 (NCI4th)— capital sentencing—prosecutor's jury argument—urging appreciation of circumstances of crime—no impropriety

The prosecutor's jury argument in a capital sentencing proceeding did not ask the jurors to put themselves in the place of the victims but urged the jury to appreciate the circumstances of the crimes. Therefore, the argument was not improper and the trial court did not err by failing to intervene *ex mero motu* to prevent it.

Am Jur 2d, Trial §§ 664-667.

25. Criminal Law § 447 (NCI4th)— capital sentencing—closing argument—victim impact statements

The prosecutor's use of victim impact statements during his closing argument in a capital sentencing proceeding did not render defendant's trial fundamentally unfair where the statements were made as a part of the prosecutor's argument that the deaths of the victims represented a unique loss to their families; his argument stressed that the victims were dead and that defendant was the person responsible for their deaths; and his argument about the location and condition of the victims' bodies was based on facts properly presented at trial.

Am Jur 2d, Trial §§ 664-667.

26. Criminal Law § 452 (NCI4th)— capital sentencing—closing argument—comments on nonstatutory mitigating circumstance

The prosecutor was properly characterizing and contesting the weight and validity of a nonstatutory mitigating circumstance

when he argued to the jury in a capital sentencing proceeding that the purpose of submitting the nonstatutory mitigating circumstance that defendant was convicted by the testimony of an accomplice was designed to influence the jury to question at sentencing whether it rightly found him guilty at the guilt-innocence phase of the trial and that he did not know how this was a mitigating circumstance since defendant had already been found guilty beyond a reasonable doubt.

Am Jur 2d, Trial §§ 572, 841.

27. Criminal Law § 452 (NCI4th)— capital sentencing—closing argument—defendant's religion—comment on nonstatutory mitigating circumstance

The prosecutor was merely characterizing and contesting the weight of defendant's proffered nonstatutory mitigating circumstance that he had served his country in time of war when the prosecutor mentioned that defendant served his country despite the conflict with his religious beliefs and argued that defendant's belief was not "thou shalt not kill" but was "thou shalt not kill Moslems, that is, kill anybody else but not Moslems," and the trial court did not err by failing to intervene *ex mero motu* to prevent this argument.

Am Jur 2d, Trial §§ 658, 841.

28. Criminal Law § 436 (NCI4th)— capital sentencing—jury argument—defendant's lack of remorse and bad character

The prosecutor's references to defendant's lack of remorse and bad character in his closing argument in a capital sentencing proceeding were not improper.

Am Jur 2d, Trial § 566.

29. Criminal Law § 1373 (NCI4th)— death penalty for two murders—not disproportionate

Sentences of death imposed upon defendant for two first-degree murders were not disproportionate to the penalty imposed in similar cases considering both the crime and the defendant where defendant was convicted on the theories of premeditation and deliberation and felony murder; defendant was also convicted of one count of assault with a deadly weapon with intent to kill inflicting serious injury, two counts of first-degree kidnapping, and two counts of first-degree rape; the jury found

each of the five submitted aggravating circumstances, including the especially heinous, atrocious, or cruel and course of conduct aggravating circumstances; the victims heard defendant shoot their male companion and were forced to ride in the car with defendant and the two codefendants; the victims were raped repeatedly before being killed; defendant attempted to strangle one victim, and when she later regained consciousness, he strangled her again until he successfully killed her; defendant also attempted to strangle the second victim, but she also regained consciousness, and defendant directed a codefendant to shoot her with a shotgun; the murders were thus marked by brutality and callousness; and the victims experienced extreme psychological and physical torture.

Am Jur 2d, Criminal Law § 628.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from two judgments imposing sentences of death entered by Grant, J., at the 13 April 1993 Criminal Session of Superior Court, Pitt 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, two counts of first-degree rape, and one count of assault with a deadly weapon with intent to kill inflicting serious injury was granted on 8 July 1994. Heard in the Supreme Court 14 March 1995.

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

Alexis C. Pearce for defendant-appellant.

PARKER, Justice.

Defendant was tried capitally on indictments charging him with the first-degree murders of Bernadine Parrish and Bobbie Jean Hartwig. The jury returned verdicts finding defendant guilty of each count of first-degree murder on the theories of both premeditation and deliberation and felony murder. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death for each murder, and the trial judge entered judgments accordingly. Execution was stayed on 18 June 1993 pending defendant's appeal. The jury also found defendant guilty of the first-degree kidnapping of Bernadine Parrish, the first-degree kidnapping of Bobbie Jean Hartwig, the first-degree rape of

Bernadine Parrish, the first-degree rape of Bobbie Jean Hartwig, and assault with a deadly weapon with intent to kill inflicting serious injury on Wesley Parrish. The trial court sentenced defendant to thirty years' imprisonment for kidnapping Bernadine Parrish, thirty years' imprisonment for kidnapping Bobbie Jean Hartwig, life imprisonment for raping Bernadine Parrish, life imprisonment for raping Bobbie Jean Hartwig, and fifteen years' imprisonment for assaulting Wesley Parrish with a deadly weapon with intent to kill inflicting serious injury, each sentence to run consecutively. For the reasons discussed herein, we conclude the pretrial hearings, jury selection, guilt-innocence phase, and sentencing proceeding of defendant's trial were free from prejudicial error; and the death sentences are not disproportionate.

The State's evidence tended to show that shortly after midnight on 24 August 1991, Wesley Parrish; his sister, Bernadine Parrish; and his girlfriend, Bobbie Jean Hartwig, were walking from where they lived in Grifton, North Carolina, to Ayden, North Carolina. The three lived in Grifton with Wesley's mother, Geraldine, and Bernadine's children. Wesley Parrish left a note for his mother telling her that the three had walked to Ayden to see an old boyfriend of Bernadine's. Wesley and Bernadine were each carrying a beer, and Bernadine also was carrying a cigarette case containing an identification card and her driver's license.

After walking several miles down Highway 11 towards Ayden, the three tried to catch a ride with a passing car. Three black men in a white four-door car stopped to pick them up.

The evidence tended to show that defendant and two friends, Kendrick Bradford and Richard Gonzales, were on their way from their barracks at Camp LeJeune in Jacksonville, North Carolina, to a club in Greenville, North Carolina. All three men had been drinking alcohol. Defendant, who was driving, passed by the victims, turned his car around, drove by them again, then turned his car around again, and stopped to pick up the victims. Wesley initially turned down the ride because he did not think everyone could fit in the car. The car drove off but stopped a short way down the road. Defendant got out of the car and called out to the victims that he would give them a ride anyway, and the three ran towards the car.

When they got to the car, Wesley noticed that the driver was holding a shotgun. Defendant told the victims to give him their money and

their wallets. Wesley and Bernadine gave defendant their beer huggers, but Bobbie Jean did not have anything with her to give him. Defendant then ordered the victims to get into the backseat of the car with Bradford. Defendant ordered Wesley to walk away from the car and go into the woods. When Wesley reached the edge of the woods, defendant shot him three times with the shotgun. Defendant got into the car and drove away.

Wesley was able to crawl to the road and eventually flag down a passing motorist. He was transported to Pitt Memorial Hospital, where he remained for seven days before being released. At the hospital, doctors removed six inches of his small intestine, which was damaged as a result of the shooting.

Defendant drove the car into a field near Pitt Community College, where it got stuck in a ditch. The men tried to remove it from the ditch. Defendant ordered the two women to go into a wooded area and take off their clothes. Defendant then raped Bobbie Jean Hartwig, while Bradford raped Bernadine Parrish. Both defendant and Bradford were armed during this time. Defendant then pointed the shotgun at Gonzales and ordered him to rape Bobbie Jean Hartwig. Defendant kept the gun pointed at Gonzales during this rape, and then defendant raped Hartwig again. Defendant then raped Bernadine Parrish while Bradford raped Bobbie Jean Hartwig.

After defendant raped Bernadine Parrish, he tried to strangle her and snapped her head back sharply. Gonzales checked her for a pulse but could not find one. Bernadine Parrish then regained consciousness, and defendant choked her and snapped her neck again. Bernadine Parrish lost control of her bodily functions and went silent. Defendant threw Bernadine's body into a ditch. Gonzales asked defendant why he killed Bernadine Parrish, and defendant informed him that he choked her "so we would never have to go to prison."

Defendant also tried to strangle Bobbie Jean and left her lying in the ditch. Defendant, Bradford, and Gonzales built a makeshift bridge out of ladders and a table top to get the car out of the ditch. They put the victims' clothes under the tires for traction. While they were trying to get the car out of the ditch, the men heard a scream from one of the women, later identified as Bobbie Jean Hartwig. Defendant asked Bradford if "he was going to take care of business." Bradford grabbed the pistol, but defendant told him not to take the pistol "because if you use the pistol you are going to have to shoot her three

or four times." Bradford then took the shotgun and shot Bobbie Jean Hartwig in the chest, getting blood on his clothes.

The men got the car out of the ditch and returned to Camp LeJeune. On the way back to Camp LeJeune, defendant was laughing; and someone made the comment, "What are we going to do to top this?" The next Monday, defendant approached Gonzales and threatened that if Gonzales ever "turned a trick" on defendant, Gonzales would be taken care of.

On 10 September 1991 the bodies of Bernadine Parrish and Bobbie Jean Hartwig were found by employees of Pitt Community College in a ditch near a building site on campus. Both bodies were badly decomposed. Autopsies revealed that Bobbie Jean Hartwig died from a gunshot wound to the chest and Bernadine Parrish died from undetermined homicidal violence. The stage of decomposition was so advanced that it was impossible to tell from the physical evidence whether the women had been raped.

A liquor bottle found at the scene of the murders had been sold at an exchange store at Camp LeJeune. A key ring with five keys was dropped at the scene. This key ring was later identified as belonging to Bradford, who had to be let into his barracks room at Camp LeJeune the morning of 24 August 1991 because he was not in possession of his room key. Hair samples taken from the backseat of the car which defendant had been driving the night of the murders were consistent with the hair of Bobbie Jean Hartwig.

Agent Ronald Marrs with the State Bureau of Investigation determined that the shotgun wadding found at the scene where Wesley Parrish had been shot was consistent with the spent shells found at the murder scene. The twenty-nine lead pellets collected during the autopsy of Bobbie Jean Hartwig were the same type of shot that would be fired from the spent shells found at the scene where Wesley Parrish was shot.

The State's evidence further tended to show that on 6 September 1991 Kendrick Bradford and Maurice Glover committed an armed robbery of a man who attempted to purchase drugs from them in downtown Greenville, North Carolina. Glover testified that while defendant was not a participant in the robbery, he saw defendant give the shotgun and pistol used in the robbery to Bradford. Defendant had hidden the shotgun in the ceiling in his barracks room at Camp LeJeune. Glover testified that defendant told him about committing

the shooting of Wesley Parrish and the kidnapping, rape, and murder of both Bernadine Parrish and Bobbie Jean Hartwig.

On the night of 7 September 1991, Bradford and defendant were spending the night at a house in Jacksonville. Pursuant to a robbery investigation, the Jacksonville police obtained entry into the house and found a .25-caliber pistol and a 12-gauge shotgun. Evidence at trial tended to show that the shotgun shells that killed Bobbie Jean Hartwig were fired by the same class of shotgun as that retrieved at the time of defendant's arrest.

While he was in Central Prison awaiting trial, defendant made a "fantasy confession" to Malik Shabazz, another inmate. In this "fantasy confession" defendant claimed that all of the information he gave Shabazz was merely fantasy and not true. In the statement defendant admitted shooting Wesley Parrish and leaving him for dead on the side of the road. He confessed to having sex with both victims and then killing one by strangling her. He indicated that one of his friends shot the other woman and that the men returned to Camp LeJeune. Shabazz voluntarily came forward with this information because he had a sister who had been murdered under similar circumstances.

Defendant put on no evidence during the guilt-innocence phase. At the close of all the evidence, defendant moved to have all the charges against him dismissed. The trial court denied this motion, and 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.

PRETRIAL

[1] In his first assignment of error, defendant argues that the trial court abused its discretion by denying his pretrial motion for a change of venue or, in the alternative, a special venire. Defendant contends that the pretrial publicity surrounding this case made a fair trial in Pitt County impossible. Defendant argues that he was prejudiced by the trial court's denying his challenge for cause of juror Stanley based on pretrial publicity. Having exhausted all his peremptory challenges, defendant was unable to remove juror Stanley from his jury; and his motion for extra peremptory challenges was denied. Defendant claims that juror Stanley's answers to *voir dire* questions about pretrial publicity revealed that he would decide the case based on pretrial publicity and not solely on the evidence presented at trial.

At a hearing on defendant's motion for change of venue, defendant presented evidence of substantial publicity about the case in Pitt County. In support of his motion, defendant introduced eight newspaper articles related to some aspect of his case, including one that discussed defendant's attempt to escape from the Pitt County jail while awaiting trial in this case. Defendant also presented the testimony of a local attorney and an investigator for the local Public Defender's Office, both of whom testified that this case had received extensive publicity in Pitt County and had been a popular topic of conversation in the community. After the trial court sustained the prosecutor's objections to his questions, defendant made an offer of proof that both men were of the opinion that defendant could not get a fair trial in Pitt County on account of pretrial publicity.

Although his motion for a change of venue was denied, the trial court ordered the exclusion of all potential jurors from Grifton Township, the township where the victims resided.

Defendant renewed his motion for a change of venue or special venire at a pretrial motions hearing on 23 March 1993. Defendant presented the testimony of Graham Clark, an attorney who represented codefendant Kendrick Bradford in his capital trial. Clark testified that the case had received extensive pretrial publicity in Pitt County, some of which focused on Bradford's claim at his trial that defendant was the most culpable perpetrator of the crimes. The trial court denied defendant's renewed motion but did allow individual questioning of jurors on the issue of pretrial publicity. He also stated that he would be very lenient in allowing challenges for cause if any of the jurors disclosed that they had been exposed to details from the Bradford trial placing the blame for the crimes on defendant.

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 motion based on pretrial publicity should be granted is whether "it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed." *State v. Jerrett*, 309 N.C. 239, 254-55, 307 S.E.2d 339, 347 (1983). Defendant has the burden to prove the existence of a reasonable likelihood that prejudice aroused by pretrial publicity makes him unable to receive a fair trial in a particular county. *State v. Yelverton*, 334 N.C. 532, 540, 434 S.E.2d 183, 187 (1993). Defendant must show that (i) jurors had prior knowledge concerning his case, (ii) he exhausted all of his peremptory challenges, and (iii) a juror objectionable to defendant on this ground sat on the jury. *State v. Jerrett*, 309 N.C. at 255, 307 S.E.2d at 347. The determination of whether defendant has shown that pretrial publicity prevented him from receiving a fair trial rests within the sound discretion of the trial court and will not be overturned absent a showing of an abuse of that discretion. *State v. Yelverton*, 334 N.C. at 540, 434 S.E.2d at 187.

"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." *State v. Jerrett*, 309 N.C. at 255, 307 S.E.2d at 348. "Only in the most extraordinary cases can an appellate court determine solely upon evidence adduced prior to the actual commencement of jury selection that a trial court has abused its discretion by denying a motion for change of venue due to existing prejudice against the defendant." *State v. Madric*, 328 N.C. 223, 227, 400 S.E.2d 31, 33 (1991). The existence of pretrial publicity by itself does not establish a reasonable likelihood that defendant cannot receive a fair trial in the county where the crime was committed. *State v. Soyars*, 332 N.C. 47, 53, 418 S.E.2d 480, 484 (1992).

From our review of the transcript, we are satisfied that defendant failed to meet his burden of showing that pretrial publicity precluded him from receiving a fair and impartial trial in Pitt County. Defendant concedes that the newspaper articles submitted in support of his motion for change of venue were factual in nature. These newspaper articles related to the facts of the crimes, defendant's arrest, his subsequent escape attempt, and a petition circulated by the family of one of the victims seeking a speedy disposition of defendant's trial. None

of these articles was shown to be inflammatory or biased against defendant. "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).

Furthermore, the testimony of the two attorneys and the private investigator in support of defendant's motion indicates only that the trial had received media and word-of-mouth publicity in Pitt County. The testimony failed to establish that this publicity was inflammatory or prejudicial against defendant.

This Court has previously noted that the responses of prospective jurors to questions on *voir dire* are the best evidence of whether pretrial publicity was prejudicial or inflammatory. *State v. Richardson*, 308 N.C. 470, 480, 302 S.E.2d 799, 805 (1983). If each juror states unequivocally that he or she can set aside pretrial information about a defendant's case and reach a determination based solely on the evidence presented at trial, the trial court does not err by refusing to grant a change of venue. *State v. Moore*, 335 N.C. 567, 586, 440 S.E.2d 797, 808, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 174, *reh'g denied*, —— U.S. ——, 130 L. Ed. 2d 532 (1994).

In the instant case, to assure a fair and impartial trial, the trial court allowed individual *voir dire* on the issue of pretrial publicity. The transcript reveals that twelve jurors and two alternates who ultimately sat on defendant's jury were thoroughly examined about their exposure to pretrial publicity. The transcript further reveals that each juror and alternate juror on defendant's jury unequivocally answered in the affirmative when asked if he or she could put aside any previous opinions about this case and decide defendant's case solely upon the evidence presented at trial.

[2] Defendant's claim that he was prejudiced by juror Stanley's presence on his jury is without merit. Juror Stanley was exposed only to general pretrial publicity about this case and was unfamiliar with any details other than the location of the victims' bodies when they were discovered. Although he expressed some initial concern with the difficulty of setting aside pretrial information, in the following exchange he unequivocally established that he could do so:

> [PROSECUTOR]: . . . [A]re you able to say, sir, that you have—that you could set aside any previous opinions that you have

about this case and decide the case entirely and completely upon, ah, the evidence and the law as the Judge would relate it to you both as to the issue of guilt and innocence and punishment if we reach that point?

JUROR: Probably, yes.

[PROSECUTOR]: Does that mean you can, sir?

. . . .

JUROR: Yes.

[PROSECUTOR]: That is—and will you, sir? Will you set aside any previous opinion expressed or that you have about this case either as it relates to the guilt or innocence of the defendant or as it relates to punishment?

JUROR: Yes.

[PROSECUTOR]: And decide this case entirely and completely upon the evidence that comes out here in the courtroom in accordance with the Judge's instructions as to the law?

JUROR: Yes.

Later during *voir dire*, juror Stanley informed counsel for the defense that he understood the capital sentencing procedure and could be fair to defendant even if it was difficult. He again informed the trial court that he could and would set aside any previous opinions he may have had about defendant's case.

As defendant has failed to meet his burden of proof in connection with this issue, we reject his arguments; and this assignment of error is overruled.

[3] Next, defendant contends that the trial court erred by denying his pretrial motion to exclude two photographs depicting the victims at the time their bodies were discovered.

Defendant argues that the introduction of these photographs was intended solely to arouse the passions and prejudices of the jury against defendant. Both photographs depicted enlarged wounds to the body caused by decomposition and small animals. Defendant contends that these photographs of the victims' badly decomposed and mutilated bodies were not probative of the crime with which he was charged, noting the absence of any dispute about the cause of death of each victim or evidence that defendant mutilated either body.

Defendant stipulated to the identity of the bodies depicted in the photographs and argues that the photographs were, therefore, unnecessary for identification purposes. He argues that these photographs were so prejudicial that he is entitled to a new trial. We reject defendant's arguments for the following reasons.

Whether to admit photographic evidence requires the trial court to weigh the probative value of the photographs against the danger of unfair prejudice to defendant. N.C.G.S. § 8C-1, Rule 403 (1992); *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988). This determination lies within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was "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.

"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." *Id.* at 284, 372 S.E.2d at 526. "Even where a body is in advanced stages of decomposition and the cause of death and identity of the victim are uncontroverted, photographs may be exhibited showing the condition of the body and its location when found." *State v. Wynne*, 329 N.C. 507, 517, 406 S.E.2d 812, 816-17 (1991).

The trial court did not abuse its discretion in admitting the photographs at issue. There is no evidence that these photographs were used excessively and solely to inflame the passions and prejudices of the jury against defendant. The photographs were in black and white, thereby lacking some of the gruesome characteristics of color photographs. They depicted the condition and location of the victims' bodies at the time they were found. Further, these photographs illustrated the testimony of Dr. Gilliland, the forensic pathologist who conducted the autopsies of the two bodies. Dr. Gilliland used these photographs to illustrate her testimony about the injuries inflicted on the victims, including testimony that it was impossible to determine from the autopsy whether the victims had been strangled or sexually assaulted due to the decomposition of the bodies. We cannot say that the trial court's decision to admit these photographs was so arbitrary that it could not have been supported by reason. This assignment of error is overruled.

JURY SELECTION

[4] Defendant contends that the trial court abused its discretion by unduly restricting his *voir dire* of potential jurors. Defendant argues that the trial court repeatedly sustained the prosecutor's objections to various questions asked by defense counsel to prospective jurors, thereby violating defendant's constitutional rights to an informed exercise of peremptory challenges, a fair and impartial jury, and an individualized and nonarbitrary sentencing proceeding.

The purpose of *voir dire* is to ensure an impartial jury to hear defendant's trial. *State v. Bracey*, 303 N.C. 112, 119, 277 S.E.2d 390, 394 (1981). The *voir dire* of prospective jurors serves a two-fold purpose: (i) to determine whether a basis for challenge for cause exists, and (ii) to enable counsel to intelligently exercise peremptory challenges. *State v. Soyars*, 332 N.C. at 56, 418 S.E.2d at 486. The trial court has broad discretion to ensure that a competent, fair, and impartial jury is impaneled. *Id.* "[D]efendant must show prejudice, as well as a clear abuse of discretion, to establish reversible error." *State v. Syriani*, 333 N.C. 350, 372, 428 S.E.2d 118, 129, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 341 (1993), *reh'g denied*, —— U.S. ——, 126 L. Ed. 2d 707 (1994).

Defendant has not identified the specific questions to which he contends the prosecution's objections were erroneously sustained. "It is the uniform practice of this Court in every case in which a death sentence has been pronounced to examine and review the record with minute care to the end it may affirmatively appear that all proper safeguards have been vouchsafed the unfortunate accused before his life is taken by the State." *State v. Fowler*, 270 N.C. 468, 469, 155 S.E.2d 83, 84 (1967). A thorough review of the transcript reveals no abuse of discretion on the part of the trial court.

The trial court allowed inquiry into views that would render a juror unable to be fair to defendant, to consider the evidence, and to follow the law. The trial court also allowed extensive inquiry into the exposure of prospective jurors to pretrial publicity and the effect such publicity would have on their ability to give defendant a fair trial. Further, the trial court allowed inquiry as to whether a juror would automatically vote to impose the death penalty regardless of the facts and circumstances of defendant's case, as mandated by *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992). These questions were sufficient to reveal any bias that a prospective juror might have had and to ensure defendant a fair and impartial jury and a

nonarbitrary, individualized sentencing proceeding. The majority of defendant's questions to which the prosecutor's objections were sustained were either irrelevant, improper in form, attempts to "stake out" a juror, questions to which the answer was admitted in response to another question, or questions that contained an incomplete statement of the law. Defendant has shown no abuse of discretion on the part of the trial court, and this assignment of error is overruled.

[5] Next, defendant contends that the trial court erroneously failed to excuse prospective jurors who viewed the death penalty as the only appropriate punishment for first-degree murder. The trial court denied defendant's challenges for cause of prospective jurors Angel, Carson, Stanley, Rose, and Howell. Defendant contends the denial of these five challenges for cause was erroneous because each of these prospective jurors expressed a predisposition to vote for the death sentence in this case and indicated that he or she would be unable to consider the sentencing option of life imprisonment. Defendant argues that the trial court's denial of these challenges for cause violated his right to an impartial jury and a nonarbitrary sentencing hearing in violation of his state and federal constitutional rights. We disagree.

The standard for determining when a prospective juror may be properly excused for cause based on 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) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). A careful review of the jury *voir dire* reveals no violation of this standard during jury selection.

The following exchange occurred during the *voir dire* examination of prospective juror Angel:

> [DEFENSE COUNSEL]: Can you conceive of a case where you would think that life imprisonment would be the appropriate punishment in a first-degree murder case?
>
> JUROR: Yes, I can conceive of them.
>
> . . . .
>
> [DEFENSE COUNSEL]: If you found the defendant guilty of first-degree murder would you then automatically vote to impose the death penalty?

JUROR: I'd have to outweigh (sic) all the facts before I made my decision.

[DEFENSE COUNSEL]: What do you mean by "outweigh all the facts"?

[PROSECUTOR]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: If you found the defendant guilty of first-degree murder would you then automatically vote to impose the death penalty regardless of the facts and circumstances?

JUROR: Yes, I would.

[DEFENSE COUNSEL]: Move to challenge this witness (sic) for cause, Your Honor.

THE COURT: Denied.

[DEFENSE COUNSEL]: If you—if you found the defendant guilty of first-degree murder, would it be difficult for you to consider the aggravating and mitigating circumstances in this case?

JUROR: No.

. . . .

THE COURT: Mr. Angel [the juror], before I can allow Mr. Wells [defense counsel] to continue with his questions, you may have said this earlier but I wanted to make sure. Did you say that if the jury returned—if you were a part of the jury that returned a verdict of guilty of first-degree murder that you would automatically—simply because the defendant was found guilty of first-degree murder that you would automatically vote to impose the death sentence?

JUROR: No, I —

[THE COURT]: Did you mean to say that?

JUROR: No, I would have to outweigh (sic) them.

THE COURT: You would sit there and we would go into a second phase, as you —

JUROR: Right.

[THE COURT]: —understand it?

JUROR: Right.

THE COURT: And you would follow the law as I instructed the jury —

JUROR: Right.

[THE COURT]: —as it pertained to the second phase?

JUROR: Right.

[THE COURT]: And if after following the law and listening to the evidence, if you thought that life imprisonment was the appropriate punishment you would vote to impose life imprisonment; is that correct?

JUROR: Right.

[THE COURT]: And if you thought conversely, that death was the appropriate punishment after weighing the fact verses [sic] the law—or applying the facts to the law that you would vote for death; is that correct? Is that what you meant to say?

JUROR: Right.

This exchange demonstrates that this prospective juror was initially confused by defendant's questioning about the death penalty. Upon further questioning by the court, this prospective juror clearly expressed that he would not automatically vote to impose the death penalty regardless of the facts and circumstances but would listen to the evidence and follow the law by weighing any aggravating circumstances against any mitigating circumstances offered by defendant.

During *voir dire* about pretrial publicity, prospective juror Carson initially stated that he had heard talk about the case and that if a person was proven guilty of the crime, he should suffer the full extent of the law, which the juror understood to be the death penalty. Later during *voir dire*, after the prosecutor explained the sentencing proceeding to Carson, Carson stated that he would be able to consider both life imprisonment and the death penalty as possible punishments if defendant were found guilty.

The following exchange occurred during Carson's *voir dire* examination by defendant about his views on the death penalty:

[DEFENSE COUNSEL]: Um, Mr. Carson, could you tell me your beliefs concerning the death penalty?

JUROR: I think in a clear-cut crime where an individual is proven without a doubt to have taken another person's life, then the punishment for that crime after looking at all the circumstances involved should be the death penalty.

[DEFENSE COUNSEL]: What—now, you said without a doubt; what if it was proved beyond a reasonable doubt?

[PROSECUTOR]: Judge, I would object.

After the State's objection was sustained and defendant's counsel defined "beyond a reasonable doubt" to prospective juror Carson, the following colloquy then ensued:

[DEFENSE COUNSEL]: Understanding that the standard of proof in the North Carolina courts is beyond a reasonable doubt, my question to you is if you sat as a juror and found the defendant guilty of first-degree murder using this standard of beyond a reasonable doubt, would you then automatically vote to impose the death penalty regardless of the facts and circumstances?

JUROR: No.

I can't—you have—at least the way I understand it, you have to look at all the facts, and the Judge explained there was [sic] three portions to the trial, right? So if you determine he's guilty, then you look at the mitigating and the aggravating evidence and determine which outweighs the other, as I understand it. In that case, if they were to bring up enough mitigating evidence to prove that, you know, there was some other facts that affected the crime, then we'd have to say that we should look at in the punishment stage something other than the death penalty. Have I missed the boat?

From these transcript excerpts, it is clear that prospective juror Carson was willing and able to set aside any opinion he may have had about the case and decide the case based solely on the evidence introduced at trial and pursuant to the trial court's instructions and Carson's oath as a juror. Carson specifically stated that he would not automatically vote for the death penalty but would weigh the aggravating circumstances against the mitigating circumstances to determine if another penalty was appropriate in this particular case.

Prior to the beginning of the jury *voir dire*, prospective juror Stanley informed the court that he thought he had made up his mind as to what sentence defendant should receive if convicted. Later dur-

ing the *voir dire*, after the State explained the capital sentencing proceeding to Stanley, Stanley informed the court that he could consider both life imprisonment and the death penalty as possible punishments if defendant was found guilty. He stated that he would be able to set aside any previous opinion about the case and base his decision entirely upon the evidence presented at trial in accordance with the trial court's instructions as to the law. When questioned by defense counsel, Stanley admitted that he had informed the court on the first day of jury selection that he thought he had already formed an opinion as to what sentence defendant should receive, but Stanley also indicated that after the capital sentencing procedure had been explained to him, he could be fair to defendant in deciding his punishment. The following exchange then occurred between the trial court and Stanley:

> [THE COURT:] The question, Mr. Stanley, is whatever opinion you may have had when you came up here on last week, I'm not sure whether it was—I think it was Wednesday in your case, can you now, after hearing basically what the law would be in this particular case, can you put that opinion aside and decide the guilt and innocence and any punishment in this case based solely upon the law and the evidence that comes out in the trial of this case; can you do that?
>
> JUROR: Yes.
>
> [DEFENSE COUNSEL]: So the next question is will you do that?
>
> JUROR: Yes.

As this excerpt makes clear, this prospective juror clearly indicated that he would be able to set aside his former opinion as to the appropriate penalty in this case and base his decision solely on the evidence presented at trial and in accordance with the law as given him by the trial court.

Defendant has failed to show that the views of any of these three prospective jurors would prevent or substantially impair the performance of his duties as a juror in this case. The trial court did not err in denying defendant's challenges for cause of prospective jurors Angel, Carson, and Stanley.

[6] Further, in connection with this assignment of error, we note that both prospective juror Rose and prospective juror Howell were excused from the jury for cause by the trial court. Prospective juror

Rose was dismissed by the trial court on its own motion after she informed the court that her young daughter was in counselling because of paranoia resulting from a recent break-in of Rose's home. Ms. Rose informed the court of her concerns that the details of this case would put her in a mental state where she would be unable to help her daughter in her therapy. Prospective juror Howell was excused for cause by the trial court on defendant's renewed motion during jury *voir dire*. There could not possibly have been any prejudice to defendant from the trial court's initial denial of defendant's motions to dismiss these two prospective jurors.

[7] Defendant next contends that the trial court erred in denying his request to rehabilitate jurors who indicated a reluctance to impose the death penalty. Defendant claims that prospective jurors Patterson, Clemons, and Tacozza were not adequately questioned about their views concerning the death penalty before being excused for cause.

Based on a defendant's right to a trial by an impartial jury, a juror may not be excused for cause merely 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 (1968). However, a potential juror may correctly be excluded for cause because of his views on capital punishment when these views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52 (quoting *Adams v. Texas*, 448 U.S. at 45, 65 L. Ed. 2d at 589). A prospective juror with reservations about the death penalty must be able to state clearly that he is willing to put aside his own beliefs temporarily in deference to the rule of law. *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149 (1986).

A prospective juror's bias or inability to follow the law does not have to be proven with unmistakable clarity, and the decision as to whether a juror's views would substantially impair the performance of his duties is within the trial court's broad discretion. *State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 731-32 (1992). "[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. "[W]here 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).

Applying the foregoing principles to the facts of this case, it is clear that the trial court did not abuse its discretion by dismissing these prospective jurors for cause or by denying defendant's requests to rehabilitate them.

The transcript reveals that after the prosecutor explained the capital sentencing procedure to the entire panel, he went through each step of the procedure with the prospective jurors individually in order to determine whether they would be able to follow the procedure and correctly apply the law. First, the prosecutor asked the prospective jurors whether they would be able to return a guilty verdict in this case knowing that the death penalty was a possible sentence. Then, the prosecutor asked each prospective juror if he or she had any religious or personal beliefs against the death penalty. Next, the prosecutor asked the prospective jurors if they could vote for the death penalty if they were satisfied from the evidence beyond a reasonable doubt that (i) at least one aggravating circumstance existed; (ii) any aggravating circumstances outweighed any mitigating circumstances; and (iii) these aggravating circumstances were sufficiently substantial to call for a death sentence. Finally, the prosecutor asked the prospective jurors if they would be able to vote for a life sentence if they were not satisfied beyond a reasonable doubt of these three things.

Prospective juror Patterson's responses to the prosecutor's questions about the death penalty revealed that she had both personal and religious beliefs against the death penalty and that as a result of these beliefs, she would be unable to recommend a sentence of death regardless of the facts and circumstances of this case. Patterson's answers unequivocally established that she would not vote to impose the death penalty under any circumstances, and defendant has failed to show that additional questioning would have resulted in different answers.

Prospective juror Clemons evinced some difficulty in understanding the prosecutor's questions about his ability to follow the law

during a capital sentencing hearing. Clemons' answers to the prosecutor's questions about the death penalty disclosed that he had religious or personal beliefs against the death penalty. Clemons' answers revealed that he would be unable to recommend a death sentence regardless of all the facts and circumstances in this case. These answers established that Clemons' views on the death penalty would substantially impair his ability to perform his duties as a juror, and defendant has made no showing that further questioning would have resulted in different answers.

In response to the prosecutor's questions about the death penalty, prospective juror Tacozza stated, "[M]y beliefs are that capital punishment is not correct." He further stated, "It would present a real conflict with my religious and—my religious beliefs. . . . What I would do at that time is conjecture, but I can tell you that it would present a real dilemma for me." When asked by the trial court if these personal and religious beliefs against the death penalty would prevent or substantially impair his ability to perform his duties as a juror, Tacozza stated, "I believe they would." These answers clearly established that Tacozza was excludable for cause because of his views on the death penalty. Defendant has made no showing that further questioning would have resulted in different answers.

As the trial court did not err in excluding these three jurors for cause or by denying defendant's request to rehabilitate each of them, this assignment of error is overruled.

[8] Defendant next argues that the prosecutor violated his federal and state constitutional rights by using peremptory challenges to exclude prospective black jurors on the basis of race. The trial court denied defendant's objections to the peremptory challenges of prospective jurors Copeland, Barrett, Rogers, Keys, and Dickens. Defendant argues that since the victims were white women and defendant is a black male, racial prejudice could easily have come into play in this case. He contends that the prosecutor peremptorily challenged five prospective black jurors in an attempt to reduce the active participation of the black community in defendant's trial as much as possible.

Defendant further argues that the trial court applied the wrong standard in overruling his objections to these challenges and improperly put the burden on defendant to show that the jurors were excluded solely on the basis of their race. Defendant argues that his constitutional rights were violated as long as the prosecutor's exer-

cise of peremptory challenges was motivated at least in part by a racially discriminatory purpose, regardless of the prosecutor's other motives. Defendant maintains that there was ample evidence from which the trial court could have found that one of the prosecutor's motives for peremptorily challenging black prospective jurors was for the racially discriminatory purpose of reducing black representation on defendant's jury.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution forbid the use of peremptory challenges for a racially discriminatory purpose. *Batson v. Kentucky*, 476 U.S. 79, 86, 90 L. Ed. 2d 69, 80 (1986); *State v. Williams*, 339 N.C. 1, 15, 452 S.E.2d 245, 254 (1994).

In *Hernandez v. New York*, 500 U.S. 352, 114 L. Ed. 2d 395 (1991), the United States Supreme Court set forth the three-step process for evaluating claims of racial discrimination under *Batson v. Kentucky*. First, defendant must make a *prima facie* showing of purposeful discrimination in the State's exercise of peremptory challenges. *Id.* at 358, 114 L. Ed. 2d at 405. Once such a showing is made, the State must come forward with race-neutral reasons for the peremptory challenges at issue. *Id.* at 358-59, 114 L. Ed. 2d at 405. Finally, the trial court must determine if defendant has proved purposeful discrimination in the State's exercise of peremptory challenges. *Id.* at 359, 114 L. Ed. 2d at 405.

To make a *prima facie* showing of purposeful discrimination, the defendant must show only that relevant circumstances raise an inference that the prosecutor exercised his peremptory challenges to remove potential jurors solely because of their race. *State v. Robinson*, 330 N.C. 1, 15, 409 S.E.2d 288, 296 (1991); *see State v. Quick*, 341 N.C. 141, 144, 462 S.E.2d 186, 188 (1995). Only if such a *prima facie* case is made does the burden shift to the State to provide race-neutral reasons for the peremptory challenges at issue. *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88.

This Court has identified several relevant factors in determining whether a defendant has raised an inference of purposeful discrimination. These factors include the defendant's race, the victim's race, and the race of the State's key witnesses. *State v. Ross*, 338 N.C. 280, 285, 449 S.E.2d 556, 561 (1994). Other factors include whether the prosecutor made racially motivated statements or asked racially motivated questions of black prospective jurors and whether there was a discernable difference in the prosecutor's method of question-

ing black prospective jurors that raises an inference of discrimination. *Id.* Another factor is whether the prosecutor used a disproportionate number of peremptory challenges to strike black jurors in a single case. *Id.* Although not dispositive, one factor tending to refute an allegation of purposeful discrimination is the acceptance rate of black jurors by the prosecution. *Id.*

In the instant case, although defendant is a member of a cognizable racial group and the prosecutor exercised peremptory challenges to remove blacks from defendant's jury, defendant has failed to make a *prima facie* showing of purposeful discrimination because the facts and circumstances of the case do not raise an inference of purposeful discrimination.

The record reveals that defendant's jury consisted of nine white jurors and three black jurors. Of the sixty-one potential jurors in this case, twelve were black. Of these twelve, four were excused for cause. Five black prospective jurors were peremptorily challenged by the State. However, the prosecutor accepted the other three blacks who were in the jury venire. These three black prospective jurors actually sat on defendant's jury. The prosecutor exercised a total of ten peremptory challenges, five against whites and five against blacks.

The State's primary witness against defendant was also a black male, a fact which tends to refute defendant's arguments that the prosecution was attempting to remove blacks from the jury assuming they might have been more favorable to defendant because of his race.

Nothing in the prosecutor's questions or his statements in the exercise of his peremptory challenges of black jurors revealed any discriminatory motive. The prosecutor did not ask any questions of a racial nature. There was no discernable difference in the prosecutor's method of questioning any black prospective jurors from the method of questioning the rest of the jury venire.

The facts and circumstances revealed during jury selection establish substantial reasons other than purposeful discrimination for each peremptory challenge at issue. The record reveals that prospective juror Copeland specifically informed the court that she realized the seriousness of the case and did not want to sit on the jury and have to make a determination about this case unless she had no other choice. Prospective juror Barrett did not drive and had to be brought

to the courthouse by the Sheriff's Department each day. She informed the court that she felt hassled by members of the Sheriff's Department because some of them were giving her a difficult time about picking her up and driving her to court each day. Prospective juror Rogers informed the court that he would have to drop out of college for the current quarter if he sat on this jury because he would miss several tests and pre-registration for other classes. Prospective juror Keys' son had felonies currently pending against him in Pitt County, which were to be heard in the same courthouse where defendant's trial was being conducted. Prospective juror Dickens had previously been charged with carrying a concealed weapon; this charge had been dismissed by one of the prosecutors in defendant's case.

The trial court did not err in ruling that defendant had not established a *prima facie* case of racial discrimination in this case. The trial court properly applied the standard as set forth in *Batson v. Kentucky* and its progeny and did not unfairly shift the burden of proof to defendant to prove that black jurors were excluded solely on account of their race. Defendant had the initial burden to establish a *prima facie* case of purposeful discrimination, a burden he failed to carry. Defendant's assignments of error in connection with these arguments are overruled.

GUILT-INNOCENCE

[9] Defendant next contends that the trial court erred by failing to intervene *ex mero motu* to declare that the plea bargain between the State and codefendant Richard Gonzales was void as against public policy and violated defendant's due process rights. Gonzales entered into a plea bargain with the State which allowed him to plead guilty to two counts of second-degree murder, two counts of first-degree kidnapping, one count of first-degree rape, one count of accessory after the fact to first-degree rape, and one count of accessory after the fact to assault with a dangerous weapon with intent to kill inflicting serious injury. In return Gonzales agreed to testify truthfully in the trials of defendant and codefendant Kendrick Bradford, in accordance with Gonzales' earlier statements to law enforcement officials about this case. Defendant contends that this plea agreement violated public policy and defendant's due process rights because it was conditioned not only on Gonzales' truthful testimony but also upon his testifying in accordance with his earlier statements to the police. Defendant argues that this unconstitutionally bound Gonzales to tes-

tify consistent with his earlier statements, which may not have been truthful, or lose the benefit of his plea bargain with the State. We reject defendant's arguments for the following reasons.

Defendant did not raise this issue at trial and as such has failed to preserve this issue for appellate review. N.C. R. App. P. 10(b)(1). However, even if defendant had properly preserved this issue, we conclude that this plea bargain did not violate either public policy or defendant's due process rights.

N.C.G.S. § 15A-1054 provides that

> a prosecutor, when the interest of justice requires, may exercise his discretion . . . to agree to charge reductions, or to agree to recommend sentence concessions, upon the understanding or agreement that the suspect will provide truthful testimony in one or more criminal proceedings.

N.C.G.S. § 15A-1054 (1988). The plea bargain between Gonzales and the State complies with this statute. Gonzales, through his attorney, gave statements to the police inculpating himself, defendant, and Kendrick Bradford in these crimes. He pled guilty of his own free will, fully understanding and accepting his plea arrangement. During his testimony during defendant's trial, the details of Gonzales' plea bargain arrangement with the State were revealed to the jury, and he was cross-examined about it by counsel for the defense.

Although Gonzales did in fact testify consistent with his prior statements to the police, nothing in the transcript or the record supports defendant's claims that the plea arrangement was conditioned on anything other than Gonzales' providing truthful testimony against defendant and Bradford, such as he had done in his prior statements. Although the wording of the plea agreement could have been more articulately phrased, it is clear from the context of the agreement that Gonzales' plea bargain was conditioned only on his truthful testimony at trial. This assignment of error is overruled.

[10] Next, defendant contends that the trial court erred by admitting into evidence a "fantasy statement" implicating defendant in these crimes made by defendant to another inmate while in Central Prison. Defendant further argues the trial court erred by denying defendant's motion for a mistrial based upon the admission of this evidence. Defendant contends that this statement was hearsay not falling within any hearsay exception. He further contends that any probative value of this statement was outweighed by the danger of unfair prej-

udice to defendant. Defendant argues that the admission of this evidence violated Rule 401 of the North Carolina Rules of Evidence and both the state and federal Constitutions. We reject defendant's arguments for the following reasons.

A statement made by defendant and offered by the State against him is admissible as an exception to the hearsay rule as a statement of a party-opponent. N.C.G.S. § 8C-1, Rule 801(d)(A) (1992). Defendant's statement to Shabazz clearly implicates defendant in these crimes, and his attempt to couch this confession in terms of make believe and fantasy does not render his inculpatory statement inadmissible hearsay.

Further, defendant's claim that this evidence was irrelevant and inadmissible under Rule 401 of the North Carolina Rules of Evidence is without merit. That rule defines relevant evidence as "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). Defendant's statement is clearly relevant in that it details defendant's participation in the shooting of Wesley Parrish and in the kidnapping, rape, and murder of both Bernadine Parrish and Bobbie Jean Hartwig.

"Whether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). We conclude that the trial court did not abuse its discretion in admitting defendant's statement to Shabazz into evidence. As this evidence was properly admitted at trial, there was no error in the trial court's refusal to grant defendant's motion for a mistrial on this basis.

SENTENCING

The State resubmitted all the evidence from the guilt-innocence phase at sentencing.

Defendant's evidence at sentencing tended to show that he was twenty-two years old at the time of the murders. Defendant testified that he grew up in Chicago and was involved with gangs while a child. Involvement in neighborhood gangs led him to convert to Islam. Defendant was also involved with martial arts and the Boy Scouts. His parents divorced, and he seldom saw his father after the divorce. He assumed the father role in his family.

Defendant testified that he did well in school when he was growing up and that he was involved in a program which allowed him to take some college courses on Saturdays while he was in elementary school. Defendant got into a lot of fights as a child. During one of these fights, defendant injured his head and suffered from memory losses. Defendant knew several people who died when he was a child, including an aunt. He testified that he had not cried since he was eleven years old.

After defendant graduated from high school, he enrolled in the Marines. Defendant claimed that he was involved in several incidents in which he and his friends were persecuted because of their race by other members of the Marines. After several of these incidents, defendant was involved in fights with other Marines.

Defendant married after his girlfriend became pregnant. Although the marriage lasted only three months because he found out his wife was having an affair, defendant's divorce did not become final until after he was imprisoned for the murders at issue in this case. Defendant also had a child by his girlfriend, Octavia Brice, but the child was not born until after defendant was incarcerated for the murders at issue in this case.

Defendant went to Saudi Arabia as part of Desert Storm on 24 December 1990. Defendant was the driver for the executive officer of his battalion. Defendant felt a great deal of conflict for serving in the Gulf War because he was fighting other Moslems and was in conflict with his religious morals. Defendant was particularly distressed when he found a picture in the wallet of a dead Saudi soldier showing his family. His unit had problems from lack of sleep and stress from being in the war zone.

After he returned from the Gulf War, defendant had a difficult time adjusting to being in the United States. He began to drink heavily and would stay up until he was exhausted on account of nightmares and caffeine addiction. He admitted that he began to receive some nonjudicial punishments for rules infractions in the Marines.

Defendant testified that he brought his brother down from Chicago to live near him in Virginia in order to keep him from being involved in a street gang.

Defendant claimed that while he was with Bradford and Gonzales the night of the murders, Bradford committed both killings and threatened defendant and Gonzales with harm if they told anyone.

Defendant admitted that although he did not shoot Wesley Parrish, he did buy the shotgun that was used to shoot Wesley Parrish. After the murders defendant experienced bad dreams about the victims but did not turn himself in to the police.

Defendant made several statements to the police. He initially denied that he had been with Bradford and Gonzales the night of the murders. In two later statements defendant claimed that he and Bradford had been in Virginia on the night of the murders. At trial defendant claimed that his last statement, in which he admitted to participating in the crimes, had been fabricated by the police.

Defendant admitted that after his initial incarceration in the Pitt County jail, he attempted to escape by hitting a police officer, chasing him around the jail, and getting the officer's keys. Defendant attempted to free other inmates before his attempt to escape was halted when he became locked between two sets of doors.

Defendant claimed to be suffering from post-traumatic stress disorder while in Central Prison awaiting trial. He was also dishonorably discharged from the Marines.

Dr. Henry Horacek, a psychiatrist, testified that at the time of the murders, defendant was suffering from psychosis, post-traumatic stress disorder, and the effects of chronic stimulant abuse and sleep deprivation. The month prior to the murders, there was a rapid deterioration in defendant's level of functioning. Dr. Horacek testified that defendant's ability to appreciate the criminality of his conduct and conform it to the requirements of the law was impaired at the time of the murders. Upon his return from Desert Storm, defendant had been similarly diagnosed by Dr. Cheran, who had prescribed Navane (anti-psychotic drug) and Lithium (anti-manic drug), two of the strongest medicines used in psychiatry.

Dr. Horacek also testified that defendant was born prematurely and had a low birth weight. He explained that low birth-weight babies frequently have problems with hyperactivity, attention problems, and learning problems. Dr. Horacek testified that defendant was younger than his chronological age. He stated that defendant was immature as a child and would have been like an adolescent as a Marine.

On cross-examination Dr. Horacek admitted that defendant's discharge summary from Central Prison mental health hospital shortly after his arrest indicated that defendant was found to be nonsuicidal and nonpsychotic. Dr. Horacek admitted that defendant had initially

denied being at the crime scene the night of the murders. Dr. Horacek testified that the report of Dr. Samuel Blumenthal, who had administered psychophysical testing on defendant, indicated that defendant claimed to have an alibi for the day of the murders. Defendant's responses to a photograph revealed feelings of guilt on the part of defendant for shooting a man, which Dr. Blumenthal found to be indicative of an internal struggle that would be consistent with defendant's guilt. Dr. Horacek further testified that defendant could be dangerous if not medicated. He admitted that defendant "had some degree of ability to distinguish right from wrong" on the day of the murders.

Octavia Brice testified that she was defendant's girlfriend. She testified that after defendant returned from Desert Storm, he was a changed man who smoked, had headaches, and was depressed. He was always compassionate and sweet with her and was the father of her child.

Defendant's mother testified about his premature birth. She testified that after she separated from her husband, defendant assumed the role of the father in the family. She too claimed defendant was a changed man after he returned from the Gulf War; defendant smoked, drank, and stayed out all night.

The same five aggravating circumstances were submitted to the jury for each murder: (i) the murder was committed for the purpose of avoiding a lawful arrest, N.C.G.S. § 15A-2000(e)(4) (Supp. 1994); (ii) the murder was committed by defendant while he was engaged in the commission of a rape, N.C.G.S. § 15A-2000(e)(5); (iii) the murder was committed by defendant in the course of a kidnapping, N.C.G.S. § 15A-2000(e)(5); (iv) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (v) the murder was committed as 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 five aggravating circumstances.

The same thirty-four mitigating circumstances were submitted to the jury for each murder. The seven 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) the capital felony was committed while defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (iii) the defendant acted under duress or under the domination of

another person, N.C.G.S. § 15A-2000(f)(5); (iv) the capacity of defendant to appreciate the criminality of his conduct was impaired, N.C.G.S. § 15A-2000(f)(6); (v) the capacity of defendant to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6); (vi) the age of defendant at the time of the crime, N.C.G.S. § 15A-2000(f)(7); and 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 found the existence of only three of these statutory mitigating circumstances, namely, (i) that defendant had no significant history of prior criminal activity, (ii) that the capital felony was committed while defendant was under the influence of a mental or emotional distress, and (iii) any other circumstance which one or more jurors deemed to have mitigating value.

The jury found fourteen of the nonstatutory mitigating circumstances submitted by defendant and declined to find thirteen others.

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, pursuant to 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.

[11] Defendant first contends that the trial court committed prejudicial error by denying his motion for a mistrial based on the trial court's improper expression of an opinion on the credibility of Dr. Henry Horacek, defendant's only expert witness.

During cross-examination by the State, Dr. Horacek indicated that he reviewed the statements of Richard Gonzales and Kendrick Bradford in forming his opinion about defendant's mental state at the time of the murders. After a bench conference in which defense counsel objected to the use of these statements during the cross-examination of Dr. Horacek, the following exchange occurred:

> Q Doctor, I'll hand you what's been marked for purposes of identification as State's Exhibit DDDD (sic), ah, and ask you if that—that is the—is that not the statement that you were provided of Kendrick—that's a photocopy of [a] statement that you were pro-

vided that Kendrick Wayne Bradford gave law enforcement officers, ah, and which you have just removed from your file?

A Yes.

Q And that, ah, is a statement that you read and considered in the course of making your evaluation; is that not true, sir?

A No, that's not true.

Q You didn't read it?

A I glanced over it with some interest but I didn't use it as a basis for my opinion.

. . . .

[THE COURT:] Madam Clerk, would it be—I'm sorry, Madam Court Reporter, would it be possible for you to read back the witness'—the question by Mr. Haigwood [the prosecutor] and the witness's answer prior to us having a bench conference?

COURT REPORTER: (Nods head).

THE COURT: Would you do that.

COURT REPORTER: "Question: You, ah, indicate—indicated also, sir, that as a part of your review in forming your opinion that you, ah, went over the statements and testimony of Richard Gonzales and Kendrick Bradford? Answer: Yes. Question: Ah, do you have those, sir? Answer: Yes, I do."

THE COURT: Now, which is it Doctor? Are you telling the truth now or were you telling the truth then?

The jury was then sent out of the courtroom, and the trial court further questioned Dr. Horacek about his seemingly inconsistent answers.

Before the jury was brought back into the courtroom, defendant moved for a mistrial based on the court's question of Dr. Horacek in the jury's presence which defendant contended expressed an opinion as to the truthfulness of the witness. The trial court denied defendant's motion. After the jury returned to the courtroom, the trial court gave the jury the following curative instruction:

THE COURT: Members of the jury, prior to your leaving the courtroom the Court, that being myself, I asked a question of the witness, Mr.—Doctor—the Doctor and at this time I'd say to the

jury to disregard any question that I asked the witness. Also, I would say to you that I have no opinion as to the truthfulness or the credibility of (sic) the veracity of this particular witness, and you are not to in any way interpret any question that I may have asked as indicating I have an opinion as to his veracity or truthfulness. So simply disregard any question that I may have asked the witness. Understood?

The trial court refused to allow the prosecutor to have the witness read the statements made by Bradford and Gonzales and limited cross-examination of Dr. Horacek to why he did not use the statements as a basis for his opinion. Dr. Horacek testified that he had in fact read the statements made by Gonzales and Bradford but that he did not form any opinion on their consistency or inconsistency with defendant's own version of the events the night of the murders. He further testified that he gave the most weight to information about defendant before and after the murders and disregarded the statements about the events of the night of the murders because he was not present and had no idea whether the statements were true.

Defendant contends that the trial court's question of Dr. Horacek was erroneous because it gave the jury the impression that the trial court thought the witness was being untruthful. He claims that except for this comment, no other reasonable explanation exists for the jury's failure to find several mitigating circumstances supported by Dr. Horacek's testimony. Defendant argues that the jury instruction given by the trial court to disregard the question did not cure this error and that the trial court committed prejudicial error by denying his motion for a mistrial. Relying on *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E.2d 631, 636 (1976), defendant argues that any intimation by the trial court in the presence of the jury that it thinks a witness is lying constitutes reversible error.

In *State v. Rhodes* this Court outlined the special hazards that may result from judicial warnings to a witness regarding perjury. These special hazards include (i) the danger that the trial court will invade the province of the jury to assess the credibility of the witness and determine the facts from the evidence presented; (ii) the danger that the trial court's comments may cause a witness to change his testimony to fit the judge's interpretation of the facts or refuse to testify at all; (iii) the danger that the trial court's warning regarding perjury may intimidate or discourage the defendant's attorney from eliciting essential testimony from a witness; and (iv) the danger that defend-

ant's due process right to a trial by a fair and impartial jury may be violated. *Id.* at 24-27, 224 S.E.2d at 636-38.

After a thorough review of the transcript, we agree with defendant that the trial court erred in asking Dr. Horacek, "Are you telling the truth now or were you telling the truth then?" This clearly conveyed to the jury that the trial court did not believe this witness was being truthful, in violation of N.C.G.S. § 15A-1222. The trial court's question created the hazard that the trial court had invaded the province of the jury to determine the credibility of this witness.

However, not every ill-advised comment by the trial court tending to impeach a witness constitutes reversible error. Unless the comment might reasonably have had a prejudicial effect on defendant's trial, the error will be considered harmless. *State v. Brady*, 299 N.C. 547, 560, 264 S.E.2d 66, 73-74 (1980). We conclude that any possible prejudice to defendant was cured by the trial court's subsequent instruction to the jury to ignore the question the trial court asked Dr. Horacek. Within a few moments of the improper comment, the trial judge explicitly informed the jurors that he had no opinion about Dr. Horacek's truthfulness or veracity and that they should not interpret his question as indicating any such opinion. During the final jury instructions, the trial court again instructed the jurors that they were the sole judges of the credibility of each witness and must decide for themselves whether to believe or disbelieve the testimony of any witness. Jurors are presumed to follow the trial court's instructions. *State v. Rouse*, 339 N.C. 59, 92, 451 S.E.2d 543, 561 (1994), *reconsideration denied*, 339 N.C. 619, 453 S.E.2d 188, *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 64 U.S.L.W. 3241 (1995).

Further, after the curative instruction was given to the jury, Dr. Horacek was extensively questioned by the prosecutor about his reasons for disregarding the statements of defendant's two codefendants. Dr. Horacek was able to explain to the jury that although he read the statements when forming his opinion, he placed no weight on them because he was unsure of the truthfulness of all the statements. This resolved any confusion from his prior, apparently inconsistent statements and cured any prejudice to defendant from the trial court's question about Dr. Horacek's inconsistent statements.

A mistrial must be granted on defendant's motion "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1988).

The decision to grant a mistrial is within the trial court's sound discretion and will not be disturbed on appeal absent a clear showing of an abuse of such discretion. *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). We conclude that since any possible prejudice to defendant from the trial court's question was cured by the court's later jury instructions, the trial court did not abuse its discretion by denying defendant's motion for a mistrial on this basis. This assignment of error is overruled.

[12] In a related assignment of error, defendant contends that the trial court abused its discretion by overruling defendant's objections to the prosecutor's repeated questioning of Dr. Horacek about the statements made by codefendants Bradford and Gonzales. Over defendant's objections the trial court allowed the prosecutor to repeatedly question Dr. Horacek about the consistency of these statements in comparison to defendant's statement about the murders. The defendant also objected to the prosecutor's repeated questions concerning Dr. Horacek's use of these statements in forming his opinion about defendant's mental condition.

Defendant argues that because Dr. Horacek testified that he did not use the statements of the defendant and his codefendants as a basis for his opinion, the evidence was not admissible as nonsubstantive basis-of-opinion evidence under Rule 705 of the North Carolina Rules of Evidence. Defendant further argues that the questioning was improper and that the evidence was not admissible as substantive evidence because it was irrelevant, especially since the guilt or innocence of defendant had already been decided. He argues that this error was not harmless for the reasons that the evidence provided the jury with information from which it could assume, first, that defendant had lied about his involvement in the murders and, second, that Dr. Horacek did not care whether defendant had lied to the police at the time of his arrest. Defendant argues that this evidence caused the jury to disbelieve Dr. Horacek's testimony about defendant's mental condition. We disagree.

The trial court refused to admit the content of the statements made by Bradford and Gonzales as substantive evidence or as nonsubstantive basis-of-opinion evidence under Rule 705 of the North Carolina Rules of Evidence. However, the trial court allowed the prosecutor to question Dr. Horacek about his reasons for reviewing these statements but not using them as a basis for his opinion testi-

mony, including questions about the consistency between the statements of Bradford and Gonzales and defendant's statement.

> [The] North Carolina Rules of Evidence permit broad cross-examination of expert witnesses. N.C.G.S. § 8C-1, Rule 611(b) (1992). The State is permitted to question an expert to obtain further details with regard to his testimony on direct examination, to impeach the witness or attack his credibility, or to elicit new and different evidence relevant to the case as a whole. " 'The largest possible scope should be given,' and 'almost any question' may be put 'to test the value of his testimony.' " 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 42 (3d ed. 1988) (footnotes omitted) (citations omitted).

State v. Bacon, 337 N.C. 66, 88, 446 S.E.2d 542, 553 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995).

The prosecutor's questions of Dr. Horacek about his nonreliance on these statements were admissible not only to clarify his earlier inconsistent answers but to impeach his credibility. Dr. Horacek testified that in performing a psychiatric evaluation, "you rely on as many records as you can get." As discussed above, he testified that he reviewed all three statements when conducting his evaluation of defendant but that he did not rely on them as a basis for his opinion concerning defendant's mental condition. Evidence that Dr. Horacek reviewed these statements but chose not to rely on them as a basis for his opinion, including evidence that he knew the codefendants' statements contained versions of the events on the night of the murders different from defendant's statement, was relevant to impeach Dr. Horacek's expert testimony under Rule 611(b). N.C.G.S. § 8C-1, Rule 611(b) (1992). The trial court did not abuse its discretion in overruling defendant's objections to the prosecutor's questions of Dr. Horacek.

[13] Next, defendant contends that the trial court erred by submitting the aggravating circumstance that the murders were committed for the purpose of avoiding or preventing a lawful arrest. N.C.G.S. § 15A-2000(e)(4). Defendant argues that the evidence was insufficient to support the submission of this aggravating circumstance. We disagree.

In determining the sufficiency of the evidence to submit an aggravating circumstance, the trial court must consider the evidence in the

light most favorable to the State. *State v. Syriani*, 333 N.C. at 392, 428 S.E.2d at 140. The State is entitled to every reasonable inference to be drawn therefrom, and any discrepancies or contradictions in the evidence must be resolved in favor of the State. *Id.* " 'If there is substantial evidence of each element of the [aggravating] issue under consideration, the issue must be submitted to the jury for its determination.' " *State v. Moose*, 310 N.C. 482, 494, 313 S.E.2d 507, 516 (1984) (quoting *State v. Stanley*, 310 N.C. 332, 347, 312 S.E.2d 393, 401 (1984) (Martin, J., dissenting)).

Submission of this aggravating circumstance is proper when there is competent evidence from which the jury could infer that at least one of the defendant's reasons for committing a murder was to avoid detection and apprehension for his crimes. *State v. McCollum*, 334 N.C. 208, 219-20, 433 S.E.2d 144, 150 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895, *reh'g denied*, —— U.S. ——, 129 L. Ed. 2d 924 (1994). The evidence in the instant case was sufficient to warrant the submission of this aggravating circumstance to the jury. Codefendant Gonzales testified that shortly after defendant choked and snapped the neck of Bernadine Parrish until she was dead, defendant told Gonzales that he killed her "so we would never have to go to prison." This statement was admissible against defendant as a statement of a party-opponent under Rule 801(d)(A). N.C.G.S. § 8C-1, Rule 801(d)(A). Further, evidence was before the jury that after Bobbie Jean Hartwig screamed, defendant told Bradford to "take care of business" and instructed him to use the shotgun instead of the pistol "because if you use the pistol you are going to have to shoot her three or four times." These statements were also admissible against defendant under Rule 801(d)(A). This evidence was sufficient to support the submission of the aggravating circumstance that these murders were committed for the purpose of avoiding or preventing a lawful arrest. This assignment of error is overruled.

[14] Next, defendant contends that the trial court erred by submitting the aggravating circumstances that each murder was committed while defendant was engaged in the commission of a rape. N.C.G.S. § 15A-2000(e)(5). Defendant argues that the trial court erred in submitting the underlying felony of rape as an aggravating circumstance for both murders at his sentencing hearing, as he had already been convicted of both rape charges. Defendant concedes that this issue has been considered and rejected by this Court but asks that we reconsider our prior holdings.

When a murder is committed during one of the felonies enumerated in N.C.G.S. § 15A-2000(e)(5) and a defendant is convicted solely under the theory of premeditation and deliberation, the other felony may properly be admitted as an aggravating circumstance. *State v. Cherry*, 298 N.C. 86, 113, 257 S.E.2d 551, 568 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). When a defendant is convicted of first-degree murder solely under the theory of felony murder, submission of the underlying felony as an aggravating circumstance is error. Proof of the underlying felony is an essential element of the State's proof of felony murder; thus, the underlying felony cannot provide a basis for additional punishment. *State v. Goodman*, 298 N.C. 1, 14-15, 257 S.E.2d 569, 579 (1979). When a defendant is convicted under both theories and both are supported by the evidence, submission of the underlying felony as an aggravating circumstance is proper. *Id.* at 15, 257 S.E.2d at 579.

Defendant in this case was convicted of two counts of first-degree murder upon both the theory of premeditation and deliberation and the theory of felony murder. Under our prior holdings submission of rape as an aggravating circumstance was proper. As defendant has not offered any reason to overrule these prior holdings, this assignment of error is overruled.

Defendant next contends that the trial court erred by submitting the aggravating circumstances that each murder was committed while defendant was engaged in the commission of a kidnapping. N.C.G.S. § 15A-2000(e)(5). Defendant contends that the trial court erred in submitting kidnapping as an aggravating circumstance in each murder, defendant having already been convicted of two counts of kidnapping the victims. Again, defendant concedes that this issue has previously been decided against him. For the reasons stated in the preceding issue, this assignment of error is overruled.

[15] Next, defendant contends that the trial court erred by submitting the aggravating circumstances that each murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9). The trial court instructed the jury about this aggravating circumstance in accordance with North Carolina Pattern Instruction section 150.10 as follows:

> In this context, heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile, and cruel means designed to inflict a high degree of pain with utter indifference to or even the enjoyment of the suffering of others.

> However, it is not enough that the murder be heinous, atrocious, or cruel, as those terms have just been defined. This murder must have been especially heinous, atrocious, or cruel. And not every—and not every murder is especially so.
>
> For this murder to have been especially heinous, atrocious, or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing and this murder must have been a pitiless crime which was unnecessarily torturous to the victim.

Defendant contends that this instruction is overbroad, vague, and violates the defendant's rights to due process. Relying on *Godfrey v. Georgia*, 446 U.S. 420, 64 L. Ed. 2d 398 (1980), defendant argues that this instruction results in the arbitrary and capricious infliction of the death penalty because it fails to provide clear and easily applicable standards by which the jury can determine if this aggravating circumstance exists. Defendant concedes that this Court has repeatedly rejected this argument but asks that we reconsider our prior holdings.

In *State v. Syriani*, 333 N.C. at 391-92, 428 S.E.2d at 141, this Court held that this instruction provides constitutionally sufficient guidance to the jury because it incorporates narrowing definitions adopted by this Court and expressly approved by the United States Supreme Court. "Approved language includes the phrase 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' " *Id.* at 389, 428 S.E.2d at 139 (quoting *Profitt v. Florida*, 428 U.S. 242, 255, 49 L. Ed. 2d 913, 924 (1976)). Other acceptable language includes the phrase " 'the level of brutality exceeds that normally present in first-degree murder.' " *Id.* at 390, 428 S.E.2d at 140 (quoting *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 by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988)).

The pattern jury instruction given in this case incorporates both the approved phrases above. In *State v. Rook*, 304 N.C. 201, 225, 283 S.E.2d 732, 747 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982), this Court upheld a similar instruction incorporating these phrases conjunctively. As defendant has not provided any compelling reasons to overrule our prior holdings, this assignment of error is overruled.

[16] Next, defendant argues that the trial court erred by submitting the aggravating circumstances that each murder was committed by

defendant as part of a course of conduct involving the commission of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11). Defendant contends that the evidence was insufficient to support the submission of this aggravating circumstance.

Submission of this aggravating circumstance is proper when there is evidence that the victim's murder and other violent crimes were part of a pattern of intentional acts establishing that there existed in defendant's mind a plan, scheme, or design involving both the murder of the victim and other crimes of violence. *State v. Cummings*, 332 N.C. 487, 508, 422 S.E.2d 692, 704 (1992). "In determining whether to submit the course of conduct aggravating circumstance, the trial court must consider 'a number of factors, among them the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons.' " *State v. Lee*, 335 N.C. 244, 277, 439 S.E.2d 547, 564 (quoting *State v. Price*, 326 N.C. 56, 81, 388 S.E.2d 84, 98, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990)), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162, *reh'g denied*, —— U.S. ——, 130 L. Ed. 2d 532 (1994).

In this case the evidence was sufficient to warrant the submission of the "course of conduct" aggravating circumstance to the jury. The evidence showed that defendant engaged in a violent course of conduct by kidnapping, raping, and murdering Bernadine Parrish and Bobbie Jean Hartwig early in the morning of 24 August 1991. He also shot and seriously wounded Wesley Parrish shortly before he kidnapped the two murder victims from the side of the road in rural Pitt County. This assignment of error is overruled.

[17] Defendant next contends that the trial court erred by failing to submit his requested mitigating circumstance for each murder which stated that codefendant Richard Gonzales would not receive the death penalty for his participation in these crimes pursuant to a plea bargain with the State. Defendant argues that the instruction was proper in law and supported by the evidence. He contends that the general catchall phrase of N.C.G.S. § 15A-2000(f)(9), which permits the jury to consider any other circumstance arising from the evidence that has mitigating value, was insufficient to protect his rights under the law. Defendant concedes that this Court has previously rejected this argument but asks that we reconsider our prior holdings.

A mitigating circumstance is "a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, but which may be

considered as extenuating, or reducing the moral culpability of the killing, or making it less deserving of the extreme punishment than other first-degree murders." *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 447 (1981). In *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), the United States Supreme Court held that any aspect of the defendant's character, record, or circumstance of the particular offense offered by the defendant as a mitigating circumstance must be considered by the jury. *Id.* at 604, 57 L. Ed. 2d at 990. However, evidence irrelevant to these factors may be properly excluded by the trial court. *Id.* at 604 n.12, 57 L. Ed. 2d at 990 n.12.

In *State v. Irwin* this Court considered *Lockett* in reaching its conclusion that the fact a codefendant received a lesser sentence is irrelevant and inappropriate for the jury's consideration as an aggravating circumstance. *State v. Irwin*, 304 N.C. at 104, 282 S.E.2d at 447. The Court stated that evidence of a codefendant's plea bargain and lesser sentence has "no bearing on defendant's character, record or the nature of his participation in the offense." *Id.*

In the instant case the fact of Gonzales' plea bargain was before the jurors, who were free to deem it to have mitigating value and consider it under N.C.G.S. § 15A-2000(f)(9). As defendant has provided no compelling reasons to abandon our prior holding, this assignment of error is overruled.

[18] Next, defendant contends that the trial court erred by denying his request that the court give peremptory instructions on twenty-three nonstatutory mitigating circumstances supported by uncontroverted evidence. Defendant concedes that four of his submitted nonstatutory mitigating circumstances were not supported by uncontroverted evidence and that he was not entitled to peremptory instructions thereon. We reject defendant's arguments.

If the evidence supporting a nonstatutory mitigating circumstance is uncontroverted and manifestly credible, the defendant is entitled to a peremptory instruction on that circumstance upon his request. *State v. Gay*, 334 N.C. 467, 492, 434 S.E.2d 840, 854 (1993). This is true for both statutory and nonstatutory mitigating circumstances. *Id.* at 493, 434 S.E.2d at 855.

"In order to be entitled to [a peremptory] instruction defendant must timely request it." *State v. Johnson*, 298 N.C. 47, 77, 257 S.E.2d 597, 618-19 (1979). The trial court is not required to determine on its own which mitigating circumstances are deserving of a peremptory

instruction. *Id.* From the foregoing it follows that in order to be sufficient, defendant's request for a peremptory instruction for mitigating circumstances must specify which circumstances are supported by uncontroverted evidence and, therefore, entitle him to a peremptory instruction.

In the instant case defendant did not specify for the trial court which nonstatutory mitigating circumstances were supported by uncontroverted evidence and, therefore, entitle him to a peremptory instruction. As he concedes, defendant was not entitled to peremptory instructions on four of his proposed nonstatutory mitigating circumstances because they were not supported by uncontroverted evidence. A thorough review of the transcript discloses that the evidence supporting five other proposed nonstatutory mitigating circumstances was also controverted. We conclude that the trial court was not required to sift through all the evidence and determine which of defendant's proposed mitigating circumstances entitle him to a peremptory instruction.

Further, we conclude that defendant's request for peremptory instructions was inadequate under *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994). In *State v. Green* we held that the same peremptory instruction is not proper for both statutory and nonstatutory mitigating circumstances. *Id.* at 174, 443 S.E.2d at 33. While the jury must accord mitigating value to a statutory mitigating circumstance supported by uncontroverted evidence, the jury may deem a nonstatutory mitigating circumstance supported by uncontroverted evidence to be without mitigating value. *Id.* Different peremptory instructions for statutory and nonstatutory mitigating circumstances must reflect this distinction. *Id.*

In the instant case the transcript does not indicate that defendant asked for different peremptory instructions for statutory and nonstatutory mitigating circumstances. Defendant made a general written request for peremptory instructions on all his requested mitigating circumstances. At the charge conference during the capital sentencing proceeding, defendant made the following general request of the trial court:

> [DEFENSE COUNSEL]: We would also ask for peremptory instructions on each of our nonstatutory mitigating circumstances.
>
> THE COURT: That's denied.

[DEFENSE COUNSEL]: And also the request Mr. Wells made as it relates to the statutory mitigating circumstances, 1 through, ah, 6.

THE COURT: What about it?

[DEFENSE COUNSEL]: That you peremptorily instruct the jury to answer yes to those—to those—I think Mr. Wells referred to the nonstatutory mitigating circumstances.

[DEFENSE COUNSEL]: As I understand it Your Honor is going to instruct the same in that as you did in Kendrick Bradford's case which is—the statutory, of course, that they only have to find one or more of us finds this to exist, so it will have the effect of a peremptory instruction that it has mitigating value. I think that's—I think Mr. Ward is just trying to nail that down.

As this excerpt of the transcript reveals, defendant did not clearly specify that he was seeking a different instruction for statutory and nonstatutory mitigating circumstances, nor did defendant propose a different peremptory instruction for the nonstatutory mitigating circumstances. In light of the foregoing, we conclude that the trial court did not err by denying defendant's request for peremptory instructions for the twenty-three nonstatutory mitigating circumstances at issue.

[19] Next, defendant argues that the trial court's instruction on the capital sentencing procedure unconstitutionally made the consideration of mitigating evidence discretionary with the jury during sentencing.

In connection with Issue Two, the court instructed the jurors that if one or more of them found a mitigating circumstance to exist, they should write yes in the space provided on the Issues and Recommendation as to Punishment sheet.

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, "[w]hen deciding this issue, each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in issue two."

In the instructions for Issue Four, the trial court charged the jury that if it found beyond a reasonable doubt that the aggravating circumstances outweighed 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 it must consider the mitigating circumstances when making this determination. The trial court then charged the jury that "[w]hen making this comparison each juror may consider any mitigating circumstance or circumstances that juror determined to exist by a preponderance of the evidence."

Defendant contends that the use of the word "may" in these instructions indicated to the jury that the consideration of mitigating evidence was discretionary in making these determinations. Defendant argues that although a jury may determine the weight to be given mitigating evidence, it cannot give such evidence no weight at all and exclude it from its consideration. *Eddings v. Oklahoma*, 455 U.S. 104, 114, 71 L. Ed. 2d 1, 11 (1982). He argues that these instructions allowed the jurors to disregard properly found mitigating circumstances.

This Court has repeatedly rejected virtually identical challenges to the use of the word "may" in the instructions for the consideration of mitigating evidence in Issue Three and Issue Four. In *State v. Lee*, 335 N.C. at 286-87, 439 S.E.2d at 569-70, this Court held that the pattern jury instructions, upon which the instructions in the instant case were based, do not make consideration of any mitigating evidence discretionary with the jurors. The Court indicated that these instructions clearly and unambiguously instruct the jury that it must weigh the mitigating circumstances against the aggravating circumstances and that the sentences in which the word "may" is used merely "describe[] 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.* We conclude that the use of the word "may" did not make consideration of mitigating evidence discretionary with the jury.

Next, defendant argues that the instructions on the consideration of mitigating circumstances at Issue Three and Issue Four were improper because they failed to require that each juror consider mitigating circumstances found to exist by that juror personally. Defendant argues that the use of the word "may" allowed jurors who found mitigating circumstances to exist at Issue Two to disregard them at Issues Three and Four.

As we held above, the use of the word "may" does not make consideration of mitigating circumstances at Issues Three and Four discretionary and merely describes which mitigating circumstances are to be considered. In *McKoy v. North Carolina*, 494 U.S. 433, 435, 108 L. Ed. 2d 369, 376 (1990), the United States Supreme Court held that jurors may not be prevented from considering mitigating circumstances they personally found to exist, even if those circumstances are not found unanimously by the jury. The instructions at issue in this case required the jury to weigh the mitigating circumstances against the aggravating circumstances and did not prevent each juror from considering any mitigating circumstances which he or she personally found. The instructions were in accordance with the constitutional requirements of *McKoy*. Defendant's argument is overruled.

[20] Next, defendant argues that these instructions were improper because they failed to require each juror to consider every mitigating circumstance found by at least one juror. Defendant has failed to properly preserve this issue for appellate review by making it a basis for an assignment of error. N.C. R. App. P. 10(b)(1). Assignment of error fifty-five, to which defendant refers in his brief, is unrelated to any argument defendant makes in connection with these jury instructions. However, we have considered defendant's argument and find it to be without merit.

In *State v. Lee* this Court rejected a similar argument that each juror should be required to consider every mitigating circumstance found by any juror. The Court recognized that jurors cannot be precluded from giving effect to all mitigating evidence. *State v. Lee*, 335 N.C. at 286, 439 S.E.2d at 569 (citing *Mills v. Maryland*, 486 U.S. 367, 376, 100 L. Ed. 2d 384, 393 (1988)). The Court further recognized that a juror cannot be prevented from considering any mitigating evidence not unanimously found by the jury. *Id.* (citing *McKoy v. North Carolina*, 494 U.S. at 435, 108 L. Ed. 2d at 376). However, the Court held that these constitutional principles do not mandate that each juror must be required to consider every mitigating circumstance found by any juror, noting that such a holding would create an anomalous situation where all the jurors were required to consider a mitigating circumstance found by a single holdout juror. *Id.* at 287, 439 S.E.2d at 570. This Court concluded that the pattern jury charge, upon which the instant jury instructions were based, was sufficient because it did not preclude each juror from giving effect to all mitigating evidence he or she found to exist by a preponderance of the evidence. *Id.* As defendant has provided no compelling reasons to

abandon our prior holdings on this issue, defendant's argument is overruled.

[21] Next, in two related assignments of error, defendant contends that the trial court erred in instructing the jury as to the manner in which the jury should consider nonstatutory mitigating circumstances in Issue Two of the North Carolina capital sentencing procedure, thereby violating his state and federal constitutional rights. In accordance with the pattern jury instructions, the trial court instructed the jury that it must first find whether a nonstatutory mitigating circumstance existed and then consider whether that nonstatutory mitigating circumstance had value. Defendant argues that this allowed the jurors to determine that mitigating evidence was without value and to disregard it during their sentencing deliberations at Issues Three and Four. Defendant argues that this Court has recognized that the jury must give weight to statutory mitigating circumstances as a matter of law, and he contends that there is no constitutionally valid basis for treating nonstatutory mitigating circumstances any differently.

Defendant concedes that this issue has previously been decided against him but argues that this Court's prior holdings on this issue are no longer valid after the decisions of the United States Supreme Court in *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256 (1989), and *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369.

In *Penry v. Lynaugh* the United States Supreme Court stated that the jury is constitutionally required to "consider and give effect to [mitigating] evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. at 319, 106 L. Ed. 2d at 278. The Court based its holding in part on *Eddings v. Oklahoma*, 455 U.S. at 114, 71 L. Ed. 2d at 11, in which the Court held that the jury does not have the authority to accord found mitigating evidence no weight at all and exclude it from its consideration. In *McKoy v. North Carolina*, the United States Supreme Court held that the constitutional consideration of mitigating evidence in North Carolina occurs during Issues Three and Four and that each juror must be able to consider all mitigating evidence in making its deliberations on these issues. *McKoy v. North Carolina*, 494 U.S. at 442-43, 108 L. Ed. 2d at 381.

This Court rejected similar arguments to those raised by defendant in *State v. Williams*, 339 N.C. 1, 452 S.E.2d 245. This Court considered both *Penry* and *McKoy* in reaching its conclusion that the

pattern instructions for the consideration of nonstatutory mitigating circumstances are proper. This Court stated:

> While a juror may not be precluded from considering evidence proffered by defendant as a 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).

State v. Williams, 339 N.C. at 43-44, 452 S.E.2d at 270-71.

In *Williams* the Court noted that the basis for allowing the jury to determine whether a proffered nonstatutory mitigating circumstance has mitigating value is found in N.C.G.S. § 15A-2000(f)(9), the catchall circumstance under which nonstatutory mitigating circumstances are submitted to the jury. *Id.* at 44, 452 S.E.2d at 271. The jury properly finds a nonstatutory mitigating circumstance to exist if it finds that the evidence supports the existence of that circumstance and if it deems the circumstance to have mitigating value. *Id.*

This Court found it significant that in *McKoy*, the United States Supreme Court recognized without criticism the statutory procedure for consideration of nonstatutory mitigating circumstances:

> "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)."

State v. Williams, 339 N.C. at 45, 452 S.E.2d at 271 (quoting *McKoy v. North Carolina*, 494 U.S. at 441 n.7, 108 L. Ed. 2d at 379 n.7).

In light of the foregoing principles, we conclude that there is nothing constitutionally infirm with the pattern jury instruction, as given in this case, which allows jurors to determine in Issue Two if a nonstatutory mitigating circumstance has mitigating value. This instruction does not enable jurors to disregard mitigating evidence at either Issue Three or Four. Both of defendant's related assignments of error in connection with this instruction are overruled.

[22] Defendant next contends that the trial court erred by failing explicitly to instruct the jury that the age of defendant as a mitigating circumstance is not limited to his chronological age on the date of the crime but includes other factors such as his mental and emotional development, his judgment and maturity, and his prior experiences. The trial court instructed the jury on age as a mitigating circumstance as follows:

> 5. Consider whether the age of the defendant at the time of this murder is a mitigating factor.
>
> The mitigating effect[] of the age of the defendant is for you to determine from all of 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 foreperson 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 foreperson write no in that space.

The mitigating circumstance of defendant's age may not be determined solely by reference to defendant's chronological age at the time of the crime, 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). Defendant argues that the trial court's instructions on the age mitigating circumstance, based on the pattern jury instructions, did not sufficiently explain what factors could be considered and may have misled the jury to believe that this mitigating circumstance does not include factors other than chronological age. He argues that as a result the jury may have failed to find age as a mitigating circumstance.

Defendant failed to object to this instruction at trial, and plain error analysis applies. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected. *Id.* In this case, the jury was instructed that "[t]he 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." We conclude that this language did not limit the consideration of this mitigating circumstance solely to chronological age, but specifically instructed the jurors to consider all the facts and circumstances related to age that they found from the evidence. There is no error, much less plain error, in this instruction. This assignment of error is overruled.

[23] Defendant next contends that the trial court erred by allowing the State to pursue the death penalty against defendant because the State permitted codefendant Richard Gonzales to plead guilty to non-capital offenses for his participation in these crimes. Defendant argues that this difference rendered the death penalty arbitrary and capricious in defendant's case as Gonzales was equally responsible for all the crimes committed based upon the theory of "acting in concert." Although defendant raises this issue for the first time on appeal and has improperly preserved this issue for review, N.C. R. App. P. 10(b)(1), we have addressed this issue and have determined that the plea bargain at issue did not render defendant's death sentence arbitrary and capricious.

As discussed above, codefendant Richard Gonzales entered into a plea bargain with the State whereby he pled guilty to two counts of second-degree murder, two counts of first-degree kidnapping, one count of first-degree rape, one count of accessory after the fact to first-degree rape, and one count of accessory after the fact to assault with a deadly weapon with intent to kill inflicting serious injury. In exchange Gonzales agreed to testify truthfully against defendant and Kendrick Bradford at their trials.

The plea bargain between the State and Gonzales was in accordance with N.C.G.S. § 15A-1054, which specifically authorizes plea bargaining with criminal defendants in exchange for truthful testimony in other criminal proceedings. N.C.G.S. § 15A-1054(a). The constitutionality of this statute not having been raised or passed on by the trial court, that issue is not before this Court. *State v. Woods*, 307 N.C.

213, 219-20, 297 S.E.2d 574, 578 (1982). Defendant's contention is that the application of this statute in his case rendered his death sentence arbitrary and capricious since Gonzales thereby received a lesser sentence.

Disparity in the sentences imposed upon codefendants does not result in cruel and unusual punishment and is not unconstitutional. *State v. Atkinson*, 298 N.C. 673, 686, 259 S.E.2d 858, 866 (1979), *overruled on other grounds by State v. Jackson*, 302 N.C. 101, 273 S.E.2d 666 (1981). The details of the plea bargain between Gonzales and the State were before the jury, and Gonzales was cross-examined about the sentence he would receive for testifying against his codefendants. The jury was free to consider this evidence under the catchall mitigating circumstance in N.C.G.S. § 15A-2000(f)(9). Based on the foregoing, we conclude that defendant's death sentence was not rendered arbitrary or capricious by his codefendant's plea bargain with the State.

Next, defendant contends the trial court erred by failing to intervene to stop what defendant contends was the prosecutor's grossly improper closing argument. Defendant argues that when considered in its entirety, the prosecutor's closing argument was intended to inflame the passions and prejudices of the jury against defendant in violation of the death penalty statute and defendant's state and federal constitutional rights.

As defendant failed to object to any of these arguments at trial, they are reviewable only to determine whether they were so grossly improper that the trial court erred by failing to intervene *ex mero motu* to correct the errors. *State v. Sexton*, 336 N.C. 321, 349, 444 S.E.2d 879, 895, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429 (1994). "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

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. at 223, 433 S.E.2d at 152. Counsel are afforded wide latitude in arguing hotly contested cases, and the scope of this latitude lies within the sound discretion of the trial court. *State v. Soyars*, 332 N.C. at 60, 418 S.E.2d at 487.

We have considered each of the arguments to which defendant objects and find them all to be without merit.

[24] First, defendant contends that the prosecutor asked the jurors to place themselves in the position of the victims in the following argument:

> Ah, you know, there is no way that any of us, I guess, can show you any number of photographs or talk in any way to any great extent to put you in the same position and see those things that occurred on the evening of the 23rd and the morning of the 24th of August of 1991. Ah, I think, though, if you think and make a conscious effort to think about that evening and what happened that evening, that it was pure horror. Pure, unadulterated horror.
>
> Three people walking on the highway, one shot down like a dog in the ditch, the other two ladies forced in the car, driven a distance, the car running in a ditch, ladies forced to try to help move the car. Those ladies as you heard evidence about crying, hysterical, worried about one of them's (sic) mother and what effect shooting or potential shooting of the brother would have on her mother because of her mother's heart condition. Two women giving their bodies, raped, and raped. And then murdered. And not—murdered in a most vile way.
>
> Bernadine Parrish, strangled in the fashion that you heard. Ah, after being raped, she passes out, becomes conscious again, sits up, strangled again to the point that her—she looses control of her bodily functions and [is] then thrown in a ditch.
>
> Bobbie Jean Hartwig, raped and raped, strangled, thrown in a ditch, regains consciousness, screaming in the ditch after being strangled and then blown away in the chest with a shotgun.
>
> I guess you folks put yourselves and try to imagine—I don't believe any of us are capable of imagining the pure horror that was going on there particularly at the campus of Pitt Community College that night in that field and in that ditch.

In *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991), the victim was strangled to death. During closing argument at the sentencing hearing, the prosecutor asked the jurors to hold their breath for as long as they could over a four-minute period so they could " 'understand . . . the dynam-

ics of manual strangulation.' " *Id.* at 324, 384 S.E.2d at 496. Although the defendant in that case objected, his objection was overruled. On appeal this Court 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. In the instant case the transcript reveals that the prosecutor was merely urging the jurors to appreciate the circumstances of the crime. The prosecutor's argument related to the nature of defendant's crimes which is one of the touchstones for propriety in a capital sentencing argument. *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). The prosecutor did not misstate or manipulate the evidence and did not ask the jurors to put themselves in the place of the victims. We conclude that the argument was not improper and that the trial court did not err by failing to intervene *ex mero motu* to prevent it.

[25] Next, defendant argues that the trial court erred by allowing the prosecutor to make several arguments to the jury based on victim-impact information. Defendant has not specified which arguments made by the prosecutor contained victim-impact statements. A review of the transcript disclosed the following alleged victim-impact arguments:

> I told you earlier there is nothing I can do to ease their pain and suffering those last few moments. Nothing I can do to ease the pain and suffering of everyone around them.
>
> It's [sic] nothing I can do to change the way that history will record their lives, not as two young ladies living in a small community, like we all do, but rather as those two ladies who were raped and murdered behind Pitt Community College. The visions of their faces on television screens and body bags being pulled from ditches records their lives now. I can't change that.
>
> They'll be known from now on as those two girls murdered behind Pitt Community College. That's just one of the many things that, um, Warren Gregory has done to these ladies, not only their—ending their lives but also ruining any memories that anyone had of them. So its [sic] little I can do about them. I can't change that.
>
> I can't change how they died, where they died. I can't relieve them of any of the pain. All I can do is try to say something, something that will convince you that justice must be done here.

Later in his closing argument, the prosecutor argued:

> I'm the last person who will speak in this courtroom on behalf of these two people, Bernadine and Bobbie Jean. As you can imagine, I'm sure there are pictures of them growing up. I'm sure their mommas and boyfriends —
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: I mean sometimes [the victims] get lost in these hearings in what it's all about. You know, this is my presentation. This is your life Bernadine. This is your life Bobbie Jean. You're those two girls who were murdered behind Pitt Community College and that's all you are. You don't have a life. You have nothing. That's all you are in this court today. And I'll put these in this box right here and we'll close them up, and that's one more case for the vault downstairs. You think about that.
>
> They had a right to expect better. They had a right to a life that went beyond a muddy ditch behind Pitt Community College. They didn't die of cancer or a car wreck or something. . . .
>
> They had a right to have a decent burial. Not a bunch of bones and skin. They had a right to have their parents and their children look at them in some funeral home somewhere.

In *Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735, *reh'g denied*, 501 U.S. 1277, 115 L. Ed. 2d 1110 (1991), the United States Supreme Court upheld the use of victim-impact statements during closing arguments unless the victim-impact evidence is so prejudicial that it renders a trial fundamentally unfair. The prosecutor's statements in the instant case were made as a part of his argument that the deaths of the victims represented a unique loss to their families. *Id.* His argument stressed that the victims were dead and that defendant was the person responsible for their deaths. *Id.* The prosecutor's arguments about the location and condition of the victims' bodies was based on facts properly presented at trial. We conclude that these victim-impact statements did not render defendant's trial fundamentally unfair.

[26] Next, defendant contends that the prosecutor improperly attempted to argue that the jury should reject one of defendant's proffered mitigating circumstances in such a way as to win favor with the jury and influence its decision. The prosecutor argued that the pur-

pose of submitting the nonstatutory mitigating circumstance that defendant was convicted by the testimony of an accomplice was designed to influence the jury to question at sentencing whether it did the right thing by finding him guilty at the guilt-innocence phase of the trial. The prosecutor stated that he did not know how this was a mitigating circumstance since defendant had already been found guilty beyond a reasonable doubt.

In *State v. Artis*, 325 N.C. at 325, 384 S.E.2d at 497, this Court held that the prosecutor "is permitted to characterize and to contest the weight of proffered nonstatutory mitigating circumstances." In the instant case the prosecutor was properly characterizing and contesting the weight and validity of this nonstatutory mitigating circumstance. The prosecutor did not exceed the scope of the evidence or the wide latitude accorded to counsel in hotly contested cases, and the trial court did not err by failing to intervene *ex mero motu* to correct this argument.

[27] Next, defendant argues that the prosecutor attacked defendant's Moslem religion in an attempt to discredit his testimony. The prosecutor mentioned the nonstatutory mitigating circumstance that defendant served his country in a time of war despite the conflict with his religious beliefs. He then argued that defendant's religious belief was not "thou shalt not kill." The prosecutor argued that defendant's belief was "thou [shalt] not kill Moslems, that is, kill anybody else but not Moslems." We conclude that the prosecutor here was merely characterizing and contesting the weight of defendant's proffered nonstatutory mitigating circumstance. The prosecutor did not exceed the scope of the evidence or the wide latitude afforded counsel in hotly contested cases. The trial court did not err by failing to intervene *ex mero motu* to prevent this argument.

[28] Next, defendant argues that the prosecutor improperly argued lack of remorse and defendant's bad character as nonstatutory aggravating circumstances. The emphasis during the sentencing phase of a capital trial is on the circumstances of the crime and on defendant's character. *State v. Artis*, 325 N.C. at 325, 384 S.E.2d at 497; *State v. Oliver*, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1983). Defendant fails to cite to any pages in the transcript where this alleged error occurred. Our thorough review of the State's argument reveals that any references to defendant's lack of remorse or character were proper under *State v. Artis*.

We conclude that there was no error in the trial court's failure to intervene *ex mero motu*. The particular arguments to which defendant objects did not rise to the level of gross impropriety so as to require the trial court to intervene *ex mero motu* to correct them.

PRESERVATION ISSUES

Defendant raises four additional issues which he has denominated as preservation issues: (i) the trial court erred by denying defendant's pretrial motions for a bill of particulars; (ii) the trial court erred by denying defendant's pretrial motion to strike the death penalty from consideration; (iii) the trial court committed plain error by failing to conduct a *voir dire* of potential jurors concerning their understanding of the meaning of life imprisonment; and (iv) the trial court erred by instructing the jury that it had a duty to impose a death sentence. We have considered defendant's arguments with regard to these issues and have found no compelling reasons to depart from our prior holdings which defendant correctly recognizes are dispositive. *See State v. Ward*, 338 N.C. 64, 122, 449 S.E.2d 709, 742 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 1013 (1995). Defendant also lists as preservation issues that the trial court erred by denying defendant's pretrial motion to suppress his confession and the trial court erred by denying defendant's motion to dismiss all charges for insufficiency of the evidence. We note first that these issues are not proper preservation issues because they are not determined solely by principles of law upon which this Court has previously ruled. Rather, these assignments of error are fact specific requiring review of the transcript and record to determine if the assignment has merit. Where counsel determines that an issue of this nature does not have merit, counsel should "omit it entirely from his or her argument on appeal." *State v. Barton*, 335 N.C. 696, 712, 441 S.E.2d 295, 303 (1994). Nevertheless, we have thoroughly reviewed the transcript and record as to these assignments and have found no error. These two assignments of error are, therefore, without merit.

PROPORTIONALITY

Having found defendant's trial and capital sentencing proceeding to be free of prejudicial error, we are required by N.C.G.S. § 15A-2000(d)(2) 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. *State v. McCollum*, 334 N.C. at 239, 433 S.E.2d at 161.

The following five aggravating circumstances were submitted and found by the jury for each murder: (i) the murder was committed for the purpose of avoiding a lawful arrest, N.C.G.S. § 15A-2000(e)(4); (ii) the murder was committed while defendant was engaged in the commission of rape, N.C.G.S. § 15A-2000(e)(5); (iii) the murder was committed while defendant was engaged in the commission of kidnapping, N.C.G.S. § 15A-2000(e)(5); (iv) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (v) 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).

After a thorough review of the transcript, record on appeal, and briefs and oral arguments of counsel, we conclude that the jury's finding of each of these aggravating circumstances was supported by the evidence presented at trial. We have also determined that nothing in the record suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

[29] Finally, we must consider "whether the punishment of death in this case is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." *State v. Davis*, 340 N.C. 1, 28, 455 S.E.2d 627, 641-42, *cert. denied*, —— U. S. ——, —— L. Ed. 2d ——, 64 U.S.L.W. 3243 (1995). 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, 164-65, 362 S.E.2d 513, 537 (1987), *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. 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. Conaway*, 339 N.C. 487, 538, 453 S.E.2d 824, 856 (1995).

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.

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.

Characteristics distinguishing the instant case include: (i) the repeated raping of the two victims, (ii) the repeated attempts to kill both victims, (iii) fear on the part of the victims who were kidnapped and held at gunpoint, and (iv) multiple murders committed to avoid arrest.

Defendant was convicted of both first-degree murders on the theories of premeditation and deliberation and felony murder. He was also convicted of one count of assault with a deadly weapon with intent to kill inflicting serious injury, two counts of first-degree kidnapping, and two counts of first-degree rape. For each murder the jury found each of the five submitted aggravating circumstances.

Of the thirty-four mitigating circumstances submitted, the jury found seventeen. While seven statutory mitigating circumstances were submitted, only three were found. The three statutory mitigating circumstances that were found were: (i) the defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of mental or emotional disturbance, and (iii) the catchall circumstance. The nonstatutory mitigating circumstances which were found related to defendant's (i) mental and emotional disturbance; (ii) inability to resist the influence of others because of alcohol and mental problems; (iii) conviction by the testimony of an accomplice; (iv) honorable service of his country in the Gulf War; and (v) good relationship with his mother, brother, and sister. The jury declined to find the statutory mitigating circumstances (i) that defendant's capacity to appreciate the criminality of his conduct was impaired, N.C.G.S. § 15A-2000(f)(6); (ii) that defendant's capacity to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6); (iii) the age of defendant at the time of the crime, N.C.G.S. § 15A-2000(f)(7); and (iv) that defendant acted under duress or under the influence of another person, N.C.G.S. § 15A-2000(f)(5).

We begin our analysis by comparing this case to those cases in which this Court has determined the sentence of death to be disproportionate. 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 (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).

We find no significant similarity between the instant case and any of the seven 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. Additionally, none of these cases included a sex offense as part of the course of conduct of the crimes. Finally, multiple aggravating circumstances were found to exist in only one of the disproportionate cases. *State v. Young*, 312 N.C. 669, 325 S.E.2d 181.

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). *State v. Gibbs*, 335 N.C. at 73, 436 S.E.2d at 363. In this case both the especially heinous, atrocious, or cruel circumstance and the course of conduct circumstance were found to exist by the jury for each murder.

"[I]n our assessment of whether a case is proportionate to other death-affirmed cases, this Court's attention is focused upon an 'independent consideration of the individual defendant and the nature of the crime or crimes which he has committed.' " *State v. Robinson*, 336 N.C. 78, 139, 443 S.E.2d 306, 337 (1994) (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)), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995).

The fact that defendant is a multiple-murderer stands as a "heavy" factor against defendant when determining the proportionality of a death sentence. *State v. McHone*, 334 N.C. 627, 648, 435 S.E.2d 296, 308 (1993), *cert. denied*, —— U.S. ——, 128 L. Ed. 2d 220 (1994); *State v. Robbins*, 319 N.C. 465, 529, 356 S.E.2d 279, 316, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). Another factor in our consideration of proportionality in the instant case is this Court's observation that juries consistently return death sentences in cases where the victim has been sexually assaulted. *State v. Holden*, 321 N.C. at 165, 362 S.E.2d at 538; *see State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250, *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526 (1985); *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732.

In *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547, the defendant kidnapped and raped two women on two different occasions. Defendant murdered one victim by beating and strangling her; the other victim managed to escape. The jury found three aggravating circumstances

when determining defendant's sentence for the murder: (i) that the murder was committed while defendant was engaged in a kidnapping; (ii) that the murder was especially heinous, atrocious, or cruel; and (iii) course of conduct. *Id.* at 293, 439 S.E.2d at 573. The jury found the statutory mitigating circumstances: (i) that defendant had no significant history of criminal activity; (ii) that defendant was mentally and emotionally disturbed; and (iii) that defendant's capacity to appreciate the criminality of his conduct was impaired. In affirming the defendant's death sentence, this Court noted that "[t]he crimes the defendant committed against the victim occurred over a period of several hours. During this time, the victim undoubtedly experienced extreme psychological and physical torture." *Id.* at 297-98, 439 S.E.2d at 575-76.

In the instant case the victims also experienced extreme psychological and physical torture. The victims heard defendant shoot at Wesley Parrish and were forced to ride in the car with defendant and his friends. The victims were then raped repeatedly before being killed. In addition, unlike in *Lee*, where the defendant killed only one of his victims, here both victims were killed.

In *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144, the nineteen-year-old defendant was convicted of first-degree murder and of first-degree rape. *Id.* at 217, 433 S.E.2d at 148. As in the murder of Bernadine Parrish, the victim in *McCollum* died of asphyxiation. *Id.* at 218, 433 S.E.2d at 149. The jury found the aggravating circumstances that the murder was committed for the purpose of avoiding or preventing lawful arrest and that the murder was especially heinous, atrocious, or cruel. *Id.* at 239-40, 433 S.E.2d at 161. As in the instant case, the jury found the statutory mitigating circumstances that defendant has no significant history of prior criminal activity and that the felony was committed while defendant was under the influence of a mental or emotional disturbance. *Id.* at 240, 433 S.E.2d at 161. Also as in the instant case, the jury rejected the statutory mitigating circumstances that defendant acted under duress or domination of another, that his capacity to appreciate the criminality of his conduct was impaired, and defendant's age at the time of the crime. The Court upheld the death sentence, stating that "[a]fter comparing this case carefully with all others in the pool of 'similar cases' used for proportionality review, we conclude that it falls within the class of first-degree murders for which we have previously upheld the death penalty." *Id.* at 244-45, 433 S.E.2d at 164.

We conclude that as in *McCollum*, the murders in the instant case "fall[] within the class of first-degree murders for which we have previously upheld the death penalty." *Id.* The murders at issue in this case are marked by brutality and callousness. The evidence indicates that defendant, along with two of his friends, forced the victims to endure the trauma of being kidnapped at gunpoint and repeatedly raped before being killed. When defendant decided to kill the victims, he began by attempting to strangle Bernadine Parrish. Parrish at some point became unconscious. However, Parrish later regained consciousness; so defendant strangled her again. The second time he was successful in killing her. Defendant had also attempted to strangle Bobbie Jean Hartwig. However, she also regained consciousness; so defendant told Bradford to "take care of business." Bradford then took a shotgun and shot Bobbie Jean Hartwig in the chest. The victims were killed so that defendant "would never have to go to prison."

In light of the foregoing, 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. Comparing defendant's case to similar cases in which the death penalty was imposed and considering both the crimes and defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive.

NO ERROR.

STATE OF NORTH CAROLINA v. DAVID CLAYTON LYNCH

No. 242A93

(Filed 28 July 1995)

1. Jury § 141 (NCI4th); Criminal Law § 1322 (NCI4th)— capital murder—jury selection—questions concerning parole

The trial court did not err in a capital first-degree murder prosecution when it denied defendant's motion to permit *voir dire* of potential jurors regarding their conceptions about parole eligibility and in refusing to instruct the jury during trial regarding the limits of parole eligibility on a life sentence. The North Carolina Supreme Court has consistently held that jurors should

not be questioned concerning their perceptions about parole eligibility during *voir dire* and has also held that evidence about parole eligibility is not relevant in determining sentencing in a capital proceeding even if the defendant requests such an instruction or if during deliberations the jury has a question about life sentences. (For offenses occurring after 1 October 1994, the trial judge must instruct the jury that a sentence of life imprisonment means a sentence of life without parole.) N.C.G.S. § 15A-2002.

Am Jur 2d, Trial §§ 575, 1118.

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

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

2. Jury § 142 (NCI4th)— capital murder—jury selection—question concerning impact of child as victim—not allowed

The trial court did not err in a capital first-degree murder prosecution by not allowing defendant to ask potential jurors during *voir dire* whether they would automatically tend to feel that the death penalty should be imposed where the victim was a child. The question at issue here was impermissible under *State v. Robinson*, 339 N.C. 263, as an attempt to "stake out" the juror and determine what kind of verdict the juror would render under the named circumstance.

Am Jur 2d, Jury §§ 207, 279.

3. Jury § 151 (NCI4th)— capital murder—jury selection—burden of proof for mitigating circumstances—questions not allowed

The trial court did not err in a capital first-degree murder prosecution by not allowing defendant to ask a potential juror whether the defense would have to prove something in order to change personal opinions leaning toward the death penalty. The juror had not been instructed as to the legal principles at issue when the question was asked and defendant did not attempt to ask any more questions on this issue after the court had explained the law to the jurors.

Am Jur 2d, Jury § 279.

4. Jury § 153 (NCI4th)— capital murder—jury selection—ability to consider mitigating circumstances—question not allowed

The trial court did not err in a capital first-degree murder prosecution by not allowing defendant to ask potential jurors whether their feelings about the death penalty were strong enough that they would not consider mitigating circumstances, "things that are set out in the law." The phrasing of the question to imply that all mitigating circumstances were "set out in the law" was an inaccurate statement of the law, and the court allowed defense counsel to fully investigate potential jurors' views and feelings about the death penalty and ask if they would automatically vote for death and if they understood they could consider mitigating circumstances.

Am Jur 2d, Jury § 279.

5. Evidence and Witnesses §§ 203, 716, 694 (NCI4th)— capital murder—evidence of defendant's mental illness excluded—no prejudicial error

In a capital prosecution for first-degree murder, the trial court was correct in not allowing questions about family history and mental illness without a foundation establishing whether defendant's mental illness was hereditary; no prejudice resulted from disallowing a witness' testimony about defendant's background and character where the same or similar evidence was admitted through other witnesses; and no determination of whether exclusion of evidence constituted error could be made where no offer of proof was made.

Am Jur 2d, Appellate Review §§ 705, 752-760; Evidence § 356.

6. Evidence and Witnesses § 203 (NCI4th)— capital murder—mental illness in defendant's family—no foundation—not admissible

The trial court did not err in a capital first-degree murder prosecution by sustaining the prosecutor's objections to a psychiatrist's testimony in the guilt-innocence phase regarding depressive problems suffered by defendant's mother and mental illness in defendant's family where no evidence had yet been offered to establish that defendant and his mother suffered from the same mental illness or that the mental illness from which

defendant suffered was hereditary. The witness was allowed to testify in depth in the guilt-innocence phase about defendant's home life and defendant's conflict with his father and to testify during the sentencing phase that defendant suffered from Aspberger syndrome, that this syndrome would produce manic depressive illness in adult life, that manic depressive illness and Aspberger syndrome "run in families," and evidence was then admitted that other members of defendant's family suffered from depression.

Am Jur 2d, Evidence § 338.

7. Evidence and Witnesses §§ 1694, 1501 (NCI4th)— capital murder—photographs of victims—bloody

The trial court did not abuse its discretion in a capital first-degree murder prosecution by admitting photographs of the victims at the crime scene and at the autopsy and the blood stained clothes of one of the victims. The pictures were admitted to illustrate testimony describing the position of the victims, the various injuries sustained by the victims, and the damage done to the neighborhood by defendant; the testimony was relevant and probative to the State's case against defendant; and the photographs and clothing submitted during the sentencing proceeding established the severity and brutality of the attack on one of the victims, India Anderson, and was admissible to support the especially heinous, atrocious, or cruel aggravating circumstance.

Am Jur 2d, Evidence §§ 1451, 1070.

Admissibility in evidence of colored photographs. 53 ALR2d 1102.

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

8. Criminal Law §§ 436, 445 (NCI4th)— capital murder—prosecutor's argument—insanity defense—evasion of responsibility—return to community—no prejudice

The trial court properly controlled the prosecutor's closing argument when the prosecutor argued that he did not think that defendant should be able to dodge or avoid or be free from responsibility by being found not guilty by reason of insanity, that a verdict of not guilty by reason of insanity is the same as a not

guilty verdict, and that the jury should find defendant guilty in order to prevent him living in the jurors' neighborhoods and committing more crimes. The court intervened *ex mero motu* and specifically instructed the jury not to take the prosecutor's personal opinions into consideration, and the jurors were also instructed to disregard statements by the prosecutor that defendant would be under no restrictions if found not guilty and that defendant might become their neighbor.

Am Jur 2d, Criminal Law § 917; Trial § 571.

Prejudicial effect of argument or comment that accused, if acquitted on ground of insanity, would be released from institution to which committed. 44 ALR2d 978.

9. Criminal Law § 769 (NCI4th)-- capital murder—insanity—instructions—no lessening of State's burden

The trial court did not err in a capital first-degree murder prosecution in its insanity instruction where defendant contends that the instructions failed to allow the jury to consider evidence regarding defendant's insanity on the individual elements of each charge, but, read contextually and in their entirety, the instructions clearly instruct the jury to consider the evidence of defendant's diminished and impaired mental capacity in determining if defendant had the ability to formulate the specific intent which is required for conviction of first-degree murder on the basis of malice, premeditation and deliberation. The distinction in the instructions between a finding of lack of mental ability to premeditate and deliberate and insanity does not constitute error.

Am Jur 2d, Trial §§ 1270-1278.

10. Criminal Law § 767 (NCI4th)— capital murder—instructions—insanity—burden of persuasion on intent

The trial court did not err in a capital first-degree murder prosecution by instructing the jury that everyone is presumed sane and that soundness of mind is the natural and normal condition of people. Although defendant argues that the presumptions shifted to defendant the burden of persuasion on the element of intent and that cases dealing simply with the constitutionality of the insanity defense are inapplicable to this case where the jury considered diminished capacity, the cases

relied upon by defendant stand for the proposition that an expert witness may testify concerning the defendant's ability to make and carry out plans, and the jury may consider such evidence when determining if defendant had the ability to form a specific intent, and do not change the N.C. Supreme Court's analysis on the issue of the insanity instruction.

Am Jur 2d, Trial §§ 1270-1278.

11. Criminal Law § 767 (NCI4th)— capital murder—insanity—instructions—burden of proof

The trial court did not err in a capital first-degree murder prosecution by instructing the jury as to defendant's burden of proving his insanity defense in accordance with existing North Carolina law. Defendant presented no new argument persuading the Supreme Court that it should overrule its previous decisions.

Am Jur 2d, Trial §§ 1270-1278, 1291.

12. Criminal Law § 1310 (NCI4th)— capital murder—sentencing—evidence of racist statements by defendant—admissible

The trial court did not abuse its discretion in a capital first-degree murder sentencing hearing by overruling defendant's objections and refusing a mistrial after evidence was elicited during cross-examination of two of defendant's expert witnesses that defendant had stated that he wanted "to shoot at blacks and to watch them dance." The statement was not elicited to establish any type of racial bias but instead to impeach the opinions of the experts and test the value of their testimony. The statement was also relevant to show that defendant had, prior to the shooting, manifested dangerousness and a violent attitude toward a particular group of people. Although both victims and defendant were white and nothing in the record suggests the killing of either victim was a racial act, the evidence was relevant since defendant shot at a particular group of people, his neighbors.

Am Jur 2d, Evidence §§ 326, 344.

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

The especially heinous, atrocious, or cruel aggravating circumstance is constitutional. The instruction held unconstitu-

tional in *Smith v. Dixon*, 766 F. Supp. 1370, defined especially heinous, atrocious, or cruel without limiting the words which focused the jury with specificity to the nature of the 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.

14. Criminal Law § 1345 (NCI4th)— first-degree murder—especially heinous, atrocious, or cruel—evidence sufficient

The trial court did not err in a capital first-degree murder prosecution by submitting the especially heinous, atrocious, or cruel aggravating circumstance to the jury where testimony demonstrates that the killing would have been "physically agonizing" to the victim and that the killing was conscienceless, pitiless, or unnecessarily torturous; defendant manifested unusual depravity of mind in this case, repeatedly and continuously shooting the victim, even as she attempted to crawl to safety; while certain testimony suggested that the first or second shot that struck India was the shot to the head and that death would have occurred soon after India was shot in the head, other evidence indicated that the victim lived for some time after being shot more than once and that in the last moments before her death, the victim was aware that she was going to die but was unable to prevent her 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.

15. Criminal Law § 1323 (NCI4th)— first-degree murder—mitigating circumstances—instructions—weight of nonstatutory circumstances

There was no error in a capital sentencing hearing for first-degree murder where the court's peremptory instructions for nonstatutory mitigating circumstances, which instructed the jury

that all the evidence tended to show the particular mitigating circumstance but the jury must determine if the circumstance existed and had value, were correct. Although defendant in essence argues that the jury should have been instructed to consider and give weight to uncontroverted nonstatutory mitigating circumstances, defendant demonstrated no reason why the Supreme Court should reverse or alter recent precedent.

Am Jur 2d, Criminal Law §§ 598, 599, 628; Trial § 1441.

16. Criminal Law § 681 (NCI4th)— first-degree murder—mitigating circumstances—mental disturbance and impaired capacity—no peremptory instruction

The trial court did not err in a capital sentencing hearing for first-degree murder by not giving peremptory instructions as to the statutory mitigating circumstances that the murder was committed under the influence of mental or emotional disturbance, that defendant's capacity to appreciate the criminality of his conduct was impaired, or as to the nonstatutory circumstance that defendant was generally depressed. The evidence was conflicting as to whether defendant was under the influence of a mental or emotional disturbance when he committed the murders, whether his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, and whether defendant was generally depressed.

Am Jur 2d, Criminal Law §§ 41, 598, 599.

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

Modern status of test of criminal responsibility—state cases. 9 ALR4th 526.

17. Criminal Law § 692 (NCI4th)— first-degree murder—instructions—not in writing

There was no reversible error in a first-degree murder prosecution where the trial court failed to provide the jury with written instructions.

Am Jur 2d, Trial § 1156.

Propriety and prejudicial effect of sending written instructions with retiring jury in criminal case. 91 ALR3d 382.

18. Criminal Law § 1346 (NCI4th)— first-degree murder—creating risk of death to more than one person

The trial court did not err in a first-degree murder prosecution by overruling defendant's objections and denying his motion to preclude the use of the aggravating circumstance of creating risk of death to more than one person. N.C.G.S. § 15A-2000(e)(10).

Am Jur 2d, Criminal Law §§ 598, 599.

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.

19. Criminal Law § 1347 (NCI4th)— first-degree murder—aggravating circumstance—course of conduct

The trial court did not err in a first-degree murder prosecution by overruling defendant's objection and denying his motion to preclude the use of the course of conduct aggravating circumstance. N.C.G.S. § 15A-2000(e)(11).

Am Jur 2d, Criminal Law §§ 598, 599.

20. Jury §§ 145, 103 (NCI4th)— first-degree murder—jury selection—individual voir dire—death qualification

The trial court did not err in a first-degree murder prosecution by allowing death-qualification of the jury and by denying defendant's motion for individual *voir dire* for a portion of the jury *voir dire*.

Am Jur 2d, Jury §§ 198,199.

21. Jury § 262 (NCI4th)— first-degree murder—peremptory challenges—jurors opposed to death penalty

The trial court did not err in a first-degree murder prosecution by permitting the prosecutor to use peremptory challenges to excuse qualified jurors on account of their lack of enthusiasm for or opposition to the death penalty.

Am Jur 2d, Jury § 234.

22. Criminal Law § 1334 (NCI4th)— death penalty—aggravating circumstances—pretrial notice

The trial court did not err in a first-degree murder prosecution by failing to require the prosecution to make pretrial disclosure of the aggravating circumstances on which the State intended to rely and any evidence tending to negate or establish such factors.

Am Jur 2d, Criminal Law §§ 598, 599.

23. Criminal Law § 1351 (NCI4th)— first-degree murder—mitigating circumstances—burden of proof

The trial court did not err in a first-degree murder prosecution by instructing the jury that defendant bore the burden of proving mitigating circumstances to the satisfaction of the jury.

Am Jur 2d, Criminal Law §§ 598, 599.

24. Criminal Law § 1323 (NCI4th)— first-degree murder—aggravating circumstances in equipoise

The trial court did not err in a first-degree murder prosecution by giving an instruction that allowed the jury to consider the death penalty if the aggravating and mitigating circumstances were in equipoise.

Am Jur 2d, Trial § 1120.

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

The North Carolina death penalty statute is constitutional.

Am Jur 2d, Criminal Law § 628.

26. Criminal Law § 1327 (NCI4th)— first-degree murder—aggravating and mitigating circumstances—instruction—duty to return death penalty

The trial court did not err in a first-degree murder prosecution when it instructed the jury that it had a duty to return a recommendation of death if it found the aggravating circumstances, in light of the mitigating circumstances, were sufficiently substantial to call for the death penalty.

Am Jur 2d, Criminal Law §§ 598, 599.

27. Evidence and Witnesses § 1209 (NCI4th)— first-degree murder—defendant's pretrial statement—motion to suppress denied

The trial court did not err in a first-degree murder prosecution in denying defendant's motion to suppress defendant's pretrial statement to the police.

Am Jur 2d, Evidence § 763.

28. Homicide § 228 (NCI4th)— first-degree murder—motion to dismiss charges denied

The trial court did not err in a first-degree murder prosecution in denying defendant's motion to dismiss all charges against him.

Am Jur 2d, Homicide § 425.

29. Jury § 145 (NCI4th)— first-degree murder—voir dire—questions regarding mitigating circumstances

The trial court did not err in a first-degree murder prosecution when it sustained the prosecution's objections to defense questions on *voir dire* regarding the jurors' understanding of specific mitigating circumstances and mitigating circumstances in general.

Am Jur 2d, Jury §§ 205, 206, 264.

30. Jury § 217 (NCI4th)— first-degree murder—jury selection—death penalty—excusal of jurors

The trial court did not err in a first-degree murder prosecution in excusing several jurors for cause based on their answers regarding their ability to consider capital punishment.

Am Jur 2d, Jury § 279.

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

31. Criminal Law § 1326 (NCI4th)— first-degree murder—sentencing—instructions—burden of proof

The trial court did not err in a first-degree murder prosecution in failing to define for the jury the term preponderance of the evidence as that term relates to defendant's burden to prove mitigating circumstances.

Am Jur 2d, Criminal Law § 598, 599.

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

A death sentence in a first-degree murder prosecution was not disproportionate where the record supports the jury's finding of the aggravating circumstances upon which the court based its sentence of death; the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and the sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Am Jur 2d, Criminal Law § 628.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death entered by Sitton, J., at the 26 April 1993 Criminal Session of Superior Court, Gaston County, upon two jury verdicts of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments imposed for two counts of assault with a deadly weapon with intent to kill inflicting serious injury, one count of assault with a deadly weapon with intent to kill, five counts of assault with a deadly weapon on a law enforcement officer, six counts of assault by discharging a firearm into occupied property, and seven counts of injury to personal property was allowed 6 July 1994. Heard in the Supreme Court 13 February 1995.

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

Richard B. Glazier for defendant-appellant.

PARKER, Justice.

Defendant was tried capitally on indictments charging him with the first-degree murders of India Anderson and Bobby Dean Anderson. The jury returned verdicts finding defendant guilty of both counts of first-degree murder based on premeditation and deliberation and lying in wait as to India Anderson and on premeditation and deliberation and felony murder as to Bobby Dean Anderson. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death for each murder. The jury also found defendant guilty of two counts of assault with a deadly weapon with intent to kill inflicting serious injury, one count of assault with a deadly weapon with intent to kill, five counts

of assault with a deadly weapon on a law enforcement officer, six counts of assault by discharging a firearm into occupied property, and seven counts of injury to personal property. For these convictions the trial court sentenced defendant to an aggregate of seventy-eight and one-half years in prison. The trial court arrested judgment on defendant's conviction of two counts of injury to real property, and one count of assault by discharging a firearm into occupied property merged with the conviction for the murder of Bobby Dean Anderson. 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 sentences are not disproportionate.

The evidence at trial tended to show the following. On 9 December 1991, from his home in Gaston County, defendant shot at his neighbors and others who came into his neighborhood for four hours. At approximately 8:00 a.m. on 9 December 1991, Tammy Anderson was taking her twelve-year-old daughter, India Anderson, and a friend's daughter, Heather Shumate, to school. Tammy and the two girls were in Tammy's car when they thought they heard the car backfire. Tammy and the girls got out of the car and heard another noise; at that point they realized someone was shooting at them. India was shot first; as Tammy ran towards India, Tammy was also shot. Tammy fell to the ground and blacked out briefly. When Tammy regained consciousness Heather was beside her, but Tammy could not see India. At this time a neighbor of the Andersons', Ronald Hunter, Sr., came running towards Tammy and Heather. Ronald Hunter, Sr. told Tammy and Heather to get down behind the car.

As Tammy, Heather, and Ronald Hunter, Sr. tried to get to safety, Ronald Hunter, Sr. was shot in the back. Ronald Hunter, Sr. was immediately shot two more times and fell to the ground. Every time Ronald Hunter, Sr. attempted to move, he was shot at again. Meanwhile, Heather and Tammy were able to get inside the Andersons' home, and Tammy called 911. While Tammy was on the phone, Tammy's husband, Bobby Anderson, walked over to and stood in front of the glass storm door. Tammy heard a shot and heard glass shatter. Bobby Anderson had been shot in the chest and was lying on the ground in front of the door. Tammy attempted to reach Bobby in order to help him but had to retreat when more shots were fired into the house. A SWAT team was eventually able to get into the Andersons' house and evacuate Tammy, Tammy's mother, and Heather. The team left Bobby Anderson, who was dead, in the house.

Around 8:00 a.m. on 9 December 1991, Ronald Hunter, Jr., a neighbor of the Andersons' and the son of Ronald Hunter, Sr., had just finished working the night shift at Freightliner and was getting ready to take a bath when he heard shooting outside. He looked out his window and saw Tammy, India, and Heather. He then saw his father running across the street to help Tammy, Heather, and India. Ronald Hunter, Jr. saw India get shot about four times as she staggered across the road. Ronald Hunter, Jr. and his mother, Tina, began yelling to India, telling her to lie down. India did lie down and she was shot several more times. Ronald Hunter, Jr. ran out to help India; but as he was dragging her back towards his house, India was shot again. Ronald Hunter, Jr. fell when India was shot, and he blacked out momentarily. When Ronald Hunter, Jr. regained consciousness, he heard shots hitting his car and heard his car alarm go off; then Ronald Hunter, Jr. was shot in the face. After he was struck in the face, Ronald Hunter, Jr. lay still pretending to be dead. Eventually Ronald Hunter, Jr. got up and made a run for the house. Ronald Hunter, Jr. left India lying on the ground; she was dead.

L.P. Bert, a member of the Gaston County Police Department, responded to calls for emergency assistance as a result of the shooting. As Bert entered the area in his patrol vehicle, he saw puffs of dirt coming his way; and his car was struck by bullets. As Bert was backing out of the area and warning other police officers of the gunfire, Detective Rick Powers drove in front of defendant's home; and his car was shot. Gaston County Police Officer W.G. Gillis, who was also at the scene, was shot in the hand and arm while trying to get a clear view of defendant. Other officers at the scene were also shot at by defendant.

Gaston County Police Sergeant James Edwards served as a crisis negotiator for the department. Edwards arrived on the scene and contacted defendant by phone. Defendant indicated to Edwards that he suffered from mental problems. Defendant also told Edwards to remove the police from the church roof by his house. Defendant then shot at the church roof, missing the officers who were on the roof, but hitting the church. Defendant informed Edwards that he had been practicing his shooting and that he was mad at his neighbors because they played loud music and had parties. After two and one-half hours on the phone with Edwards, during which time defendant continued shooting at his neighbors and the police, defendant surrendered.

Gaston County Police Detective-Sergeant J.R. Phillips took custody of defendant and transferred him to the police department for questioning. Detective D.P. Finger was in the car with Phillips and defendant. On the way to the station, defendant was asked his name and date of birth. Defendant gave his name and said he was thirty-one. Once at the station, Phillips advised defendant of his constitutional rights. Defendant indicated that he understood his rights and that he was willing to waive his rights and give a statement. In his statement defendant stated that the Andersons had harassed him since he moved into the neighborhood, that they threw wild parties, and that they would spin their tires in front of his house. Defendant also stated that he had decided to kill himself and had driven out to Seattle, Washington, and then back to the coast of North Carolina. Defendant then decided that instead of killing himself, he would kill the people who were bothering him. Defendant owned a .223-caliber Ruger ranch rifle, a Winchester .300 magnum rifle, a Springfield M1A1 .308-caliber rifle, and a Springfield .45-caliber automatic pistol. Defendant had over 1,250 rounds of ammunition for the guns. On the night of 8 December 1991, defendant barricaded himself in his home. Defendant blocked his doors with a refrigerator, stove, and washing machine; he also put plywood over windows and mattresses against the walls in his home. Defendant then waited until 8:00 a.m. to begin shooting. After defendant read and signed his confession, he stated that he knew what he had done was wrong, but "they needed to die."

Investigator Kenneth D. Ervin examined the crime scene and discovered the house was in the condition described by defendant. Ervin also noted that the windows were nailed shut.

Some of defendant's neighbors testified that while they were in their homes on the morning of 9 December 1991, bullets entered through the walls and into their bathrooms and living rooms. Bullets also struck and damaged many cars in the neighborhood.

Defendant presented evidence that he never bothered anyone in the neighborhood, that the Andersons had loud parties, and that their children ran wild. He also presented evidence that India Anderson would throw rocks at defendant and dig up people's flowers. Many of defendant's friends testified that defendant was withdrawn and depressed and that he had problems with his neighbors. These same witnesses testified that in addition to being a good friend and a good worker, defendant was good with children and was active in church activities at different times. Defendant's friends also testified that

they had recommended defendant for jobs, had set him up on dates with relatives, had let him play with their children, and had gone on trips with him.

Defendant presented expert testimony that he suffered from major depression, schizotypal personality disorder, and attention deficit disorder. Defendant would go through periods of time when he would lose contact with reality and do bizarre things such as driving across country without sleeping. Psychologist Faye Ellen Sultan testified that on 9 December 1991, defendant was unable to assess the nature and quality of his acts and did not know what he was doing was wrong. Dr. Joseph Horacek, a psychiatrist, testified that defendant suffered from auditory sensitivity, manic depression, schizotypal personality disorder, an autistic disorder, and Aspberger syndrome, an inherited neuro-developmental problem. Dr. Horacek testified that while defendant could plan the murders in a pure mechanical sense, defendant did not understand the nature and quality of his acts.

Dr. Clabe W. Lynn, the State's psychiatrist, testified that when he observed defendant, defendant was not suffering from any major psychiatric problems; but defendant was depressed and suffered from an adjustment disorder. Dr. Lynn did not reach a decision as to defendant's ability to understand right from wrong on 9 December 1991.

During the sentencing proceeding defendant presented evidence that there was a history of manic depressive illness in his family and that defendant had suffered from a mental handicap since birth which increased in severity as defendant became older. A third defense expert, Dr. Billy Williamson Royal, testified that he was in agreement with the diagnoses of Dr. Horacek and Dr. Sultan. All three experts agreed defendant could be treated for his mental illness in prison. Also at sentencing numerous witnesses testified as to defendant's good and nonviolent character, his willingness to help others, and his involvement with church activities.

Additional facts will be addressed as necessary to the understanding of a particular issue.

JURY SELECTION

[1] Defendant argues that the trial court committed reversible error when it denied defendant's motion to permit *voir dire* of potential jurors regarding their conceptions about parole eligibility and in refusing to instruct the jury during trial regarding the limits of parole

eligibility on a life sentence. This Court has consistently held that jurors should not be questioned concerning their perceptions about parole eligibility during *voir dire*. *State v. Payne*, 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 292 (1995). This Court has also held that evidence about parole eligibility is not relevant in determining sentencing in a capital proceeding even if the defendant requests such an instruction or if during deliberations the jury has a question about life sentences. *See State v. Skipper*, 337 N.C. 1, 43, 446 S.E.2d 252, 275 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). This Court has previously 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 as to crimes committed prior to 1 October 1994. *State v. Conaway*, 339 N.C. 487, 520, 453 S.E.2d 824, 845 (1995). After that date by statutory amendment, North Carolina has life without parole. N.C.G.S. § 15A-1380.5 (Supp. 1994). For offenses occurring after 1 October 1994, the trial judge must instruct the jury that a sentence of life imprisonment means a sentence of life without parole. N.C.G.S. § 15A-2002 (Supp. 1994). Defendant has failed to assert a convincing basis for this Court to abandon its prior decisions holding that instructions on parole eligibility should not be given and that jurors should not be questioned regarding their perceptions about parole eligibility. This assignment of error is overruled.

[2] Defendant argues that the trial court committed reversible error when it disallowed three particular questions during *voir dire*. The questions at issue were as follows:

> 1. How about in a case where a child is killed? Would you automatically tend to feel that the death penalty should be imposed?
>
> 2. [W]ould you require the defense to prove something to you in order to change your personal opinions about leaning toward the death penalty?
>
> 3. In other words, would any of you feel that your feelings about the death penalty were strong enough so that you would not consider the mitigating circumstances presented by the defense, things that are set out in the law that you can consider and should consider? Would you be able to do that or would your mind be such that you would be unable to do that?

Defendant argues that these questions were proper under *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992), because they inquired

into whether a juror could be fair and impartial in a capital case and whether predetermined views regarding the death penalty would substantially impair a juror's ability to serve on the jury. We conclude that *Morgan v. Illinois* does not require that a defendant be allowed to ask the questions at issue in this case.

In *State v. Robinson*, 339 N.C. 263, 451 S.E.2d 196, (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 818 (1995), this Court held that it was not proper to ask potential jurors if they would impose the death penalty under the particular facts and circumstances of the case. *Id.* at 273, 451 S.E.2d at 202. In *Robinson* defendant had attempted to ask jurors if they would be able to follow the judge's instructions and weigh the aggravating and mitigating circumstance even though the defendant had killed three people, including a small child, and had a previous conviction for first-degree murder. *Id.* at 272, 451 S.E.2d at 202. This Court held that the trial court did not err by not allowing the question because the question was "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." *Id.* at 273, 451 S.E.2d at 202. This Court also noted that " '[c]ounsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided . . . . Jurors should not be asked what kind of verdict they would render under certain named circumstances.' " *Id.* (quoting *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980)).

We conclude that the first question at issue here, whether the juror would "automatically tend to feel that the death penalty should be imposed" when a child had been killed, was impermissible since the question was an attempt to "stake out" the juror and determine what kind of verdict the juror would render under the named circumstance.

[3] Regarding the other two questions, a review of the *voir dire* reveals that the trial court did not allow the questions to be asked because the questions as phrased did not correctly state the law.

As to the second question, defense counsel asked prospective juror Willis:

> Let me ask if the percentage would be such that you would be leaning toward the death penalty, would it—would you require the defense to prove something to you in order to change your personal opinions about leaning toward the death penalty?

The trial court did not allow Willis to answer, stating:

Sustained.

And, members of the jury, I will explain to you that mitigating circumstances are required to be proven by a preponderance to a juror or by a preponderance is the standard. The State has beyond a reasonable doubt as to aggravating factors. But the defendant does have to prove mitigating circumstances by a preponderance. Would you be able to follow the law in each respect?

Prospective juror Willis responded, "Yes." Willis had already stated that she could consider both death and life imprisonment as a sentence. The concept of aggravating and mitigating circumstances had previously been explained to juror Willis, and she had said she could consider the evidence presented.

In *State v. Phillips*, 300 N.C. at 681-82, 268 S.E.2d at 455, this Court held that the trial court did not err by refusing to permit defendant to ask a prospective juror whether the defendant would have to prove anything to the juror in order to be entitled to a verdict of not guilty. The Court held the question was an attempt to "fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided." *Id.* at 682, 268 S.E.2d at 455. We conclude that the question at issue here was also impermissible as the juror had not been instructed as to the legal principles at issue when the question was asked. After the question was asked, the trial court explained that the defendant and the State had different burdens in regard to proving mitigating and aggravating circumstances. Defendant did not attempt to ask any more questions on this issue after the court had explained the law to the jurors.

[4] In the next question at issue defendant attempted to ask a different group of prospective jurors:

In other words, would any of you feel that your feelings about the death penalty were strong enough so that you would not consider the mitigating circumstances presented by the defense, things that are set out in the law that you can consider and should consider? Would you be able to do that or would your mind be such that you would be unable to do that?

> The Court again did not allow an answer to be given, stating:
>
> Well, the Court will sustain that. Not necessarily set out. Things they find to be and they deem to be mitigating. Do you understand that you can—may find mitigating circumstances as an individual juror? Do you understand that?

The three jurors being questioned responded that they did understand. These jurors had already stated that they would not "automatically tend to favor the death penalty" if defendant was found guilty. Defendant again did not attempt to follow up with additional questions.

The phrasing of the question to imply that all mitigating circumstances were "set out in the law" was an inaccurate statement of the law. Only statutory mitigating circumstances are actually set out and, if found, must be considered to have value. Nonstatutory mitigating circumstances are not specifically set out and do not necessarily have to have mitigating value. *State v. Basden*, 339 N.C. 288, 304, 451 S.E.2d 238, 247 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 845 (1995).

Defendant relies on *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492, to support his argument that he should have been allowed to ask all three questions. In *Morgan* the United States Supreme Court held that a defendant must be allowed, through the use of jury *voir dire*, an opportunity "to lay bare the foundation of [his] challenge for cause against those prospective jurors who would *always* impose death following conviction." *Id.* at 733, 119 L. Ed. 2d at 506. The Court went on to hold that a defendant is "entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case-in-chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." *Id.* at 736, 119 L. Ed. 2d at 507.

In *Morgan v. Illinois* the defendant was not allowed to ask if a juror would "automatically vote to impose the death penalty no matter what the facts are." *Id.* at 723, 119 L. Ed. 2d at 499. The questions at issue here bear little resemblance to the question at issue in *Morgan*. This Court has held that

> *Morgan* stands for the principle that a defendant in a capital trial must be allowed to make inquiry as to whether a particular juror would automatically vote for the death penalty. "Within this broad principle, however, the trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled; its rul-

ings in this regard will not be reversed absent a showing of abuse of discretion." *State v. Yelverton*, 334 N.C. 532, 541, 434 S.E.2d 183, 188 (1993).

State v. Robinson, 336 N.C. 78, 102-03, 443 S.E.2d 306, 317 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995).

In this case the trial court did allow defense counsel to fully investigate potential jurors' views and feelings about the death penalty and ask if they would automatically vote for death and if they understood they could consider mitigating circumstances. The court itself explained the different burdens of proof that defendant and the State must meet when submitting aggravating and mitigating circumstance for consideration by the jury. Defendant having been "afforded a fair opportunity to make the inquiries specifically authorized in *Morgan*," *Robinson*, 336 N.C. at 103, 443 S.E.2d at 317, we conclude that the trial court did not abuse its discretion by not allowing defendant to ask these three particular questions. Defendant's assignment of error on these grounds is overruled.

GUILT-INNOCENCE PHASE

[5] Defendant argues that the trial court erred when it improperly sustained repeated prosecutorial objections to lay witnesses' testimony concerning defendant's home life; mental illness in defendant's family; defendant's physical appearance on occasion; and statements by defendant to his friends as to his mental state, mental health, and emotional status including comments about suicide. A review of the transcript reveals, however, that: (i) most of the evidence which may not have been admitted through the testimony of one particular witness was admitted through the testimony of other witnesses; (ii) the objections were correctly sustained because defendant had not laid a proper foundation; or (iii) there was no offer of proof after an objection was sustained, and the question has not been properly preserved for appellate review.

Defendant sets forth over thirty questions that he contends the trial court should have allowed the witnesses to answer. Defendant begins by noting that "[e]vidence is relevant if it has any logical tendency to prove a fact in issue," *State v. Goodson*, 313 N.C. 318, 320, 327 S.E.2d 868, 869 (1985), and that the relevancy standard is relatively lax and particularly easy to satisfy in a criminal case, *State v. McElrath*, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988). Defendant then argues that excluding relevant evidence is a violation of defendant's

right to present evidence in his defense, which right is guaranteed by the Sixth Amendment. Defendant also argues that the exclusion of relevant evidence violates defendant's right to due process, which "is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 308 (1973). Defendant argues that in this case the trial court allowed various defense witnesses to take the stand, but in an arbitrary fashion the trial court excluded material portions of the witnesses' testimony. This exclusion of relevant evidence elicited from numerous witnesses prevented him from offering material evidence in support of his insanity and diminished-capacity defenses, thereby implicating defendant's federal and state constitutional rights and reducing defendant's ability to defend himself against the two charges of first-degree murder.

Asserting that many mental illnesses are hereditary, defendant argues that the witnesses should have been able to testify concerning defendant's dysfunctional family. However, defendant did not establish that his particular mental illnesses were hereditary before asking questions about the history of mental illness in his family. In *State v. Wade*, 296 N.C. 454, 251 S.E.2d 407 (1979), the Court noted:

> While it is true that evidence of hereditary insanity has been held admissible, there was not an adequate foundation for its admission here. In order for insanity among a person's ancestors or relatives to be relevant, it must first be shown that (1) there is independent evidence of insanity on the part of the person, (2) the same type of mental disorder is involved, and (3) the mental disorder is hereditary in character.

Id. at 464, 251 S.E.2d at 413 (citations omitted). In this case, as in *Wade*, at the time the witness testified, no evidence had been presented that the mental disorders from which defendant suffered were hereditary in character. Thus, the questions about mental illness within defendant's family were properly excluded.

Next, defendant argues that the witnesses should have been allowed to testify concerning turmoil in defendant's life to explain why defendant could not conform his conduct to the dictates of society. Defendant argues that facts about defendant's lifestyle, actions, appearance, and conversation with friends and family should have been presented to the jury so it could understand the experts' and lay witnesses' opinions. However, evidence similar to that defendant sought to elicit from lay witnesses was, in fact, presented to the jury

at some point during the guilt-innocence phase. Witnesses were allowed to testify that defendant was depressed; that the inside of his home was disorderly; that he had trouble interacting with members of the opposite sex; that he had strong opinions condemning smoking, drinking, and sex; that he was strange and weird; that he was shy and withdrawn; that he had had suicidal thoughts, had been to a mental ward months before this incident, and had been prescribed Prozac but stopped taking it; that he had problems with his neighbors; and that his neighbors made him agitated. Thus, defendant was not prejudiced by the trial court's disallowing repetitious evidence about different aspects of defendant's life, as the evidence was admitted through other witnesses. *See State v. Pridgen*, 313 N.C. 80, 87, 326 S.E.2d 618, 623 (1985) (holding it was not error not to admit evidence at one point as the same evidence was elicited at other times); *State v. Walden*, 311 N.C. 667, 673, 319 S.E.2d 577, 581 (1984) (holding defendant cannot show prejudice from exclusion of evidence at one point where same or similar evidence later admitted through different witness).

The trial court also did not allow certain witnesses to relate statements defendant made to the witness prior to the alleged crime. "[S]tatements by an accused of an existing emotion or other mental state made before the commission of the crime and not shown to be in contemplation of the commission of the crime are admissible as bearing upon the mental capacity of the accused at the time the crime was committed." *State v. Linville*, 300 N.C. 135, 137, 265 S.E.2d 150, 152 (1980). However, defendant in this case failed to make an offer of proof, and this Court cannot determine whether defendant's statements related to his existing emotional or mental state. " '[I]n order for a party to 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. Hill*, 331 N.C. 387, 410, 417 S.E.2d 765, 776 (1992) (quoting *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)), *cert. denied*, — U.S. —, 122 L. Ed. 2d 684, *reh'g denied*, — U.S. —, 123 L. Ed. 2d 503 (1993); *see also State v. Walden*, 311 N.C. at 673, 319 S.E.2d at 581 (holding where defendant fails to include in record the answer to an objected-to question, he has failed to show prejudice).

Defendant argued in oral argument that no offer of proof was necessary since answers to the questions to which an objection was sustained were presented in the sentencing proceeding. Defendant is

correct that evidence pertaining to the history of mental illness in defendant's family was elicited during the sentencing proceeding, but as to certain other questions asked in the guilt-innocence phase, nothing in the record indicates what the answers would have revealed. In these instances this Court cannot determine if the evidence would have been relevant to defendant's mental capacity at the time the crime was committed. *See State v. Wade*, 296 N.C. at 464, 251 S.E.2d at 413 (holding that Court cannot tell if exclusion of declarations by defendant to witness was prejudicial without the potential answers).

To establish prejudice based on evidentiary rulings, defendant bears the burden of showing that a reasonable possibility exists that, absent the error, a different result would have been reached. N.C.G.S. § 15A-1443(a) (1988); *see State v. Weeks*, 322 N.C. 152, 170, 367 S.E.2d 895, 906 (1988). After carefully reviewing the questions and answers to which the prosecution objected, we conclude the trial court did not err; and, moreover, any error that did occur during the questioning of defendant's witnesses was harmless. The trial court was correct in not allowing the questions about family history and mental illness without a foundation establishing whether defendant's mental illness was hereditary. Where the same or similar evidence was admitted through other witnesses, no prejudice resulted from disallowing a witness' testimony about defendant's background and character. Finally, in those circumstances where no offer of proof was made, we cannot determine if exclusion of the evidence constituted error. Defendant's assignment of error is overruled.

[6] In a related issue defendant argues that the trial court committed reversible error during the guilt-innocence phase by sustaining the prosecution's objections to testimony by Dr. Horacek regarding mental illness in defendant's family.

Specifically, the trial court struck the witness' testimony that "[i]n the past few years she [defendant's mother] has had some major depressive problems and memory problems." Horacek also was not allowed to answer defendant's question, "Did you learn from your investigation with regard to the family of David Lynch as to whether or not there was any mental illness in the family?" Defendant argues that this testimony should not have been excluded because Horacek had stated that the family history had been part of the basis for his opinion.

A review of Dr. Horacek's testimony in the guilt-innocence phase reveals that Horacek was allowed to testify in depth about defend-

ant's home life with his family. Additionally, Horacek testified concerning defendant's conflict with his father and defendant's tendency to run away or disappear for periods of time, a habit which began when he was young and continued into defendant's adult life. The trial court correctly ruled, however, that the witness could not testify that defendant's mother was depressed because no evidence had yet been offered to establish that defendant and his mother suffered from the same mental illness or that the mental illness from which defendant suffered was in fact hereditary. *See State v. Wade*, 296 N.C. at 464, 251 S.E.2d at 413.

During the sentencing phase Dr. Horacek testified that defendant suffered from Aspberger syndrome; that this syndrome would produce manic depressive illness in adult life; and that manic depressive illness and Aspberger syndrome "run in families." After Dr. Horacek had testified that defendant's illnesses "run in families," evidence that other members of defendant's family suffered from depression was admitted. Thus, once defendant had established that defendant suffered from a particular mental illness and that the illness was hereditary, then evidence that other family members suffered from the same illness was correctly admitted by the trial court. Defendant not having set forth the proper foundation for admitting such evidence during the guilt-innocence phase, the trial court correctly determined such evidence was inadmissible at that time. Defendant's argument is without merit.

[7] Defendant further contends that the trial court committed reversible error in denying defendant's motion to exclude or substantially limit the number of photographs, X rays, and diagrams of the victims' bodies at the scene of the crime and at the autopsy. Prior to trial defendant moved to exclude all irrelevant photographs and all photographs whose probative value was outweighed by the danger of unfair prejudice. The trial court reserved ruling on defendant's motion until the State moved to introduce the photographs. In his brief before this Court, defendant makes no argument concerning X rays or diagrams.

Defendant specifically argues that six crime-scene photographs of the victims as well as eight autopsy photographs of the victims were gory and graphic and were unnecessarily introduced during the guilt-innocence phase of the trial since the medical examiners who had performed the autopsy had already testified in detail about the victims' injuries. Defendant also argues that the trial court erred by

allowing the State to introduce a number of crime-scene photographs and the bloody clothes of India Anderson at the sentencing proceeding. Defendant contends that the photographs and clothes were unrelated to any issue before the jury at the sentencing proceeding and that the sole purpose for the introduction of the photographs and bloody clothing was to sway the jury through sympathy for the deceased and anger at defendant.

Defendant relies on *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988), in arguing that the admission of the photographs was prejudicial error. In *Hennis* this Court 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.

Id. at 284, 372 S.E.2d at 526.

The Court noted further in *Hennis* that

> there is no bright line indicating at what point the number of crime scene or autopsy photographs becomes too great. The trial court's task is rather to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation.

Id. at 285, 372 S.E.2d at 527.

"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. Alford*, 339 N.C. 562, 577, 453 S.E.2d 512, 520 (1995). Additionally, photographs taken during an autopsy are generally deemed admissible, and "[i]n a first-degree murder case, autopsy photographs are relevant even when such factors as the identity of the victim or the cause of death are not disputed." *State v. Skipper*, 337 N.C. at 35, 446 S.E.2d at 270.

Based on our review of the autopsy and crime-scene photographs and the manner in which they were presented to the jury, we conclude that the trial court did not abuse its discretion in allowing the admission of the photographs. The eight autopsy photographs were of the multiple wounds of the two victims photographed from different angles. The multiple crime-scene photographs illustrated the posi-

tions of the victims India Anderson, Bobby Anderson, and Ronald Hunter, Sr., as well as the damage done to defendant's neighbors' homes and cars. The photographs admitted during the sentencing proceeding were also from the crime scene and showed the wounds inflicted upon India Anderson. When the clothes were shown to the jury, the witness described the holes in the clothes and the blood on the clothes, illustrating the severity of the attack on India Anderson.

After reviewing the photographs and the manner in which they were presented, we are of the opinion that the pictures were not unfairly prejudicial or unduly repetitive. The pictures were admitted to illustrate testimony describing the position of the victims, the various injuries sustained by the victims, and the damage done to the neighborhood by defendant. The testimony was relevant and probative to the State's case against defendant. The photographs and clothing submitted during the sentencing proceeding established the severity and brutality of the attack on India. This evidence was admissible to support the especially heinous, atrocious, or cruel aggravating circumstance. We conclude the trial court did not abuse its discretion in admitting the evidence at issue. Defendant's assignment of error is overruled.

[8] Defendant next argues that he should be granted a new trial because the trial court erred in not intervening *ex mero motu* when the prosecutor made inflammatory and prejudicial remarks to the jury in closing argument. Defendant argues that on four occasions, the prosecutor erred by urging the jury not to allow defendant to be free from responsibility or to avoid responsibility by finding defendant not guilty by reason of insanity. At one point the prosecutor argued that he did not think defendant should "be able to dodge" or "avoid" or be "free from responsibility." In response to this argument, the trial court intervened *ex mero motu* and instructed the jury as follows:

> Members of the jury, just a moment ago the district attorney indicated what he thought or he said, "but I think," . . . but you are not to take his opinions in consideration. The Court will allow you to take what he said as a contention on behalf of the state, but do not take any statement to you as a personal opinion. That is improper.

Defendant also argues that the following argument was erroneous:

Ladies and gentlemen, the last point I am going to make. Think about this. Are you satisfied that he was insane on December 9, 1991. The state submits to you that you are not. If you are even thinking about it, remember this. Not guilty by reason of insanity is not guilty. Oh, it has a little bit more wording there but the effect is not guilty. When you say not guilty you are saying no crime was committed. You are saying David Lynch—

MR. WILLIAMS: (Interrupting)—OBJECTION to that argument.

THE COURT: OVERRULED.

MR. LANDS: You are saying David Lynch didn't kill and assault. Are you satisfied? When you say not guilty that means there are no restrictions on Mr. Lynch.

MR. CALDWELL: OBJECTION.

THE COURT: SUSTAINED. Well, OVERRULED as to that statement.

MR. LANDS: No restrictions. Perhaps some day he becomes your neighbor—

MR. CALDWELL: (Interrupting)—OBJECTION.

THE COURT: SUSTAINED. Stay within the bounds of argument.

MR. CALDWELL: Ask the Court to instruct the jury to disregard the last statement.

THE COURT: ALLOWED. Members of the jury, do not take the last statement of the district attorney in consideration in your jury deliberations.

Defendant argues that the suggestion that a verdict of not guilty by reason of insanity is the same as a verdict of not guilty was erroneous because it misstated the law. Defendant also argues that the statement urging the jury to find defendant guilty in order to prevent him from living in the jurors' neighborhoods and committing more crimes was intended to inflame the jurors and appeal to their emotions. Defendant concedes that the trial court properly sustained objections in both cases and instructed the jurors not to consider the latter argument but argues that the statements could not have been disregarded by the jury and, thus, fatally infected defendant's trial. We disagree.

> The control of the arguments of counsel must be left largely to the discretion of the trial judge, and the appellate courts ordinarily will not review the exercise of the trial judge's discretion in this regard unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations.

State v. Johnson, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979) (citations omitted). Where a jury has been specifically instructed by the trial court not to take certain statements made by the prosecutor into consideration, "[w]e must assume the jury heeded the instructions and did not consider the arguments to the defendant's prejudice." *State v. Erlewine*, 328 N.C. 626, 632, 403 S.E.2d 280, 283 (1991).

We conclude that in this case the trial court properly controlled the prosecutor's closing argument so as to avoid any prejudicial error to defendant. During the prosecutor's closing arguments the trial court intervened *ex mero motu* and specifically instructed the jury not to take the prosecutor's personal opinions into consideration. The jurors were also instructed to disregard statements by the prosecutor that defendant would be under no restrictions if found not guilty and that defendant might become their neighbor. Based on our careful review of the prosecutor's closing argument and the instructions given by the trial court during the closing argument, defendant's assignment of error is overruled.

JURY INSTRUCTIONS

[9] Defendant makes three arguments regarding the insanity instruction. First, defendant argues that the jury instruction for insanity unconstitutionally relieved the State of its burden of proof by forbidding the jury to consider the affirmative defense of insanity on any element unless the jury first convicted defendant of murder. Defendant contends that the trial court's instructions failed to allow the jury to consider evidence regarding defendant's insanity on the individual elements of each charge because in the instructions to the jury, the court stated:

> When there is evidence which tends to show that the defendant was legally insane at the time of the alleged offense, you will consider this evidence only if you find that the state has proved beyond a reasonable doubt each of the things about which I have already instructed you in regard to the two concepts.

Under these instructions, according to defendant, the jury "could not consider the substantial evidence of the defendant's diminished, impaired mental capacity and mental illness on the issues of premeditation, deliberation, specific intent to kill or malice." Defendant argues that the jury should have been allowed to consider such evidence because the defendant may fail to carry his burden of insanity and still present sufficient evidence to create a reasonable doubt as to the elements of first-degree murder.

Defendant fails to note that after the trial court instructed the jury on the elements of intent to kill and premeditation and deliberation, the trial court instructed on the concept of lack of mental capacity as follows:

> You may find there is evidence which tends to show that the defendant lacked mental capacity at the time of the acts alleged in this case. If you find that the defendant lacked mental capacity, you should consider whether this condition affected his ability to formulate the specific intent which is required for conviction of first-degree murder on the basis of malice, premeditation and deliberation.
>
> In order for you to find the defendant guilty of first-degree murder under this theory, that is, upon the basis of malice, premeditation and deliberation; you must find beyond a reasonable doubt that he killed the deceased with malice and in the execution of an actual specific intent to kill formed after premeditation and deliberation. If, as a result of lack of mental capacity, the defendant did not have the specific intent to kill the deceased formed after premeditation and deliberation, he is not guilty of first-degree murder under this theory.
>
> Therefore I charge that if, upon considering the evidence with respect to the defendant's lack of mental capacity, you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first-degree murder under this theory, you will not return a verdict of first-degree murder on the basis of malice, premeditation and deliberation.

"One of the cardinal rules governing appellate review of trial court instructions is that the charge will be read contextually and an excerpt will not be held prejudicial if a reading of the whole charge leaves no reasonable grounds to believe that the jury was misled." *State v. Alston*, 294 N.C. 577, 594, 243 S.E.2d 354, 365 (1978); *see also*

State v. Davis, 321 N.C. 52, 59, 361 S.E.2d 724, 728 (1987) (holding that "[i]n reviewing jury instructions for error, this Court has held that they must be considered in their entirety"). Read contextually and in their entirety, the jury instructions clearly instruct the jury to consider the evidence of defendant's diminished and impaired mental capacity in determining if defendant had the ability to formulate the "specific intent which is required for conviction of first-degree murder on the basis of malice, premeditation and deliberation."

While the instructions do distinguish between a finding of lack of mental ability to premeditate and deliberate and insanity, this distinction does not constitute error. This Court has held that "[t]he ability to distinguish between right and wrong and the ability to premeditate and deliberate are entirely different considerations." *State v. Ingle*, 336 N.C. 617, 629, 445 S.E.2d 880, 886 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 222 (1995). "It requires less mental ability to form a purpose to do an act [to premeditate and deliberate] than to determine its moral quality." *State v. Cooper*, 286 N.C. 549, 573, 213 S.E.2d 305, 321 (1975). Thus, the trial court did not err when it instructed the jury to consider the issue of defendant's sanity only after it had considered defendant's mental ability to formulate the specific intent to kill as these are two different concepts.

Reviewing the jury instructions in their entirety, we conclude that the trial court did not err in instructing the jury to consider the evidence of insanity after it determined that the State had proven beyond a reasonable doubt all the elements of murder. The trial court had previously instructed that when considering the elements of specific intent—premeditation and deliberation—the jury should consider defendant's potential lack of mental capacity. While the jurors were instructed not to reach a decision on defendant's sanity until they had considered all the elements of the crime, they were never barred from considering evidence of defendant's mental capacity when determining whether the State had proven the elements of the crime beyond a reasonable doubt. Defendant's assignment of error is overruled.

[10] Second, defendant argues that the trial court committed reversible error in instructing the jury that "everyone is presumed sane" and that "soundness of mind is the natural and normal condition of people." According to defendant these presumptions deprived him of his Fourteenth Amendment right to due process of law and are contrary to *Francis v. Franklin*, 471 U.S. 307, 85 L. Ed. 2d 344 (1985),

and *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39 (1979). Specifically, defendant argues that the presumptions shifted to defendant the burden of persuasion on the element of intent, for if a person is presumed to be of a sound mind, he obviously is considered to intend the consequences of his acts. In *Sandstrom* the erroneous instruction reads "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Sandstrom*, 442 U.S. at 512, 61 L. Ed. 2d at 43. In *Franklin* the instructions at issue read: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted," and a "person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." *Franklin*, 471 U.S. at 311, 85 L. Ed. 2d at 351. In both these cases the instructions included phrases not present in the instructions at issue in this case. Specifically, the instructions in *Franklin* and *Sandstrom* instructed the jury that a person of a sound mind is presumed to intend the consequences of his act. Such instructions created a presumption that the defendant acted with specific intent and shifted the burden of proving this essential element to the defendant, who then had to prove he did not act with specific intent.

In *State v. Mize*, 315 N.C. 285, 293, 337 S.E.2d 562, 567 (1985), the defendant argued that by placing the burden of proof on the issue of insanity on defendant, the State is relieved of its duty to establish that the act was committed with the requisite *mens rea*. This Court held that "[t]he *mens rea* or the criminal intent required for first degree murder is proven through the elements of premeditation and deliberation" and "that the State is not unconstitutionally relieved of any burden by the rule placing the burden of proof on the issue of insanity on defendant." *Id.* at 293-94, 337 S.E.2d at 567. In *State v. Thompson*, 328 N.C. 477, 484-85, 402 S.E.2d 386, 389-90 (1991), the defendant also argued that the State was relieved of proving essential elements of the crime because the burden of proving insanity is placed on the defendant. The defendant argued that the instruction was in violation of the holding in *Franklin*, 471 U.S. 307, 85 L. Ed. 2d 344, and *Sandstrom*, 442 U.S. 510, 61 L. Ed. 2d 39. This Court rejected defendant's argument. *Thompson*, 328 N.C. at 485, 402 S.E.2d at 390.

In the present case defendant argues that prior to *State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1989); *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988); and *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988), this Court did not recognize the existence of a diminished capacity or mental illness defense negating specific intent. Thus,

defendant argues that prior to these three cases, evidence of mental illness could not be considered by the jury as to any other issue in the case once a defendant was determined to be sane. After *Clark*, *Rose*, and *Shank*, the jury was allowed to consider the evidence of mental illness as it relates to issues of premeditation and deliberation and would consider the presumption of sanity instruction when considering the lack of mental capacity instruction for purposes of premeditation and deliberation. Thus, defendant argues cases dealing simply with the constitutionality of the insanity instruction are inapplicable to this case where the jury considered diminished capacity.

Our review of *Clark*, *Rose*, and *Shank* discloses that these cases stand for the proposition that an expert witness may testify concerning the defendant's ability to make and carry out plans, and the jury may consider such evidence when determining if defendant had the ability to form a specific intent. *Clark*, 324 N.C. at 159-60, 377 S.E.2d at 62; *Rose*, 323 N.C. at 458, 373 S.E.2d at 428; *Shank*, 322 N.C. at 248, 367 S.E.2d at 643. We conclude that *Clark*, *Rose*, and *Shank* do not change this Court's analysis on the issue of the insanity instruction, and we decline to disturb our cases holding that the State has not been relieved of its burden to prove specific intent by requiring defendant to prove that he was insane. Defendant's assignment of error is overruled.

[11] Finally, defendant argues that the trial court committed reversible error by placing on defendant the burden of proof on the issue of insanity in violation of his right to have the prosecution prove every element of the crime beyond a reasonable doubt. This argument is similar to the argument above. Defendant argues that the insanity "instruction violates due process by shifting the burden of proof on the *mens rea* element of first degree murder as well as the scienter elements of all the specific intent felonies with which defendant was charged."

The trial court instructed the jury as to defendant's burden of proving his insanity defense in accordance with existing North Carolina law. As defendant concedes in his brief this Court has previously considered and rejected defendant's arguments. In *State v. Thompson*, 328 N.C. at 485, 402 S.E.2d at 390, the defendant argued that placing on the defendant the burden of proof on the issue of insanity violates due process by shifting the burden of proof on the *mens rea* element of first-degree murder as well as the scienter elements of burglary and robbery with a dangerous weapon. In

Thompson, 328 N.C. 477, 402 S.E.2d 386, this Court noted that such arguments have been rejected in *State v. Evangelista*, 319 N.C. 152, 353 S.E.2d 375 (1987), and *State v. Mize*, 315 N.C. 285, 337 S.E.2d 562, and declined to overrule these cases. This defendant has presented no new argument persuading this Court that it should overrule its previous decisions. Defendant's assignment of error is without merit.

SENTENCING PROCEEDING

[12] Defendant argues that the trial court committed reversible error when it overruled defendant's objections to evidence the defendant stated he wanted "to shoot at blacks and to watch them dance." This evidence was elicited during cross-examination of two of defendant's expert witnesses at the sentencing proceeding. Defendant argues that the introduction of this evidence was erroneous because it was without probative value, did not negate any mitigating circumstance tendered by defendant, did not relate to any aggravating circumstance in the case, and prejudiced defendant.

The State, during its cross-examination of Dr. Horacek, asked Horacek if he had reviewed statements made by Wes Hodnett when forming his opinion about defendant. Horacek said he had considered such statements. The State asked Horacek if it were not true that Wes Hodnett had said that defendant told Hodnett that "he [defendant] wanted to shoot at blacks and to watch them dance." Dr. Horacek responded that he did not recall reading that statement and could not find the statement in his file. The State did not ask Horacek any more questions about this specific statement. On cross-examination of Dr. Royal, another of defendant's experts, the State asked: "Is it not true in there that Wes Hodnett made a statement that David [defendant] talked about shooting at blacks at their feet?" Dr. Royal stated, over objection, that in his file he had written:

> He stated on one occasion he was talking in front of his sister about shooting at a group of blacks and making them dance around while he was shooting at their feet. He stated that his sister got on to him about this and he went on and smiled and said he was kidding.

Defendant moved to strike this testimony and moved for a mistrial. Defendant argues this statement was irrelevant. Both victims and defendant were white, and nothing in the record suggests the killing of either victim was a racial act.

Defendant also argues that to allow defendant's jury to make its decision to sentence defendant to death based on a statement indicating a racist opinion on the part of defendant undermines the essence of the Eighth Amendment. In *Dawson v. Delaware*, 503 U.S. 159, 117 L. Ed. 2d 309 (1992), the Court overturned a death sentence where, at the sentencing proceeding, evidence was presented that the defendant belonged to a white racist prison gang, the Aryan Brotherhood. The Court held that admission of the Aryan Brotherhood evidence, which had no relevance to the issues being decided in the proceeding, was error. *Id.* at 160, 117 L. Ed. 2d at 314. The Court concluded that this evidence had no tendency to prove any aggravating circumstances or to rebut any mitigating circumstances. *Id.* at 166-67, 117 L. Ed. 2d at 318. The Court recognized, however, that in certain situations the evidence about the Aryan Brotherhood may have been relevant and admissible; it was just not admissible under the particular facts of that case. *Id.* at 166, 117 L. Ed. 2d at 318. Defendant argues that as in *Dawson*, the statement here was irrelevant to any issue in the penalty phase.

In *State v. Bacon*, 337 N.C. 66, 87, 446 S.E.2d 542, 552 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995), the defendant argued that the trial court improperly permitted the district attorney to cross-examine defendant's expert psychiatrist as to whether defendant was dangerous. In *Bacon*, as here, the defendant argued that since this testimony did not prove any aggravating circumstance and did not rebut any mitigating circumstances, admission of the testimony violated his Eighth and Fourteenth Amendment rights. In *Bacon* the expert had testified on direct examination about defendant's mental condition on the day of the crime. *Id.* at 88, 446 S.E.2d at 552. This Court, holding that it was not error for the State to elicit an opinion about defendant's dangerousness during cross-examination of defendant's expert, stated:

> North Carolina Rules of Evidence permit broad cross-examination of expert witnesses. N.C.G.S. § 8C-1, Rule 611(b) (1992). The State is permitted to question an expert to obtain further details with regard to his testimony on direct examination, to impeach the witness or attack his credibility, or to elicit new and different evidence relevant to the case as a whole. " 'The largest possible scope should be given,' and 'almost any question' may be put 'to test the value of his testimony.' " 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 42 (3d ed. 1988) (footnotes omitted) (citations omitted).

State v. Bacon, 337 N.C. at 88, 446 S.E.2d at 553.

In *State v. Reeves*, 337 N.C. 700, 448 S.E.2d 802 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 860 (1995), this Court held that the trial court did not err when it allowed the district attorney to ask defendant's expert witness during cross-examination about details of other crimes defendant had committed. Specifically, the expert was asked if the defendant had raped three other women and if defendant had also sodomized one of the women and cut her throat. The expert had testified that he had based his opinion concerning defendant's mental problems in part on these other acts of violence which were raised on cross-examination. The trial court in *Reeves*, 337 N.C. at 718, 448 S.E.2d at 809, instructed the jury to consider the evidence about these other crimes only as it formed the basis of Dr. Royal's opinion concerning the mental and emotional condition of the defendant. This Court held the evidence was relevant under Rule 705 since the other crimes were considered by the expert in forming his opinion. *Id.* at 719, 448 S.E.2d at 810.

N.C.G.S. § 8C-1, Rule 705 provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or *voir dire* before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question.

We conclude that the statement at issue here was not elicited to establish any type of racial bias but instead to impeach the opinions of Dr. Royal and Dr. Horacek and " 'test the value of [their] testimony.' " *Bacon*, 337 N.C. at 88, 446 S.E.2d at 553 (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 42). Both doctors testified that defendant's actions on the day of the murders were a result of his mental illnesses. On cross-examination Dr. Horacek testified that in forming his opinion about defendant, he "looked at various statements of people who knew David Lynch," including statements from Wes Hodnett. Dr. Royal also stated that he reviewed interviews of defendant's friends and utilized information from the interviews when arriving at his diagnosis. The State then asked Dr. Royal about the statement at issue as well as other statements

made by Wes Hodnett suggesting that defendant planned to kill people sometime before the actual shooting occurred. The trial court instructed the jury that it was only to "consider the alleged statements made by the defendant for the purpose of this witness's forming his opinion based upon those alleged statements and for no other purpose."

As statements made by Wes Hodnett were considered by both experts when they were diagnosing defendant's mental condition, questions about this particular statement were relevant under Rule 705 and admissible under the broad scope permitted during cross-examination of expert witnesses.

Additionally, defendant's friends testified that defendant was gentle, quiet, and kind-natured and had to have been out of his mind when he committed these crimes. This statement was evidence that defendant was not as gentle and kind as defendant's evidence implied. *See Bacon*, 337 N.C. at 88, 446 S.E.2d at 552-53 (holding because defendant had presented evidence through his friends that he was not someone who would kill another human being, that he was even-tempered, and that his actions on the day of the crime were totally out of character, defendant's expert could be asked to give an opinion as to defendant's dangerousness to rebut this evidence). The statement was relevant to show that defendant had, prior to the shooting, manifested dangerousness and a violent attitude toward a particular group of people. This evidence was relevant since in this case defendant shot at a particular group of people, his neighbors.

Defendant also argues that even if the evidence had some probative value, that value was minimal and is outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 states that

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"Whether evidence should be excluded under this [R]ule [403] as being more prejudicial than probative is within the discretion of the superior court judge." *State v. Reeves*, 337 N.C. at 719, 448 S.E.2d at 810. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. at 285,

372 S.E.2d at 527. The expert witnesses in this case stated that they considered statements made by defendant's friends in forming their opinions as to defendant's mental condition. The statement at issue was relevant to the jury's consideration of the expert's opinion, and the trial court's ruling was not so arbitrary that it could not have been the result of a reasoned decision. We conclude that the trial court did not abuse its discretion in allowing the admission of the statement and overrule defendant's assignment of error.

[13] Defendant argues that the trial court committed reversible error in submitting the aggravating circumstance that the murder of India Anderson was especially heinous, atrocious, or cruel as it was not supported by the evidence and its submission offended federal and state constitutional principles.

Defendant begins his argument by stating that the North Carolina pattern jury instruction for the especially heinous, atrocious, or cruel circumstance is unconstitutionally vague. He notes that the North Carolina instruction was determined to be unconstitutional in *Smith v. Dixon*, 766 F. Supp. 1370 (E.D.N.C. 1991), *rev'd*, 14 F.3d 956 (4th Cir.), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 72 (1994). However, in citing *Smith v. Dixon*, defendant fails to note that the instruction attacked in *Dixon* defined especially heinous, atrocious, or cruel without limiting the words which focused the jury with specificity to the nature of the circumstance. *Id.* at 1383.

In this case the trial court included a limiting instruction when instructing the jury as to the especially heinous, atrocious, or cruel circumstance. After defining heinous, atrocious, or cruel, the trial court specifically instructed that

> it is not enough that this murder be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious, or cruel; and not every murder is especially so.
>
> For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have excluded [sic] that which is normally present in any killing; or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

This Court has consistently held that the especially heinous, atrocious, or cruel aggravating circumstance is constitutional when the narrowing definition is incorporated into the instruction. *State v. Lee*,

335 N.C. 244, 285, 439 S.E.2d 547, 569, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162, *reh'g denied*, —— U.S. ——, 130 L. Ed. 2d 532 (1994); *State v. Gibbs*, 335 N.C. 1, 70, 436 S.E.2d 321, 361 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994); *State v. Syriani*, 333 N.C. 350, 391-92, 428 S.E.2d 118, 141, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 341 (1993), *reh'g denied*, —— U.S. ——, 126 L. Ed. 2d 707 (1994). Defendant has presented no new argument that convinces us we should overrule our prior decisions on this issue.

[14] Defendant also argues that it was error to submit the especially heinous, atrocious, or cruel aggravating circumstance because there was insufficient evidence to support its submission.

> In determining sufficiency of the evidence to support this [aggravating] circumstance, the trial court must consider the evidence in the light most favorable to the State. The State is entitled to every reasonable inference to be drawn from the facts. Contradictions and discrepancies are for the jury to resolve, and all evidence admitted which is favorable to the State is to be considered.

State v. Gibbs, 335 N.C. at 61, 436 S.E.2d at 355-56 (citations omitted). This Court has identified several types of murders which may warrant the submission of the especially heinous, atrocious, or cruel circumstance.

> One type includes killings physically agonizing or otherwise dehumanizing to the victim. *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328 [*death sentence vacated*, 488 U.S. 807, 102 L. Ed. 2d 18, *on remand*, 323 N.C. 622, 374 S.E.2d 277] (1988) [, *death sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 329 N.C. 662, 407 S.E.2d 218 (1991)]. A second type includes killings less violent but "conscienceless, pitiless, or unnecessarily torturous to the victim," *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985), [*cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986),] including those which leave the victim in her "last moments aware of but helpless to prevent impending death," *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984). A third type exists where "the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder." *Brown*, 315 N.C. at 65, 337 S.E.2d at 827.

Id. at 61-62, 436 S.E.2d at 356.

In the instant case, viewed in the light most favorable to the State, the evidence supports the submission of the especially heinous, atrocious, or cruel circumstance. The victim was shot by defendant nine times. The evidence indicates that India was hit once and began jumping on one leg and wandering across the street into the Hunters' yard. One witness testified that after the victim was first shot and wandering in the street, she then

> looked toward us; and when we said "Get down," she got down and started crawling toward us. Then I seen like another shot, like it would bounce, like her clothes like bounced up; and then she would try to get up and try to walk toward us again; and then we kept hollering, "Get down;" and she would try to get down; but she would again try to get back up and walk; and it just went on for a few minutes like that; and finally, she came to our ditch in our yard the last time; and I seen her get shot in the side; and it looked like it blowed her side out and she fell to the ground.

This testimony demonstrates that the killing would have been "physically agonizing" to the victim and that the killing was " 'conscienceless, pitiless, or unnecessarily torturous.' " *Gibbs*, 335 N.C. at 61, 436 S.E.2d at 356 (quoting *Brown*, 315 N.C. at 65, 337 S.E.2d at 826-27). Defendant manifested unusual depravity of mind in this case, repeatedly and continuously shooting the victim, even as she attempted to crawl to safety. While certain testimony suggested that the first or second shot that struck India was the shot to the head and that death would have occurred soon after India was shot in the head, other evidence indicated that the victim lived for some time after being shot more than once and that in the last moments before her death, the victim was aware that she was going to die but was unable to prevent her impending death. The evidence viewed in the light most favorable to the State supported the submission of the especially heinous, atrocious, or cruel circumstance. Defendant's assignment of error is overruled.

[15] Defendant argues that the trial court erred in instructing the jury that it could refuse to find uncontroverted nonstatutory mitigating circumstances if the jury deemed the evidence to have no mitigating value. Defendant argues that a sentencer in a capital case "may not refuse to consider . . . any relevant mitigating evidence," *Hitchcock v. Dugger*, 481 U.S. 393, 394, 95 L. Ed. 2d 347, 350 (1987), and that by instructing the jury to consider if a submitted nonstatutory mitigating

circumstance has mitigating value, the trial court allowed the jury to disregard relevant mitigating evidence. Defendant argues that all forty-one mitigating circumstances submitted to the jury were inherently mitigating and that the jury should not have been allowed to reject any of the mitigating circumstances. Defendant argues the jury should have been required to consider and give effect to all the circumstances supported by uncontroverted evidence when imposing sentence because the jury "may not refuse to consider[] any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death." *Penry v. Lynaugh*, 492 U.S. 302, 318, 106 L. Ed. 2d 256, 277 (1989). Defendant argues that once a peremptory instruction is given as to a mitigating circumstance, the only question that remains is how much weight the jury will give the circumstance. Defendant argues that contrary to the jury instructions given in this case, the jury cannot decide a nonstatutory mitigating circumstance has no weight after being given a peremptory instruction which states that all of the evidence tends to show the existence of the mitigating circumstance.

Defendant concedes that this Court has previously rejected this argument but asks the Court to reconsider and reverse its prior decisions in this regard. We conclude that the trial court's peremptory instructions for nonstatutory mitigating circumstances, which instructed the jury that all the evidence tended to show the particular mitigating circumstance but the jury must determine if the circumstance existed and had value, were correct. In *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994), the defendant argued that the trial court erred in not instructing the jury to consider and give weight to an uncontroverted nonstatutory mitigating circumstance. The Court held that a juror may find that a nonstatutory mitigating circumstance exists but may give that circumstance no mitigating value. The Court noted that in *State v. Gay*, 334 N.C. 467, 434 S.E.2d 840 (1993), the Court held that peremptory instructions could be given for nonstatutory mitigating circumstances. *Green*, 336 N.C. at 173, 443 S.E.2d at 32. This Court in *Green* went on to note that "nothing we stated in *Gay* supports the notion that the peremptory instructions to be used with regard to nonstatutory mitigating circumstances should be identical to those used with regard to statutory mitigating circumstances." *Id.* The Court held that even if a jury finds from uncontroverted and manifestly credible evidence that a nonstatutory mitigating circumstance exists, " 'jurors may reject the nonstatutory mitigating circumstance

if they do not deem it to have mitigating value.' " *Id.* at 173-74, 443 S.E.2d at 32-33 (quoting *Gay*, 334 N.C. at 492, 434 S.E.2d at 854).

Defendant in essence argues that the jury should have been instructed to consider and give weight to uncontroverted nonstatutory mitigating circumstances. We conclude that the trial court's peremptory instructions for nonstatutory mitigating circumstances were correct. The trial court first set out a mitigating circumstance and then would instruct:

> All of the evidence tends to show [named mitigating circumstance]. Accordingly, as to this mitigating circumstance, I charge that if you find the facts to be as all the evidence tends to show, you will answer, "Yes," as to the mitigating circumstance Number [#] on the issue and recommendation form if one or more of you deems it to have mitigating value.

"[J]urors are allowed to reject any nonstatutory mitigating circumstance which they do not deem to have mitigating value." *State v. Basden*, 339 N.C. at 304, 451 S.E.2d at 247; *see also State v. Spruill*, 338 N.C. 612, 661, 452 S.E.2d 279, 306 (1994), *cert. denied*, —— U. S. ——, —— L. Ed. 2d ——, 64 U.S.L.W. 3242 (1995); *State v. Reeves*, 337 N.C. at 737, 448 S.E.2d at 820; *State v. Robinson*, 336 N.C. 78, 117, 443 S.E.2d 306, 325. Defendant's argument is contrary to our prior decisions on this issue, and defendant has demonstrated no reason why we should reverse or alter our recent precedent. This assignment of error is without merit and overruled.

[16] Defendant argues that the trial court committed plain and reversible error when it failed to peremptorily instruct the jury as to statutory mitigating circumstances—N.C.G.S. § 15A-2000(f)(2), murder committed while the defendant was under the influence of a mental or emotional disturbance, and N.C.G.S. § 15A-2000 (f)(6), the impairment of defendant's capacity to appreciate the criminality of his conduct—and the nonstatutory mitigating circumstance that defendant was generally depressed. Defendant argues that he offered manifestly credible and uncontradicted evidence as to each of these three mitigating circumstances and that he was overwhelmingly prejudiced by the trial court's failure to peremptorily instruct the jury on these three circumstances.

"Where all the evidence in a case, if believed, tends to show that a particular mitigating factor exists, a peremptory instruction is proper. However, a peremptory instruction is inappropriate when the

evidence surrounding that issue is conflicting." *State v. Noland*, 312 N.C. 1, 20, 320 S.E.2d 642, 654 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369, *reh'g denied*, 471 U.S. 1050, 85 L. Ed. 2d 342 (1985). In this case the trial court considered whether a peremptory instruction should be given for each of the submitted mitigating circumstances and determined that the evidence did not support giving a peremptory instruction as to these three particular circumstances. We agree.

The State presented the expert psychiatric testimony of Dr. Lynn. Lynn testified that he examined defendant and reviewed tests done on defendant. His examination found no evidence of any major psychiatric problems or severe mental illness. Lynn testified that defendant was in contact with reality when he examined defendant and that he did not find any type of mental illness indicating defendant did not know right from wrong and could not be responsible.

An employer of defendant's also testified that defendant knew right from wrong and that the employer was never aware of or had any reason to believe defendant suffered from any kind of mental condition. Another workplace acquaintance testified that defendant did not seem "mentally ill at all" and that he knew exactly what he was doing on 9 December 1991. Detective Finger and Detective Phillips, who were with defendant on 9 December 1991, testified that based on their observations of defendant on 9 December 1991, defendant understood the nature and qualities of his actions and could tell right from wrong on the day of the murders. This evidence indicates that defendant was not under the influence of a mental or emotional disturbance when the murders were committed and that his capacity to appreciate the criminality of his conduct was not impaired.

Additional testimony indicated defendant was able to appreciate the criminality of his conduct or to conform his conduct to the requirements of law and was not generally depressed. Witnesses testified that defendant was talkative, went on trips with people, was trusted with his friends' children and grandchildren, volunteered to help at children's church summer camp, was a good worker, and was very "gentle, kind and always wanting to help anyway that he could." There was also testimony defendant enjoyed being at summer camp, loved children, was relaxed when he visited friends, had a "very quick sense of humor," was very personable once he got to know people, and enjoyed talking with people.

We conclude the evidence was conflicting as to whether defendant was under the influence of a mental or emotional disturbance when he committed the murders, whether defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, and whether defendant was generally depressed. The trial court did not err by failing to give a peremptory instruction as to these mitigating circumstances. Defendant's assignment of error is overruled.

PRESERVATION ISSUES

[17-26] Defendant has designated ten preservation issues. The issues are as follows: (i) the trial court committed reversible error in failing to provide the jury with written jury instructions; (ii) the trial court committed reversible error in overruling defendant's objections and denying his motion to preclude the use of aggravating circumstance N.C.G.S. § 15A-2000(e)(10); (iii) the trial court erred in overruling defendant's objection and denying his motion to preclude the use of aggravating circumstance N.C.G.S. § 15A-2000(e)(11); (iv) the trial court erred by allowing death-qualification of the jury and by denying defendant's motion for individual *voir dire* for a portion of the jury *voir dire*; (v) the trial court erred by permitting the prosecutor to use peremptory challenges to excuse qualified jurors on account of their lack of enthusiasm for or opposition to the death penalty; (vi) the trial court erred in failing to require the prosecution to make pretrial disclosure of the aggravating circumstances on which the State intended to rely and any evidence tending to negate or establish such factors; (vii) the trial court erred by instructing the jury that defendant bore the burden of proving mitigating circumstances to the satisfaction of the jury; (viii) the trial court's instruction that allowed the jury to consider the death penalty if the aggravating and mitigating circumstances were in equipoise was erroneous; (ix) the North Carolina death penalty statute is unconstitutional; and (x) the trial court erred when it instructed the jury that it had a duty to return a recommendation of death if it found the aggravating circumstances, in light of the mitigating circumstances, were sufficiently substantial to call for the death penalty. We have considered defendant's arguments with regard to these issues and have found no compelling reasons to depart from our prior holdings which are dispositive. *See State v. Ward*, 338 N.C. 64, 122, 449 S.E.2d 709, 742 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 1013 (1995).

[27-31] Defendant also presents five other issues under preservation issues, namely, (i) the trial court erred in denying defendant's motion

to suppress defendant's pretrial statement to the police; (ii) the trial court erred in denying defendant's motion to dismiss all charges against him; (iii) the trial court erred when it sustained the prosecution's objections to defense questions on *voir dire* regarding the jurors' understanding of specific mitigating circumstances and mitigating circumstances in general; (iv) the trial court committed reversible error in excusing several jurors for cause based on their answers regarding their ability to consider capital punishment; and (v) the trial court erred in failing to define for the jury the term preponderance of the evidence as that term relates to defendant's burden to prove mitigating circumstances.

We note first that these issues are not proper preservation issues as they are not determined solely by principles of law upon which this Court has previously ruled, but require a review of the transcript and record to determine whether based on the specific facts, question, or answer, the assignment of error has merit. Where counsel determines that an issue of this nature has no merit, counsel should, "omit it entirely from his or her argument on appeal." *State v. Barton*, 335 N.C. 696, 712, 441 S.E.2d 295, 303 (1994). Nevertheless, we have considered defendant's arguments on these issues, have thoroughly reviewed the transcript and record as to these assignments, and have found no error. These assignments of error are, therefore, without merit.

PROPORTIONALITY

[32] Having found defendant's trial and capital sentencing proceeding to be free from prejudicial error, we are required by statute to review the record and determine for each murder: (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) (Supp. 1994); *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).

In the murder of India Anderson, the jury found three aggravating circumstances: (i) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); (ii) 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); 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).

In the murder of Bobby Anderson, the jury found only one aggravating circumstance, 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).

After a thorough review of the transcript, record on appeal, briefs, and oral arguments of counsel, we conclude that the evidence supported the jury's finding that each of these aggravating circumstances existed. We also conclude, based on this review, that nothing in the record suggests that the sentences of death were 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. at 132-33, 443 S.E.2d at 334. 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, 164-65, 362 S.E.2d 513, 537 (1987), *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).

To begin, we compare this case with 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. 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 (1979).

In *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542, this Court clarified the composition of the pool so that it accounts 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.

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.

We begin our analysis by comparing the instant case with the seven cases in which this Court has determined that the sentence of death was disproportionate: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

In only two of the cases where this Court has held the sentences disproportionate, *State v. Rogers* and *State v. Bondurant*, did the jury find the course of conduct aggravating circumstance. We conclude that this case is distinguishable from both *Bondurant* and *Rogers*.

In *State v. Rogers* the defendant shot and killed one victim during an argument in a parking lot. *Rogers*, 316 N.C. at 210, 341 S.E.2d at 718. In *Rogers*, as in the case of Bobby Anderson, the only aggravating circumstance found was the course of conduct circumstance. However, in *Rogers* the event upon which the aggravating circumstance was based was the firing of a pistol at the victim's companion in the moments immediately following the shooting of the victim. *Id.* at 234, 341 S.E.2d at 731. These facts stand in stark contrast to the numerous and serious accompanying crimes of violence in the present case. Defendant's additional violent crimes in the consideration of the sentence for the murder of Bobby Anderson included the murder of a twelve-year-old child; seriously injuring two additional victims; shooting three police officers; and shooting into his neighbors' residences, some of which were occupied at the time. The facts of this case are easily distinguishable from *Rogers*.

In *State v. Bondurant* the defendant shot his victim after the defendant had spent the night drinking. Immediately after the victim had been shot, the defendant took the victim to the hospital. *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182-83. The Court held that the death sentence was disproportionate in *Bondurant* in part because "immediately after he shot the victim, [defendant] exhibited a concern for [the victim's] life and remorse for his action by directing the driver of the automobile to the hospital." *Id.* at 694, 309 S.E.2d at 182. In this case defendant expressed no remorse for his action, continuing to shoot at the victims after they had fallen. Unlike the defendant in *Bondurant*, who took the victim to a hospital, defendant here ensured that no one could help the victims by shooting those who tried. *Bondurant* does not support a finding that the sentences in this case are disproportionate.

Further, we find no significant similarity between this case and any of the five other cases in which the Court has held that the death penalty is disproportionate. Most notably, in all the cases where the death sentence has been determined to be disproportionate, only one person has been murdered by the defendant. In contrast, this case involved a double murder and multiple serious assaults.

Defendant argues that the death sentences in this case are disproportionate given the multitude of mitigating circumstances found by the jury. We note that in deciding whether a death sentence is disproportionate, this Court independently considers each individual defendant and the nature of the crimes that defendant has committed. *State v. Bacon*, 337 N.C. at 109-10, 446 S.E.2d at 566.

This Court has

> consistently . . . rejected a "mechanical[,] mathematical approach" to weighing aggravating and mitigating circumstances. *State v. McDougall*, 308 N.C. [1,] 32, 301 S.E.2d [308,] 326[, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983)]. We cannot say as a matter of law that the jury recommended a disproportionate sentence merely because the sentence was based on a single aggravating circumstance.

State v. Greene, 324 N.C. 1, 27, 376 S.E.2d 430, 446 (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).

A "single aggravating circumstance may outweigh a number of mitigating circumstances and may be sufficient to support a death sentence." *State v. Bacon*, 337 N.C. at 110, 446 S.E.2d at 566. In this case the trial court submitted forty-one mitigating circumstances, and the jury found thirty-eight of them. While the number of mitigating circumstances submitted in this case is great, only three of the submitted circumstances were statutory, and the jury found only two of them: (i) that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1), and (ii) that the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2). The jury failed to find N.C.G.S. § 15A-2000(f)(6), that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

Additionally, many of the nonstatutory mitigating circumstances which were submitted were directed at three particular aspects of defendant's character. First, the court submitted the nonstatutory mitigating circumstance that "defendant has engaged in work providing direct assistance and helped others." The court also submitted six separate mitigating circumstances which discussed specific instances when the defendant helped others. Second, six of defendant's nonstatutory mitigating circumstances related to his activities at church.

Third, ten of the mitigating circumstances related to defendant's mental problems.

As to the murder of Bobby Anderson, only one aggravating circumstance was submitted and found, the course of conduct circumstance. This Court has upheld death sentences in other cases where this was the only aggravating circumstance and there were multiple mitigating circumstances. *See State v. McHone*, 334 N.C. 627, 435 S.E.2d 296 (1993) (holding that in a double murder where the jury found ten mitigating circumstances, including that defendant was mentally or emotionally disturbed when he committed the crime, but rejected the circumstance that defendant's capacity to appreciate the criminality of his acts was impaired, death sentence was not disproportionate), *cert. denied*, —— U.S. ——, 128 L. Ed. 2d 220 (1994); *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982) (holding that in a double murder where jury found seven mitigating circumstances including that defendant had no significant history of prior criminal activity and had a good character and reputation, death sentence was not disproportionate), *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).

As to the murder of India Anderson, three aggravating circumstances were submitted: (i) course of conduct; (ii) especially heinous, atrocious, or cruel; and (iii) knowing risk to more than one person by the use of a weapon or device hazardous to the lives of more than one person. As noted above, the Court has upheld a death sentence when only the course of conduct aggravating circumstance has been found by the jury. This Court has also upheld death sentences when the only circumstance found was especially heinous, atrocious, or cruel even when there was evidence that defendant suffered from a mental or emotional disorder. *See State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118; *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933, 70 L. Ed. 2d 240, *reh'g denied*, 454 U.S. 1117, 70 L. Ed. 2d 655 (1981).

We conclude that based on the particular aggravating circumstance or circumstances found by the jury during the sentencing proceeding, the death sentences in this case are not rendered disproportionate merely by the number of mitigating circumstances also found.

Defendant also argues that the death sentences were disproportionate because many juries have returned verdicts of life imprison-

ment even in double- or triple-murder cases. Defendant cites many cases in his brief to support this argument. We note that some of the cases included by defendant in his analysis are not in the proportionality pool as the crimes in those cases were committed prior to 1 June 1977, the effective date of our capital punishment statute. *State v. Dampier*, 314 N.C. 292, 333 S.E.2d 230 (1985); *State v. Mills*, 307 N.C. 504, 299 S.E.2d 203 (1983); *State v. Harris*, 306 N.C. 724, 295 S.E.2d 391 (1982); *State v. Stephens*, 300 N.C. 321, 266 S.E.2d 588 (1980). Our review of multiple-murder cases where the defendant was sentenced to life imprisonment reveals that the case that is most similar to the case at hand is *State v. Rainey*, 331 N.C. 259, 415 S.E.2d 337 (1992). In *Rainey* the defendant murdered three people at a funeral; he also shot and seriously injured three others. The jury found that the murder was part of a course of conduct including other violent crimes, that the defendant had no significant history of prior criminal activity, that the murder was committed while defendant was mentally or emotionally disturbed, and that defendant's capacity to appreciate the criminality of his conduct was impaired. Nevertheless, we conclude that *Rainey* is distinguishable from the present case in that (i) the jury in *Rainey* did not reject the impaired capacity mitigating circumstance and (ii) defendant Rainey left the scene immediately after the shooting and called 911. *Id.* at 263, 415 S.E.2d at 339.

This Court has held that the fact that a defendant is a multiple murderer stands as a "heavy" factor against defendant when determining the proportionality of a death sentence. *State v. McHone*, 334 N.C. at 648, 435 S.E.2d at 308; *State v. Robbins*, 319 N.C. 465, 529, 356 S.E.2d 279, 316, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). Furthermore,

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

> that the constitutional requirement of "individualized consideration" as to proportionality could only be served if the issue of whether the death penalty was disproportionate in a particular case ultimately rested upon the "experienced judgments" of the members of this Court, rather than upon mere numerical comparisons of aggravators, mitigators and other circumstances.

State v. Green, 336 N.C. at 198, 443 S.E.2d at 46-47.

In other double-murder cases, juries have returned sentences of death; and this Court has held these sentences were not disproportionate even though there was evidence that defendant was suffering from a mental or emotional disturbance or was unable to appreciate the criminality of his activity. *See State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (holding that death sentence was not disproportionate even though jury found mitigating circumstances that defendant was under influence of mental and emotional disturbance and that defendant's capacity to appreciate the criminality of his conduct was impaired); *State v. Green*, 336 N.C. 142, 443 S.E.2d 14 (holding that death sentence was not disproportionate even though jury found murder committed while defendant under the influence of mental or emotional disturbance); *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (holding that death sentence was not disproportionate even though jury found that defendant was under influence of mental or emotional disturbance, had borderline IQ, and suffered from an adjustment disorder and a personality disorder); *State v. McHone*, 334 N.C. 627, 435 S.E.2d 296 (holding that death sentence was not disproportionate even though jury found murder committed while defendant was under the influence of mental and emotional disturbance).

In *State v. Ingle*, 336 N.C. 617, 445 S.E.2d 880, the defendant brutally murdered an elderly couple for no apparent reason. Defendant presented evidence to show that at the time of the murders, he was experiencing a psychotic episode that was the result of a borderline personality disorder. *Id.* at 627, 445 S.E.2d at 885. For one of the murders the only aggravating circumstance found by the jury was the course of conduct circumstance; for the other murder the jury found the especially heinous, atrocious, or cruel circumstance and the course of conduct circumstance. *Id.* at 652, 445 S.E.2d at 898. The trial court submitted, but the jury did not find, the mitigating circumstance that defendant lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the law. *Id.* at 655, 445

S.E.2d at 900. The jury also rejected the circumstances that defendant had no significant history of violence and that the murder was committed while defendant was under the influence of a mental or emotional disturbance. *Id.* Defendant argued that the death sentences were disproportionate based in part on the substantial evidence of his insanity at the time of the murders. This Court rejected defendant's argument and held that the sentence of death for each murder was not disproportionate.

We conclude that the actions of defendant in this case were more egregious than the actions of defendant in *Ingle* and in most multiple-murder cases. Defendant argues that in most of the death cases affirmed on appeal, the defendants exhibited far more depravity of mind and inhumane cruelty than defendant did in this case; we disagree. Defendant in this case planned to shoot and murder his neighbors. Defendant barricaded himself in his home and protected himself from retaliation by putting mattresses against the walls and blocking his doors. He then waited for the Andersons to leave. When Tammy Anderson, India Anderson, and Heather Shumate left for school, defendant shot and hit twelve-year-old India and her mother. As India wandered across the street, defendant shot at her again and continued to shoot at her even as she attempted to crawl towards safety, striking India's body many times. When Ronald Hunter, Jr. attempted to aid India Anderson, defendant shot him.

Defendant also repeatedly shot at Bobby Anderson. After Bobby fell to the floor of his home, defendant continued to shoot at the home so that Bobby's wife could not reach Bobby and help him. Defendant also ensured that no police could assist the victims by shooting at the police. At the end of defendant's four-hour rampage, two victims were dead; two victims were seriously injured; three victims had been struck by at least one shot; and bullets had entered occupied homes in the neighborhood. The jury found that defendant was not insane and that his capacity to appreciate the criminality of his conduct was not impaired.

Contrary to defendant's arguments, we conclude that the murders in this case indicated depravity of mind and inhumane cruelty; the murders were brutal, pitiless, and conscienceless. The actions by defendant were as egregious or more egregious than those of other double-murder defendants who have argued that they were mentally impaired. *See State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252; *State v. Ingle*, 336 N.C. 617, 445 S.E.2d 880; *State v. Robinson*, 336 N.C. 78, 443

S.E.2d 306. In light of the facts and circumstances of this case, we conclude that the sentences of death in this case were not disproportionate.

In conclusion, we have carefully reviewed the transcript of the trial and sentencing proceeding as well as the record, briefs, and oral arguments of counsel. We have considered all of defendant's assignments of error and conclude that defendant received a fair trial and a fair sentencing proceeding free from prejudicial error before an impartial judge and jury. We conclude that the convictions and aggravating circumstance were fully supported by the evidence and that the sentences of death were not imposed under the influence of passion, prejudice, or any other arbitrary factor and are not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. JOHNNY RAY DAUGHTRY

No. 412A93

(Filed 28 July 1995)

1. Appeal and Error § 150 (NCI4th)— constitutional issue—failure to raise in trial court

Where defendant did not make an argument at trial for exclusion of his incriminating statement to the police based on the Fourth Amendment to the U.S. Constitution, he may not properly present an argument based thereon in the Supreme Court.

Am Jur 2d, Evidence § 752.

2. Evidence and Witnesses § 1240 (NCI4th)— incriminating statement—defendant not in custody—*Edwards v. Arizona* inapplicable

Defendant's freedom of movement was not restrained during his interview by the police so as to render him in custody for Fifth Amendment purposes where defendant testified that he knew he was free to leave, even when the door to the interview room was shut; defendant was never handcuffed or frisked; at most the police patted him down before the interview to make sure he was

unarmed; and the officers never threatened defendant, raised their voices, or ordered defendant to do anything. When defendant asked for a lawyer, a reasonable person would have felt free to leave, the prohibitions of *Edwards v. Arizona*, 451 U.S. 477, which established the custodial interrogation must cease when an accused requests an attorney and may not be resumed by police officers without an attorney present, thus did not apply, and defendant's rights were not violated when an officer told him he could continue talking to the officers without an attorney if he wished.

Am Jur 2d, Criminal Law §§ 788-797.

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

3. Constitutional Law § 344 (NCI4th)— right to presence at all trial stages—jury venire—members borrowed for another trial—no violation

Defendant's right to be present at every stage of his trial was not violated when the court divided the jury venire into four groups of twelve persons each; the court allowed the persons on panels three and four to be borrowed for a trial in another courtroom; on the second day of voir dire in defendant's trial, the court separated the persons on panels three and four according to whether they had been selected to serve on the jury in the other case, placing those who had been selected at the end of the line; and one person from panel four who had not been selected to serve at the other trial sat on defendant's jury.

Am Jur 2d, Criminal Law § 695.

4. Jury § 227 (NCI4th)— capital trial—jury selection—death penalty views—excusal for cause despite rehabilitation testimony

Where, in response to questions by the prosecutor and the court in a capital trial, one prospective juror indicated on three separate occasions that she either would not or could not impose the death penalty, and a second prospective juror stated that under no circumstances could he vote to impose death, the trial court acted within its discretion by excusing these jurors for cause even though both stated during rehabilitation that they

could "fairly consider" both life imprisonment and death as possible punishments, since the trial court properly could have determined that their rehabilitation testimony reflected a desire to do their duty and to follow the court's instructions rather than an actual ability to sentence defendant to death.

Am Jur 2d, Jury § 279.

5. Jury § 226 (NCI4th)— capital trial—jury selection—death penalty views—excusal for cause without rehabilitation

The trial court did not abuse its discretion in excusing a prospective juror for cause based on her death penalty views without allowing defendant an opportunity to rehabilitate her where the juror's responses to questions from both the prosecution and the trial court established that she would not vote to impose the death penalty under any circumstances, and defendant failed to show that further questioning would likely have produced different testimony.

Am Jur 2d, Jury § 279.

6. Evidence and Witnesses § 1694 (NCI4th)— photographs of murder victim's body—admissibility

The trial court did not err by admitting for illustrative purposes four photographs of a murder victim's naked body at the crime scene where the photographs depicted the body from four different angles as examined by an SBI agent; three also revealed bloodstain patterns about which a serologist testified; and the number of photographs was not excessive.

Am Jur 2d, Homicide § 417.

Admissibility in evidence of enlarged photographs or photostatic copies. 72 ALR2d 308.

7. Evidence and Witnesses § 1659 (NCI4th)— photographs—substantive or illustrative evidence—instruction not plain error

Any error in the trial court's instruction that the jury in a murder trial could consider certain photographs "as evidence of facts that they illustrate" when some photographs were admitted for illustrative purposes only was not plain error given the physical and circumstantial evidence, as well as defendant's confession, since any error concerning whether photographs constituted sub-

stantive or illustrative evidence probably did not affect the jury's deliberations or decision.

Am Jur 2d, Evidence §§ 960, 961.

8. Evidence and Witnesses § 2211 (NCI4th)— DNA test results—expert testimony—tests performed by another—right of confrontation—evidence rules not violated

The trial court did not err by allowing an SBI agent, who was an expert in DNA analysis and molecular genetics, to testify about the results of DNA testing on blood samples found on pants worn by defendant on the night of a murder and the statistical significance thereof based upon DNA analysis performed by another agent in the SBI unit under his direct supervision since the DNA report prepared by the other agent was reliable and could be used by the witness to form his opinions. The witness's DNA testimony did not violate defendant's Confrontation Clause rights since the witness was vigorously cross-examined about the DNA testing procedures at the SBI and about his opinions. Nor did the testimony violate N.C.G.S. § 8C-1, Rules 702, 703 or 403.

Am Jur 2d, Evidence § 574.

Admissibility of DNA identification evidence. 84 ALR4th 313.

9. Evidence and Witnesses § 2210 (NCI4th)— expert testimony—bloodstain patterns—manner of victim's murder

The trial court did not err by allowing an expert in forensic serology and bloodstain pattern interpretation to state opinions about the position of a murder victim's body when she was struck by a blunt object and the number and force of blows inflicted upon her based upon his examination of the bloodstain patterns found on the ground, porch steps at the crime scene, and a log discovered on a woodpile near the body. The testimony was competent and relevant to show the manner of the victim's murder, and its probative value was not outweighed by the danger of unfair prejudice.

Am Jur 2d, Expert and Opinion Evidence § 300.

Admissibility, in criminal prosecution, of expert opinion evidence as to "blood splatter" interpretation. 9 ALR5th 369.

10. Appeal and Error § 155 (NCI4th)— admission of testimony—failure to preserve for appellate review

Defendant failed to preserve an assignment of error to the admission of testimony for appellate review under N.C. R. App. P. 10(b)(2) where the portion of a witness's testimony about which defendant complains was neither mentioned in defendant's motion to exclude nor objected to at trial. Defendant also waived appellate review under N.C. R. App. P. 10(c)(4) by failing specifically and distinctly to contend that the error amounts to plain error.

Am Jur 2d, Appellate Review § 614.

11. Evidence and Witnesses §§ 1009, 1010 (NCI4th)— abuse by defendant—statements made by murder victim—residual exception to hearsay rule

Statements made by a murder victim to a witness and in a letter to defendant concerning abuse she suffered from defendant were properly admitted in defendant's murder trial under the residual exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 804(b)(5). The trial court properly found that the statements were probative of a material fact in that they were evidence of motive, identity and intent. Error by the trial court in failing to make findings of fact to support its conclusion that the statements possessed the requisite trustworthiness was harmless beyond a reasonable doubt where the record sustains the court's conclusion and contains overwhelming evidence of defendant's guilt, including his confession, DNA test results, and blood-type matching.

Am Jur 2d, Evidence §§ 683-685.

12. Homicide § 659 (NCI4th)— instructions—voluntary intoxication—specific intent to kill—omission of proposed final mandate

The trial court in a first-degree murder case did not shift the burden of proof by omitting defendant's proposed "final mandate" from the instructions on voluntary intoxication as it related to defendant's ability to form a specific intent to kill since the trial court gave the substance of the instruction defendant requested, and the omission of the "final mandate" could not have misled the jury about the burden of proof, especially considering the court's

explicit instructions about reasonable doubt and the State's burden of proof.

Am Jur 2d, Homicide §§ 483, 508, 517.

13. Rape and Allied Offenses §§ 28, 164 (NCI4th)— first-degree sexual offense—diminished capacity no defense

The trial court did not err by failing to instruct on diminished capacity as that defense related to a charge of first-degree sexual offense since first-degree sexual offense is not a specific intent crime, and diminished capacity is thus not a defense to such crime.

Am Jur 2d, Rape § 37.

14. Constitutional Law § 342 (NCI4th)— failure of record to show defendant's presence at trial—absence not assumed

It will not be assumed that defendant was absent from his capital trial on several occasions where the court reporter did not consistently record defendant's presence while court was in session, but the transcript does not indicate, and defendant has not shown, that he was absent from the trial.

Am Jur 2d, Criminal Law §§ 697, 906.

15. Criminal Law § 1309 (NCI4th)— capital sentencing—admissibility of evidence—Rule 403 balancing test inapplicable

The trial court was not required to perform the Rule 403 balancing test in deciding whether to permit the State to introduce a photograph in a capital sentencing proceeding because the Rules of Evidence do not apply in sentencing proceedings; any evidence the court deems relevant to sentence may be introduced at this stage; and the State must be permitted to present any competent, relevant evidence which will substantially support imposition of the death penalty. N.C.G.S. § 8C-1, Rule 1101(b)(3); N.C.G.S. § 15A-2000(a)(3).

Am Jur 2d, Criminal Law §§ 598, 599.

16. Criminal Law § 1314 (NCI4th)— capital sentencing—photograph of victim's body—relevancy to heinous, atrocious, or cruel aggravating circumstance

The trial court did not err by admitting in a capital sentencing proceeding an eight-by-ten-inch color photograph of the murder

victim's naked body, from the rear, that showed a stick protruding from the body and injuries to the rectal area which had been excluded from the guilt phase because the record supports the court's finding that the photograph was relevant to the especially heinous, atrocious, or cruel aggravating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599.

17. Criminal Law § 1314 (NCI4th)— capital sentencing—remorse shown by defendant—exclusion of evidence—harmless error

The trial court in a capital sentencing proceeding erred by refusing to permit defendant's psychiatric expert to answer questions as to whether he had seen indications of remorse on defendant's part and what he had observed of defendant's reaction to the victim's death since this evidence was relevant to the nonstatutory mitigating circumstance that defendant exhibited remorse within a short time following the crime. Assuming that this error had constitutional implications, it was nevertheless harmless beyond a reasonable doubt where the jury did not find the mitigating circumstance regarding defendant's remorse even though other uncontroverted evidence thereof was presented at the sentencing hearing.

Am Jur 2d, Criminal Law §§ 598, 599.

18. Criminal Law § 463 (NCI4th)— capital sentencing—prosecutor's closing argument—statements showing cruelty of killing

The trial court did not err by (1) overruling defendant's objections to the prosecutor's jury argument in a capital sentencing proceeding that the evidence supported inferences that the victim was alive as defendant bludgeoned her, the victim was alive when defendant inserted a stick in her rectum, and defendant twisted the stick in the rectum as he inserted it, and (2) failing to intervene during the portion of the argument in which the prosecutor gave a chronological summary of the crime, since the evidence supported the arguments, and the arguments did not improperly encourage the jury to find the murder especially heinous, atrocious, or cruel simply on the basis of the sex offense but sought to give the jury a complete picture of the merciless nature of the crime and urged the jury to find this aggravating circumstance on the basis of the overwhelming brutality of the killing.

Am Jur 2d, Criminal Law §§ 588 et seq.

19. Criminal Law § 1339 (NCI4th)— capital sentencing—aggravating circumstances—heinous, atrocious, or cruel murder—murder during another felony—separate evidence supporting both circumstances

Separate evidence existed in a capital sentencing proceeding to support the trial court's submission of both the aggravating circumstance that the murder was especially heinous, atrocious, or cruel and the aggravating circumstance that it was committed while defendant was engaged in the commission of a sex offense where a reasonable juror could have found the especially heinous, atrocious, or cruel circumstance based on the medical examiner's testimony about the victim's severe blunt-trauma wounds, and a reasonable juror could find that the murder was committed while defendant was engaged in the commission of a sex offense based on evidence that multiple external abrasions and lacerations existed around the victim's rectum and vagina and that some object had been inserted into the rectum or the vagina, causing external lacerations.

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

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

20. Criminal Law § 1343 (NCI4th)— capital sentencing—aggravating circumstances—consideration of separate evidence—sufficiency of instruction

In a capital sentencing proceeding in which the trial court submitted the aggravating circumstances that the murder was especially heinous, atrocious, or cruel and that it was committed while defendant was engaged in a sex offense, the trial court's instruction that the jury should not "focus on the sexual offense but instead focus on the manner of [the victim's] killing" when considering the heinous, atrocious, or cruel aggravating circumstance was sufficient to prohibit the jury from considering the same evidence in support of both circumstances submitted and was not plain error.

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

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that mur-

der was heinous, cruel, depraved, or the like—post-*Gregg* cases. 63 ALR4th 478.

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

The trial court could properly determine that no reasonable juror in this capital sentencing proceeding could conclude that defendant's criminal history was insignificant and thus did not err in failing to submit the mitigating circumstance that defendant had no significant history of prior criminal activity where defendant's prior criminal history included numerous beatings of the victim, an incident in which defendant shot an acquaintance in the leg, a conviction for driving under the influence, and a guilty plea to assault inflicting serious injury in an altercation in which defendant hit a man in the head with a large stick, causing a concussion and breaking the man's jaw and ribs.

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

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-*Gregg* cases. 65 ALR4th 838.

22. Criminal Law § 1362 (NCI4th)— capital sentencing—mitigating circumstance—age of defendant—submission not required

The trial court properly declined to submit defendant's age as a mitigating circumstance in this capital sentencing proceeding, although defendant contended that the evidence showed his emotional age to be younger than his chronological age of twenty-seven at the time of the crime, where the evidence showed that defendant completed high school and that his general knowledge was "sufficient for most purposes"; he has average intelligence, with no major disturbance of mood or thinking, and was gainfully employed prior to his arrest; and the evidence did not link defendant's immaturity and impulsive behavior to his age but showed that those traits stemmed from a personality disorder and dysfunctional family life.

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

23 Criminal Law § 1363 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—support of child—sole supporter of victim—insufficiency of evidence

The evidence did not require the trial court to submit the nonstatutory mitigating circumstances that "defendant had provided child support for his child by another woman for several years" and "defendant was the sole supporter of [the victim] while they were living together" where the evidence showed only that the woman with whom defendant conceived a child received government support, and it also showed that defendant provided support to the victim but failed to show that he was her "sole supporter."

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

24. Criminal Law § 1363 (NCI4th)— capital sentencing—request for nonstatutory mitigating circumstance—redundancy of alcohol dependence—insufficient evidence of marijuana dependence

The trial court properly ruled that the portion of a requested mitigating circumstance referring to the effect of defendant's alcohol dependence upon his judgment was subsumed within the submitted circumstance that "defendant has a history of chronic alcohol dependency and abuse." Furthermore, the evidence was insufficient to require submission of the portion of the requested instruction referring to marijuana dependence where a psychiatrist testified that defendant had abused marijuana but did not state that he was dependent upon it.

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

25. Criminal Law § 1363 (NCI4th)— capital sentencing—requested mitigating circumstance—subsumption by circumstances submitted

The trial court did not err by refusing to submit the mitigating circumstance that "defendant never developed a normal father-son relationship with his father" because it was subsumed within submitted mitigating circumstances that "defendant's mental and/or emotional disturbances were caused in part by the emotional instability of his family" and "defendant had grown up in a dysfunctional family with much discord between his parents and with both parents being 'workaholics' with limited time for their children."

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

26. Criminal Law § 1363 (NCI4th)— capital sentencing—mitigating circumstance—continued remorse by defendant—failure to submit as harmless error

The trial court erred by failing to submit defendant's requested mitigating circumstance that within a short time following the crime defendant exhibited remorse and sorrow "and has continued to do so" where defendant cried on the stand when asked on direct examination about his reaction to the victim's death and the sexual offense committed against her. However, even if this error was of constitutional dimension, it was harmless beyond a reasonable doubt where the jury saw defendant on the stand and heard the evidence relevant to this circumstance, and the court instructed on the "catchall" circumstance, which no juror found to exist.

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

27. Criminal Law § 1363 (NCI4th)— capital sentencing—mitigating circumstance—no attempt to flee—failure to submit as harmless error

The trial court's failure to submit defendant's requested mitigating circumstance that "defendant at no time resisted arrest or attempted to flee from Johnston County" was harmless error where the jury knew from the evidence that defendant cooperated with the police and never tried to escape from the police station, and the trial court submitted the "catchall" mitigating circumstance.

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

28. Criminal Law § 1334 (NCI4th)— aggravating circumstances—notice not required

The trial court did not commit constitutional error by denying defendant's motion for disclosure of the aggravating circumstances upon which the State intended to rely.

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

29. Criminal Law § 1300 (NCI4th)— capital case—guilt and sentencing phases—separate juries not required

The trial court did not err by denying defendant's motion for separate juries for the guilt and sentencing phases of his capital trial.

Am Jur 2d, Criminal Law §§ 609 et seq., 628.

Comment Note.—Effect of abolition of capital punishment on procedural rules governing crimes punishable by death—post-*Furman* decisions. 71 ALR3d 453.

30. Jury § 235 (NCI4th)— death-qualified jury—constitutionality

The trial court did not commit constitutional error by denying defendant's motion to prohibit death-qualifying questions during voir dire.

Am Jur 2d, Jury §§ 189 et seq.

31. Jury § 261 (NCI4th)— peremptory challenges—opposition to death penalty

The trial court did not err by allowing the State to exercise peremptory challenges to excuse prospective jurors who indicated opposition to the death penalty.

Am Jur 2d, Jury §§ 234 et seq.

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

32. Criminal Law § 1343 (NCI4th)— heinous, atrocious, or cruel aggravating circumstance—constitutional instruction

The trial court's instruction on the heinous, atrocious, or cruel aggravating circumstance was not unconstitutionally vague.

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

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

33. Criminal Law § 1325 (NCI4th)— consideration of mitigating circumstances—propriety of instructions

The trial court's instructions on Issues Three and Four on the Issues and Recommendation as to Punishment form in a capital trial were proper.

Am Jur 2d, Trial §§ 888 seq.

34. Criminal Law § 1326 (NCI4th)— mitigating circumstances—instruction on burden of proof

The trial court did not erroneously instruct the jury on defendant's burden of proving mitigating circumstances.

Am Jur 2d, Trial §§ 888 seq.

35. Criminal Law § 762 (NCI4th)— instructions on reasonable doubt

The trial court did not commit constitutional error when it defined reasonable doubt in the jury instructions at both phases of a capital trial.

Am Jur 2d, Jury §§ 890 et seq.

36. Constitutional Law § 371 (NCI4th)— death penalty—not cruel and unusual punishment

Imposition of the death penalty upon defendant did not violate his rights under the Eighth Amendment to the U.S. Constitution.

Am Jur 2d, Criminal Law §§ 588 et seq.

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

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

37. Criminal Law § 1322 (NCI4th)— life imprisonment—jail time—refusal to instruct

The trial court did not err by failing to inform the jury in a capital trial about the amount of time defendant would spend in jail if sentenced to life imprisonment.

Am Jur 2d, Trial §§ 100, 890.

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

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

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

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, where the jury found defendant guilty upon theories of premeditation and deliberation and felony murder; the evidence supported the jury's finding of the aggravating circumstances that the murder was especially heinous, atrocious, or cruel and was committed while defendant was engaged in a sexual offense; the only statutory mitigating circumstance found by the jury was that defendant was under the influence of a mental or emotional disturbance; the victim was murdered in a brutal, merciless, and dehumanizing attack which included severe blunt-trauma injuries and a depraved sexual offense; and defendant committed the murder at the victim's home.

Am Jur 2d, Criminal Law § 628.

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 20 September 1993 Criminal Session of Superior Court, Johnston County, on a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 11 April 1995.

Michael F. Easley, Attorney General, by William B. Crumpler and Valerie B. Spalding, Assistant Attorneys General, and Simone E. Frier, Staff Attorney, for the State.

W. Terry Sherrill and Ann L. Hester for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of the first-degree murder of Jennifer Narron, his former girlfriend, and sentenced to death. He appeals from his conviction and sentence. We conclude that defendant received a fair trial, free of prejudicial error, and that the sentence of death is not disproportionate.

The State's evidence tended to show that the victim was killed on 9 April 1992. At that time she was living with her boyfriend, Michael Hopkins, in his Smithfield apartment. Hopkins testified that he last saw the victim alive at about 4:00 p.m., just before he went to bed. When he awoke around 7:30 p.m., he discovered the victim's body

lying in a pool of blood near the front steps outside his apartment. Hopkins ran to his landlady's house and called the police; he waited at the end of the driveway until the officers arrived.

The Smithfield Police Department received a call at 7:38 p.m., and officers arrived at Hopkins' apartment a few minutes later. They found the victim's naked body face down next to the apartment steps. Her head lay in a pool of blood, and a stick protruded from her rectum. Her left arm extended along the left side of her body, palm up; her right index finger was in her mouth. SBI Special Agent David McDougall examined the scene. He found several articles of the victim's clothing on the ground near the body and a three-inch-thick log containing blood and strands of hair atop a woodpile not far away. He saw no signs of a struggle or other violence inside the apartment.

Dr. Karen Chancellor, a forensic pathologist who performed the autopsy, testified that she found multiple bruises and abrasions on the victim's head, face, and neck. The lower jawbone was fractured in two places, and the back of the scalp had four separate lacerations, each exposing bone. She also found multiple skull fractures, hemorrhaging around the brain and brain stem, and bruises of the brain tissue. Chancellor testified that both internal and external lacerations existed in and around the vagina and rectum. Further, the injuries around the rectal area were consistent with an object being rotated in the rectum. She opined that death resulted from blunt-force trauma to the head, the victim had been hit at least five times, and the log McDougall found could have been used to inflict the injuries.

SBI Special Agent Scott Worsham testified that hair taken from the log was consistent with the victim's. He removed the stick from the victim's rectum under McDougall's supervision. The stick had been embedded about six and one-half inches into the rectum and inserted at such an angle that it could have penetrated some other part of the body, such as the vaginal area.

SBI Special Agent Mark T. Boodee, an expert in forensic serology, testified about the results of DNA testing, which revealed that blood samples taken from the pants defendant wore on the night of the murder contained DNA material that matched the victim's. SBI Special Agent Peter Duane Deaver, another expert forensic serologist, testified that blood found on the log and on defendant's pants was the same type as the victim's blood but not the same as defendant's.

Defendant testified that he and the victim had lived together for about three and one-half years; they broke up in March 1992. On the day of the murder he left work around 3:00 p.m., drank some beer on the way home, and also drank a few beers at a local tavern. He arrived at his grandmother's house, where he was living, between 5:30 and 6:00 p.m. He then went to Mike Hopkins' home at about 6:30. He and the victim sat on the steps outside the apartment talking for a while. The next thing he remembered was being two or three blocks away from Hopkins' apartment, walking in an agitated state. He noticed a little blood on his hand. He then met some friends and drank with them from 8:30 until about 11:00 p.m. He did not get drunk.

Two psychiatric experts testified for defendant. Dr. Robert Rollins testified that defendant had average intelligence and no major disturbance of mood or thinking. Defendant was distrustful, expected people to mistreat him, and lacked concern about other people. Rollins diagnosed defendant with alcohol abuse and dependence as well as adjustment disorder, which included depression. Dr. Billy Royal diagnosed defendant with depression, alcohol and marijuana abuse, and personality disorder. He considered the disorder to include immaturity, impulsivity, and dependence in the relationship with the victim. Both doctors opined that defendant's ability to form a specific intent to kill and to premeditate and deliberate was impaired on 9 April 1992. Both also noted defendant's history of violence toward the victim.

At sentencing the State relied on its guilt phase evidence and also introduced an eight-by-ten-inch photograph that depicted the stick protruding from the victim's rectum. This photograph had been excluded from the guilt phase.

Defendant's sister testified at sentencing that defendant supported the victim as best he could and always helped his two deaf brothers. She also stated that their father, who was not at home much due to his work, hit defendant and assaulted their mother. Further, defendant used various drugs, including marijuana and cocaine.

Psychiatric testimony offered at sentencing showed that defendant grew up in a dysfunctional family environment that included abuse of his mother and severe punishment of defendant for his transgressions. He became dependent upon alcohol early in his teenage years; this dependence exacerbated the difficulty he experienced in dealing with the end of his relationship with the victim. According to

the expert testimony, defendant suffered from depression, substance dependence, and personality disorder at the time of trial.

The jury found defendant guilty of first-degree murder under the theory of premeditation and deliberation and under the felony murder rule; it also convicted defendant of first-degree sexual offense. At sentencing the jury found two aggravating circumstances: "The capital felony was committed while the defendant was engaged in a sex offense"; and "The capital felony was especially heinous, atrocious, or cruel." The jury found one statutory mitigating circumstance, "The capital felony was committed while the defendant was under the influence of mental or emotional disturbance," and fourteen of the nineteen nonstatutory mitigating circumstances submitted. It unanimously recommended a sentence of death, which the trial court accordingly imposed.

Additional facts will be presented as necessary for analysis of the issues.

PRETRIAL PHASE

First, defendant contends the trial court erred by denying his pretrial motion to suppress the statement he made to Lieutenant Cuddington and Agent Dees at the Smithfield Police Department on 10 April 1992 and all evidence obtained as a result thereof. He argues that his statement was obtained illegally and that the physical evidence should have been excluded as the fruit of the poisonous tree. The State's evidence at the pretrial hearing tended to show that Cuddington and Dees began to look for defendant at approximately 1:00 a.m. on 10 April after they learned of defendant's past relationship with the victim. They found defendant at his grandmother's house at 3:00 a.m. While Cuddington asked defendant if he would go to the police station for questioning, Dees remained in the yard near the street. Both Cuddington and Dees drove unmarked police cars and wore plain clothes at that time. Defendant agreed to accompany Cuddington to the police station and rode in the front seat of Cuddington's squad car. He was not handcuffed or frisked.

Cuddington and Dees escorted defendant into the shift commander's room at the Smithfield Police Department at about 3:25 a.m. Dees sat at one desk, Cuddington sat at another, and defendant sat in a chair six or eight feet in front of Dees. The officers left the door open at first but later closed it to shut out hallway noise. They told defendant they wanted to shut the door and explained why; defend-

ant voiced no objection. The officers assured defendant that they would not lock the door and that he was not under arrest and could leave at any time. Dees then advised defendant of his *Miranda* rights as a precaution. Defendant indicated that he understood each right, and at about 3:28 a.m. he agreed to waive them. Dees then began asking defendant general questions about his occupation and usual daily activities before inquiring into his actions on 9 April 1992. Defendant stated that he had stopped at a tavern after work that day and consumed six or seven beers. He also stated that he saw the victim on his way home from the tavern and that they said "hello" in passing.

Defendant then sat back in his chair and said, "I think I need to speak to a lawyer." Cuddington asked if defendant had a particular lawyer in mind; defendant said he was not sure. Cuddington handed defendant a telephone directory opened to the Yellow Pages section containing attorney listings for the Smithfield area. As he did so, Dees told defendant he could talk to a lawyer and could continue to talk to the police if he wanted to. Defendant briefly perused the Yellow Pages and then said, "well, let's go ahead and talk," or words to that effect. Dees reminded defendant of his rights to remain silent and to the assistance of an attorney; defendant indicated he understood his rights. Defendant had not been placed under arrest at that time. During the ensuing interview, defendant stated that he had seen the victim, they sat on the steps of her house, they argued, and he hit her. The next thing he knew, he was walking down the road toward his grandmother's house. He did not know how many times he hit her but said, "I didn't mean to do it." Twice he asked Cuddington to kill him because he had killed the victim. At some point during the interview, defendant told Dees and Cuddington where in his grandmother's house they would find the clothes he was wearing when he hit the victim. SBI Special Agent McDougall and Patrolman Craig Fish were dispatched to retrieve the clothing. Dees wrote out a short statement indicating that defendant hit the victim but did not remember anything else; defendant refused to sign it. Defendant first mentioned hitting the victim at about 4:00 a.m. and was placed under arrest at about 6:45 a.m. when the interview concluded.

Defendant testified at the hearing that he had accompanied Cuddington to the police station because he felt he had to, even though no one placed handcuffs on him, pulled a weapon, or touched him in any way. None of the officers made defendant feel that he was under arrest at that time. Even after Cuddington and Dees shut the door to the interview room, defendant knew he was free to leave.

Defendant further testified that while he looked at the Yellow Pages, he asked what time it was. The officers said it was about 3:30 a.m.; defendant then said he probably could not find a lawyer willing to come to the station at that time. According to defendant, one of the officers agreed and then said they only had a few more questions to ask, if defendant was willing to answer them without a lawyer present. The court denied defendant's motion to suppress; both defendant's statement and the clothing found at his grandmother's house were admitted at trial.

[1] Defendant argues that the trial court erred in two ways when it denied his pretrial motion to exclude his incriminating statement. First, defendant submits the court erred by not determining whether he was seized in violation of the Fourth Amendment to the United States Constitution. Defendant did not make an argument based on the Fourth Amendment to the United States Constitution at trial; therefore, "he may not properly present an argument based thereon in this Court." *State v. Gibbs*, 335 N.C. 1, 42, 436 S.E.2d 321, 334 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 881 (1994).

[2] Second, defendant contends the trial court erred by concluding that he voluntarily reinitiated interrogation after requesting an attorney by saying, "well, let's go ahead and talk." Defendant relies on *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, *reh'g denied*, 385 U.S. 890, 17 L. Ed. 2d 121 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 376, *reh'g denied*, 452 U.S. 973, 69 L. Ed. 2d 984 (1981), which together establish that custodial interrogation must cease when an accused requests an attorney and may not be resumed by police officers without an attorney present. He contends the police improperly resumed interrogation after his request for an attorney when they told him he could still talk to them if he wanted to. We conclude that defendant was not in custody when he requested an attorney; thus, *Miranda* and *Edwards* do not apply.

Both *Miranda* and *Edwards* protect suspects during custodial interrogation. *Minnick v. Mississippi*, 498 U.S. 146, 150-51, 112 L. Ed. 2d 489, 495-96 (1990); *State v. Medlin*, 333 N.C. 280, 290, 426 S.E.2d 402, 407 (1993). A suspect is in custody for purposes of *Miranda* and *Edwards* when, considering the totality of the circumstances, "a reasonable person in the suspect's position would [not] feel free to leave at will [but would] feel compelled to stay." *Medlin*, 333 N.C. at 291, 426 S.E.2d at 407. "[T]he ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of move-

ment' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 77 L. Ed. 2d 1275, 1279 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977)).

The record reveals that defendant's freedom of movement was not restrained during his interview so as to render him in custody for purposes of the Fifth Amendment to the United States Constitution. Defendant testified that he knew he was free to leave, even when the door to the interview room was shut. He was never handcuffed or frisked; at most the police patted him down before the interview to make sure he was unarmed. Dees and Cuddington never threatened defendant, raised their voices, or ordered defendant to do anything. We conclude that when defendant asked for a lawyer, a reasonable person would have felt free to leave. Thus, the prohibitions of *Edwards* do not apply here, and defendant's rights were not violated when Dees told him he could continue talking to the officers if he wished. The trial court properly denied defendant's motion to suppress his incriminating statements. It follows that the "fruit of the poisonous tree" doctrine did not require suppression of the physical evidence obtained as a result thereof. *See Medlin*, 333 N.C. at 295, 426 S.E.2d at 409. These assignments of error are overruled.

JURY SELECTION

[3] Defendant assigns as error the manner in which the trial court conducted *voir dire*. After the court preliminarily instructed the venire regarding the charges pending against defendant and read the names of potential witnesses, it divided the group into four panels of about twelve persons each. The persons on each panel would be questioned individually as requested by defendant. The court instructed panel one to remain in the courtroom, panel two to return at 2:00 p.m. that day, panel three to report at 9:30 the following morning, and panel four to report at 2:00 the following afternoon. It then stated, "I'm going to allow another courtroom to borrow [panels three and four] this morning and maybe this afternoon on a case that's going to be tried." On the second day of *voir dire*, the trial court called the persons on panels three and four who had not been selected to serve on the jury at the other trial, placing those who had been selected at the end of the line.

One person from panel four, who had not been selected to serve at the other trial, sat on defendant's jury. Defendant contends that the jury selection process in the other courtroom became part of the jury selection in his trial when the trial court separated the persons on

panels three and four according to whether they had been selected to serve on the jury in the other courtroom. He further contends that because he was not present in the other courtroom for that jury selection, he was absent from a stage of his trial.

Defendant's right to be present in the courtroom at every stage of his trial is protected by the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, *State v. Buchanan*, 330 N.C. 202, 208-09, 410 S.E.2d 832, 836 (1991), as well as Article I, Section 23 of the North Carolina Constitution, *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990). A defendant may not waive this right. *Smith*, 326 N.C. at 794, 392 S.E.2d at 363. However, defendant has failed to show error in this regard. Defendant's contention that the court's procedure somehow prejudiced him rests on pure speculation. We will not find reversible error on this basis. *See State v. Bell*, 338 N.C. 363, 379, 450 S.E.2d 710, 719 (1994), *cert. denied*, — U.S. —, 132 L. Ed. 2d 861 (1995). This assignment of error is overruled.

[4] Defendant next contends the trial court erred by striking prospective jurors Capps and Keen for cause. He asserts that the court should have excused them for their views on the death penalty only if those views would have prevented or substantially impaired the performance of their duties as jurors in accordance with their instructions and their oaths. *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985). Defendant contends that while Capps and Keen stated an opposition to the death penalty, they were not excludable under *Witt* because they also indicated that their beliefs would not "substantially impair" their ability to carry out their duties as jurors. We disagree.

The *voir dire* testimony of Capps and Keen demonstrated a bias against the death penalty. In response to questions from both the prosecution and the trial court, Capps indicated on three separate occasions that she either would not or could not impose the death penalty. Similarly, Keen told both the prosecutor and the court that under no circumstances could he vote to impose death. Despite this testimony, defendant argues, these jurors were improperly excused for cause because both stated during rehabilitation that they could "fairly consider" both life imprisonment and death as possible punishments. This Court has noted that a prospective juror's equivocation regarding the death penalty may indicate a "conscientious desire

to do his duty as a juror and to follow the trial court's instructions in the face of recognizing his personal inability to impose the death penalty." *State v. Yelverton*, 334 N.C. 532, 544, 434 S.E.2d 183, 190 (1993). The trial court properly could have determined that the rehabilitation testimony of Capps and Keen reflected such a desire rather than an actual ability to sentence defendant to death. "The granting of a challenge for cause where the juror's fitness or unfitness is arguable is a matter within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion." *State v. Abraham*, 338 N.C. 315, 343, 451 S.E.2d 131, 145 (1994). We conclude that the court acted within its discretion by excusing these jurors for cause. This assignment of error is overruled.

[5] Defendant next contends the trial court erred by striking prospective juror Sanders for cause without allowing defendant an opportunity to rehabilitate. Sanders indicated during *voir dire* that she strongly opposed the death penalty and that her views would interfere with her ability to execute her duties as a juror. For example, the prosecutor asked her if she would "automatically vote against the death penalty"; Sanders replied that she would. She again answered affirmatively when the trial court asked, "Ms. Sanders, as I understand it, under no circumstances could you render a verdict that meant the death penalty. Is that what you're saying?" The court then allowed the State's challenge for cause without allowing defendant an attempt at rehabilitation.

Whether to excuse a prospective juror for cause lies within the trial court's discretion. *State v. McDowell*, 329 N.C. 363, 379-80, 407 S.E.2d 200, 209 (1991). A trial court does not abuse its discretion when it precludes rehabilitation by a defendant where the State's challenge for cause is supported by a prospective juror's *voir dire* testimony and the defendant fails to show that further questioning would likely have produced different testimony. *State v. McCollum*, 334 N.C. 208, 234, 433 S.E.2d 144, 158 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 895, *reh'g denied*, — U.S. —, 129 L. Ed. 2d 924 (1994). Defendant argues that had the court allowed him an attempt at rehabilitation, Sanders might have revealed a willingness to set aside her personal feelings and follow the court's instructions regarding the death penalty.

Defendant has failed to identify anything in the record to support his position. There is no reason to believe an attempt to rehabilitate Sanders would have yielded different testimony. Sanders' responses

to questions from both the prosecution and the trial court established that under no circumstances would she vote to impose death. Faced with such unequivocal testimony, the trial court had the discretion not to allow rehabilitation. Defendant has not shown an abuse of that discretion. This assignment of error is overruled.

GUILT PHASE

Next, defendant contends the trial court erred by admitting four photographs into evidence and improperly instructing the jury regarding them. Defendant filed a motion *in limine* seeking to exclude certain photographs on the grounds that they were repetitive, unduly grisly, and more prejudicial than probative. The trial court granted the motion as to two photographs but denied it as to four, exhibits fourteen through seventeen, which showed the victim's naked body at the crime scene. The court excluded exhibits twelve and thirteen from the guilt phase but ruled that both photos would be admissible at sentencing. Exhibits fourteen through seventeen were admitted over defendant's objection at trial for the limited purpose of illustrating testimony.

Defendant argues that the exhibits should have been excluded because they were repetitious and their probative value was outweighed by the danger of unfair prejudice. *See* N.C.G.S. § 8C-1, Rule 403 (1992). What represents "an excessive number of photographs" and whether the "photographic evidence is more probative than prejudicial" are matters within the trial court's discretion. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Where, as here, a party introduces photographs for illustrative purposes and not solely to arouse prejudice or passion, they are admissible even if revolting and repetitious. *State v. Peterson*, 337 N.C. 384, 394, 446 S.E.2d 43, 49 (1994). Each photograph about which defendant argues was relevant to illustrate specific testimony. They depicted the victim's body from four different angles at the crime scene as examined by McDougall. Three also revealed blood stain patterns, about which Agent Deaver testified. Such photographs are not rendered inadmissible "by the portrayal of the gruesome events which the witness testifies they accurately portray." *State v. Elkerson*, 304 N.C. 658, 665, 285 S.E.2d 784, 789 (1982). The number of photographs (four) was not excessive. Their admission, therefore, was not error.

[7] The trial court instructed without objection that the jury could consider certain photographs "as evidence of facts that they illustrate." Defendant argues that this was plain error because some pho-

tographs were admitted for illustrative purposes only. The plain error rule applies in those rare cases where an error " 'amounts to a denial of a fundamental right of the accused' " or is " 'something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). To determine whether plain error occurred, we must examine the whole record and decide whether the instruction had a "probable impact" on the jury's verdict. *Id.* at 661, 300 S.E.2d at 378-79. Our review of the record reveals that the instruction could not have had such an impact. Given the physical and circumstantial evidence, as well as defendant's confession, any error concerning whether photographs constituted substantive or illustrative evidence probably did not affect the jury's deliberations or decision. These assignments of error are overruled.

[8] Defendant next argues the trial court erred by allowing Agent Boodee to testify about the results of DNA testing and the statistical significance thereof. Boodee testified as an expert in DNA analysis and molecular genetics. He testified that DNA in blood samples found on the pants defendant wore on the night of the murder matched the victim's DNA. He further testified that the probability of another person unrelated to the victim having the same DNA banding pattern was one in 5.5 billion for each of the Caucasian, African-American, and Lumbee populations in North Carolina. Defendant argues that the trial court should not have allowed Boodee to testify because he did not personally perform the DNA tests, prepare the guidelines by which the testing was done, or write the report from which he testified. Defendant contends Boodee's testimony violated the Confrontation Clause of the Sixth Amendment to the United States Constitution as well as N.C.G.S. § 8C-1, Rules 702, 703, and 403. We disagree.

Inherently reliable information is admissible to show the basis for an expert's opinion, even if the information would otherwise be inadmissible hearsay. *See State v. Huffstetler*, 312 N.C. 92, 106-08, 322 S.E.2d 110, 119-21 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). SBI Special Agent Anita Matthews, an intern in the DNA unit, performed the DNA analysis under Boodee's direct supervision. Boodee reviewed her final report, as did two additional special agents in the DNA unit. Thus, the report was inherently reliable, and Boodee could use it to form his opinions. Boodee was vigorously cross-examined about the DNA testing procedures at the SBI and about his

opinions. Therefore, the testimony did not violate defendant's Confrontation Clause rights.

N.C.G.S. § 8C-1, Rule 702 provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion." Boodee qualified as an expert, and his scientific testimony could assist the jury in determining whether defendant killed the victim. Thus, he was competent to testify, and allowing him to do so did not violate Rule 702.

N.C.G.S. § 8C-1, Rule 703 permits an expert to give an opinion based on evidence not otherwise admissible at trial, provided the evidence is of the type reasonably relied upon by other experts in the field. Boodee based his opinion on the results of DNA analysis performed by Matthews and supervised by Boodee. DNA evidence is admissible in North Carolina. *State v. Pennington*, 327 N.C. 89, 100, 393 S.E.2d 847, 854 (1990). Boodee's testimony in no way violated Rule 703.

Finally, defendant argues that Boodee's testimony should have been excluded under N.C.G.S. § 8C-1, Rule 403. This argument has no merit. The DNA evidence was highly probative of the identity of the victim's killer. It did not unfairly prejudice defendant, confuse the issues, or mislead the jury. The trial court properly allowed Boodee to testify about the results of DNA analysis and the statistical significance thereof.

[9] Defendant next argues the trial court erred by overruling his objections to the testimony of Special Agent Deaver, an expert in forensic serology and bloodstain pattern interpretation. Defendant contends Deaver's testimony was incompetent and irrelevant because it lacked an adequate foundation and was speculative. Moreover, argues defendant, its probative value was outweighed by the danger of unfair prejudice and confusion of the issues. Defendant complains about the portion of Deaver's testimony regarding the number of blows inflicted upon the victim, the position of the victim's body when she was struck, and the force of the blows. Deaver based his opinions on his examination of the bloodstain patterns found on the ground, the porch steps, and the log discovered on the woodpile.

Defendant has failed to show error in this regard. The prosecutor laid an adequate foundation for Deaver's testimony. Deaver had com-

pleted a basic and advanced course in bloodstain pattern interpretation and was teaching that subject to SBI agents. Before testifying about his findings in this case, he described in detail the process of interpreting bloodstain patterns. Deaver did not speculate but gave opinions based on his examination of the physical evidence at the crime scene. The testimony was competent and relevant to show the manner of the victim's murder; its probative value was not outweighed by the danger of unfair prejudice. The trial court, therefore, properly admitted the evidence. This assignment of error is overruled.

Next, defendant argues the trial court erred by allowing inadmissible hearsay testimony, which defendant had moved to exclude, about statements the victim made and a letter she purportedly wrote to defendant. The State presented two witnesses who testified about statements the victim made during the six to eight weeks preceding the murder. Michael Hopkins testified that the victim told him while they were living together that "she had broken up with [defendant] and—but, as far as seeing—seeing anybody, she wasn't." David Bunch, the victim's co-worker, testified that the victim told him that defendant beat her on weekends when he was drunk, that she was going to leave defendant because of the beatings, that she had broken off her relationship with defendant and was seeing Hopkins, and that defendant wanted to talk to her before he left the state so they could part as friends. Bunch also testified about a conversation between the victim and her mother and sisters in which the victim stated, "I can't understand why you all want me to be with [defendant]. I have who I want, if you all can't be around me without having [defendant] . . . leave, stay the hell away from me." Finally, Lieutenant Cuddington read into evidence a letter the victim apparently wrote in which she mentioned the abuse she suffered from defendant.

[10] The portion of Hopkins' testimony about which defendant complains was neither mentioned in defendant's motion nor objected to at trial. Defendant therefore failed to preserve this assignment of error for appellate review under N.C. R. App. P. 10(b)(2); *see State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994). Defendant also failed specifically and distinctly to contend that the error amounts to plain error, thereby waiving appellate review under N.C. R. App. P. 10(c)(4). *See Hamilton*, 338 N.C. at 208, 449 S.E.2d at 411.

[11] At the hearing on defendant's motion, the trial court ruled that Bunch's testimony and the letter from the victim to defendant were

admissible under N.C.G.S. § 8C-1, Rule 804(b)(5), which provides in part:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness [is admissible] 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.

Defendant argues this ruling was erroneous because the statements were not probative of a material fact and lacked circumstantial guarantees of trustworthiness. Defendant also argues the trial court failed to make the findings of fact regarding circumstantial guarantees of trustworthiness required by *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985).

The trial court found that the statements were evidence of motive and identity. Further, they were relevant to defendant's intent: " '[I]ll-will or previous difficulty between the parties' is among the circumstances that a jury may consider in deciding that defendant killed with premeditation and deliberation." *State v. Faucette*, 326 N.C. 676, 686, 392 S.E.2d 71, 76 (1990) (quoting *State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986), *sentence vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987)). Our review of the record reveals that the evidence supports the court's determination that the statements were probative of material facts.

While the trial court concluded that the statements possessed the requisite trustworthiness, it failed to make findings of fact in that regard. This omission was erroneous under *Smith*. We conclude, however, that the record sustains the court's conclusions. Moreover, it contains overwhelming evidence of defendant's guilt—including his confession, DNA test results, and blood-type matching—which points unerringly to defendant as the perpetrator of this crime. The error, therefore, is harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *see Faucette*, 326 N.C. at 687-88, 392 S.E.2d at 77 (failure to make the requisite findings held harmless beyond a reasonable doubt where evidence of defendant's guilt was overwhelming). This assignment of error is overruled.

[12] Defendant also argues that the trial court's instructions regarding voluntary intoxication and diminished capacity were erroneous. The trial court instructed the jury as follows:

> There is evidence in this case which tends to show that the defendant was intoxicated at the time of the acts alleged in this case, and/or that he was suffering from a mental or emotional condition which affected his ability to plan. Now, generally, voluntary intoxication is not a legal excuse for a crime, however if you find that the defendant was . . . intoxicated and that/or that he was suffering from a mental condition or a combination of these, you should consider whether this affected his ability to formulate the specific intent which is required for conviction of first degree murder under this theory.
>
> In order for you to find the defendant guilty of first degree murder under this theory, that is the theory of malice, premeditation and deliberation, you must find, beyond a reasonable doubt, that he killed the deceased . . . with malice and [as] a result of premeditation and deliberation. If as a result of intoxication and/or because of his mental or emotional condition . . . he did not have the specific intent to kill Jennifer Narron, formed after premeditation and deliberation, then he is not guilty of murder in the first degree under this theory, that is the theory of malice, premeditation and deliberation.
>
> Finally, in considering whether malice, premeditation and deliberation existed, you may consider the opinions rendered by expert witnesses regarding those elements, in other words, Dr. Rollins and Dr. Royal.

After so instructing the jury, the court asked counsel if they had any objections. Defense counsel entered one exception for the record that is unrelated to the instruction at issue. Defendant's proposed instruction included what defendant now calls a "final mandate": "Therefore, I charge you that if upon considering the evidence with respect to the [d]efendant's intoxication you have a reasonable doubt as to whether the [d]efendant formulated the specific intent required for a conviction of first degree murder, you will not return a verdict of first degree murder." Defendant now argues that the trial court shifted the burden of proof by omitting defendant's proposed "final mandate." We disagree.

Because defendant did not object to the instruction, we will reverse only upon a finding of plain error, which defendant has not shown. The trial court gave the substance of the instruction defendant requested. "[W]hen a request is made for a specific instruction that is supported by the evidence and is a correct statement of the law, the court, although not required to give the requested instruction verbatim, must charge the jury in substantial conformity therewith." *State v. Holder*, 331 N.C. 462, 474, 418 S.E.2d 197, 203 (1992). The omission of the "final mandate" could not have misled the jury about the burden of proof, especially considering the court's explicit instructions about reasonable doubt and the State's burden of proof. Further, in *Holder* we upheld an instruction substantially similar to this one. *See id.* at 473-75, 418 S.E.2d at 203-04. The trial court's instruction was not erroneous.

[13] Defendant further contends the trial court erred by failing to instruct on diminished capacity as that defense related to the charge of first-degree sexual offense. Defendant did not request such an instruction, did not object at trial to its absence, and has not shown plain error. First-degree sexual offense is not a specific-intent crime; the intent to commit the crime "is inferred from the commission of the act." *State v. Boone*, 307 N.C. 198, 209, 297 S.E.2d 585, 592 (1982). Thus, diminished capacity is not a defense to first-degree sexual offense, and the trial court did not commit error, plain or otherwise, by failing to instruct on that defense.

In a related argument, defendant contends that because the trial court failed to instruct on diminished capacity as a defense to the charge of first-degree sexual offense, the following rulings were also erroneous: the denial of defendant's motion to dismiss the charge of first-degree sexual offense, the refusal to submit the offense of second-degree sexual offense, and the submission of the charge of first-degree murder under the felony murder rule. Defendant also argues that the court's failure to instruct on diminished capacity made its instruction on the "continuous transaction" rule erroneous. Defendant cites no authority in support of his contentions, a violation of Rule 28(b)(5) of the Rules of Appellate Procedure. More importantly, we held above that the trial court did not err in its instructions regarding first-degree sexual offense; it follows that the rulings and instruction complained of here were not erroneous. This assignment of error is overruled.

[14] Defendant next argues that he must have a new trial because he was absent from his trial on several occasions. The transcript specifically notes defendant's presence at some, but not all, times during the trial; defendant's argument apparently rests on the fact that the court reporter did not consistently record defendant's presence while court was in session. He contends that "[t]he record does not indicate that [d]efendant was present in the courtroom while trial proceeding[s] were ongoing" and that he was absent from the sentencing proceeding during the presentation of his own witnesses and the opening and closing statements.

Defendant appears to rely on the incompleteness of the record to argue that the State cannot prove this error harmless beyond a reasonable doubt. "[H]owever, whatever incompleteness may exist in the record precludes defendant from showing that error occurred." *State v. Adams*, 335 N.C. 401, 410, 439 S.E.2d 760, 764 (1994). The transcript does not indicate, and defendant has not shown, that he was absent. We will not assume error "when none appears on the record." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). This assignment of error is overruled.

SENTENCING PHASE

Defendant next argues that the trial court erred by allowing the State to introduce at sentencing an eight-by-ten-inch color photograph of the victim's naked body, from the rear, that showed the stick protruding from the body and the injuries to the rectal area. The court had excluded this photograph from the guilt phase. Defendant contends that the court failed to perform the balancing test required by N.C.G.S. § 8C-1, Rule 403 and that the photograph was inadmissible under this rule because it possessed little probative value, created a great danger of unfair prejudice, and served merely to inflame the passions of the jury. We disagree.

[15, 16] The Rules of Evidence do not apply in sentencing proceedings. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992). Any evidence the court "deems relevant to sentence" may be introduced at this stage. N.C.G.S. § 15A-2000(a)(3) (Supp. 1994). The State "must be permitted to present *any* competent, relevant evidence . . . which will substantially support the imposition of the death penalty." *State v. Brown*, 315 N.C. 40, 61, 337 S.E.2d 808, 824 (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). Thus, the trial court

was not required to perform the Rule 403 balancing test. Photographs of the victim depicting injuries to the body and the manner of death can be relevant to issues to be determined at sentencing. *See 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). The court found that the photograph was relevant to the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *See* N.C.G.S. § 15A-2000(e)(9). The record supports that determination. We therefore conclude the trial court did not err by admitting the photograph at sentencing. This assignment of error is overruled.

[17] In another assignment of error, defendant argues that the trial court erred by sustaining the State's objection to two questions asked of defense expert Dr. Royal. Defense counsel asked Dr. Royal whether he "had seen indications of remorse on [defendant's] part" and what he had observed of "[d]efendant's reaction to [the victim's] death." Defendant argues that the trial court should have allowed Royal to answer the questions because the testimony was relevant and admissible to prove the mitigating circumstance that defendant felt remorse following the murder. We agree that the trial court erred but conclude that the error was harmless beyond a reasonable doubt.

We note that defendant failed to make an offer of proof as to how Royal would have answered the questions. That failure is not fatal, however, because the record clearly reveals the " 'essential content' of the excluded testimony and its significance." *State v. Hester*, 330 N.C. 547, 555, 411 S.E.2d 610, 615 (1992). Defense counsel sought to elicit testimony about defendant's remorse for the crime through these two pointed questions. Such evidence was relevant to the nonstatutory mitigating circumstance "[t]hat within a short time following the crime defendant exhibited remorse and sorrow."

Assuming *arguendo* that this error had constitutional implications under *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and its progeny, we nevertheless conclude that it was harmless beyond a reasonable doubt. Despite uncontroverted evidence thereof, the jury did not find the mitigating circumstance regarding defendant's remorse. For example, Lieutenant Cuddington testified that defendant cried during his police interview and asked Cuddington to kill him for what he had done. Further, the jury saw defendant cry during his direct examination. Given these clear indications of defendant's sorrow and remorse, we conclude that the exclusion of Dr. Royal's testi-

mony was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b). This assignment of error is overruled.

Defendant next contends that two portions of the prosecutor's closing argument were grossly improper in that they contained statements unsupported by law or the evidence. Both related to the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). Defendant objected during one part and assigns error to the trial court's overruling of his objections. Defendant failed to object during the remaining portion but asserts that the trial court should have intervened *ex mero motu* to censor the prosecutor's comments. We disagree with both contentions.

[18] First, defendant argues that the trial court should have sustained his objections to the segment of the closing argument in which the prosecutor stated that the evidence supported inferences that: (1) the victim was alive as defendant bludgeoned her, (2) the victim was alive when defendant inserted the tree limb into her rectum, and (3) defendant twisted the stick in the rectum as he inserted it. Defendant contends the trial court's overruling of his objections allowed the prosecutor to urge the jury to find the (e)(9) circumstance based on the evidence of the sex offense. We conclude, however, that the statements to which defendant objected represented references to the pitiless and dehumanizing manner of the murder. The acts depicted highlight the excessive brutality and cruelty of the killing. Thus, the trial court properly overruled defendant's objections.

Second, defendant argues that the trial court should have intervened during the portion of the closing argument in which the prosecutor gave a chronological summary of the crime. The prosecutor stated:

> This was not a normal killing. . . . Picture in your mind, if you will, a knock on the door. [The victim] answers, comes out sits on the steps and talks. . . . Then the man who has used a stick before, to break jaws, gets mad again. He disrobes her in broad daylight outside of the apartment. Then he grabs a log and he begins to use it like a club. . . . She falls, and is helpless on the ground. . . . [H]e . . . strikes with the log against her head again and again and again. . . . [Then h]e grabs a different kind of stick [and] inserts one prong in her genital area, . . . the other prong into [her] rectum, and with such force, . . . six inches into her rectum. Then he

leaves her there, the stick still in her rectum, the blood still gushing from her head.

Defendant did not object to this portion of the argument; therefore, we will find error only if the comments were so grossly improper as to require intervention *ex mero motu*. *State v. Basden*, 339 N.C. 288, 300-01, 451 S.E.2d 238, 247 (1994). No such gross impropriety exists here. The argument sought to give the jury a complete picture of the merciless nature of the crime. It did not encourage the jury to find the murder especially heinous, atrocious, or cruel simply on the basis of the sex offense but rather on the basis of the overwhelming brutality of the crime. Further, the evidence supported the argument. The testimony of the medical examiner indicated that a laceration in the victim's vagina connected to the rectum and the abdominal cavity and that the injuries were consistent with the stick having been rotated. This permits the inference that defendant inserted part of the stick into the genital area and part into the rectum, and twisted it. The argument did not require the trial court to intervene absent an objection by defendant. This assignment of error is overruled.

[19] Next, defendant argues that the trial court erred by submitting the aggravating circumstances that the capital felony was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9), and that the capital felony was committed while defendant was engaged in the commission of a sex offense, N.C.G.S. § 15A-2000(e)(5). Defendant contends the evidence supporting the former circumstance completely incorporated that supporting the latter. Because separate evidence must exist to support each aggravating circumstance submitted, *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1994), defendant argues that the trial court erred by submitting two circumstances sustained only by the evidence of the sex offense. Defendant further argues that even if the trial court properly submitted both circumstances, it erred by failing to instruct the jury that it could not consider the same evidence in support of more than one circumstance. We find no error.

Where separate evidence exists "to support each aggravating circumstance, it is not improper for both . . . to be submitted." *Id.* Different evidence supported each circumstance at issue here. A reasonable juror could have found that the murder was especially heinous, atrocious, or cruel based on the severe blunt-trauma wounds. The medical examiner's testimony revealed the extent of those injuries. The victim suffered multiple skull fractures and lacer-

ations which exposed the skull, and her lower jaw was fractured in two places. She sustained contusions to the brain tissue, brain hemorrhaging at the subdural and subarachnoid levels, and hemorrhaging of the brain stem. This indicated diffuse, severe brain injury. The victim also had numerous abrasions on her head, face, neck, and chest as well as her back, hands, and arms. This evidence, independent of the additional evidence establishing the commission of a sex offense, supported submission of the circumstance that the murder was especially heinous, atrocious, or cruel.

The evidence tending to support the (e)(5) circumstance showed that multiple external abrasions and lacerations existed around the victim's rectum and vagina. Further, the medical examiner testified that some object had been inserted into the rectum or the vagina, causing internal lacerations. A reasonable juror could have determined based solely on this evidence that the murder was committed while defendant was engaged in the commission of a sex offense. The evidence of each aggravating circumstance was sufficient and did not overlap; thus, the trial court did not commit error, constitutional or otherwise, by submitting both to the jury.

[20] The trial court instructed the jury not to "focus on the sexual offense but instead focus on the manner of [the victim's] killing" when considering the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. Defendant contends this instruction was erroneous because it failed to prohibit jurors from considering the same evidence in support of both aggravating circumstances submitted.

Defendant did not object at trial, so we review for plain error. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Trial courts "should . . . instruct the jury in such a way as to ensure that jurors will not use the same evidence to find more than one aggravating circumstance." *Gay*, 334 N.C. at 495, 434 S.E.2d at 856. Though it could have been more precise, the instruction here sufficed to meet the requirements of *Gay*. Plenary evidence existed apart from that of the sex offense to support the (e)(9) circumstance. We cannot conclude that the trial court's failure to give a more precise instruction had a probable impact on the jury's sentence recommendation. Thus, we hold that no plain error occurred. *See Odom*, 307 N.C. at 661, 300 S.E.2d at 379. This assignment of error is overruled.

Defendant next assigns as error the trial court's failure to submit two statutory mitigating circumstances. Defendant contends this fail-

ure represents constitutional error which the State cannot prove harmless beyond a reasonable doubt. We disagree.

[21] First, defendant contends the trial court should have submitted the mitigating circumstance that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1). Before submitting this circumstance, a court must "determine whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity." *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988). If the court decides that a rational jury could so conclude from the evidence, the jury is entitled to determine whether the evidence reveals a significant history. *Id.* A significant history for purposes of N.C.G.S. § 15A-2000(f)(1) is one likely to influence the jury's sentence recommendation. *State v. Sexton*, 336 N.C. 321, 375, 444 S.E.2d 879, 910, *cert. denied*, —- U.S. —-, 130 L. Ed. 2d 429 (1994).

The evidence here of defendant's prior criminal history includes references to defendant's numerous beatings of the victim, to an incident in which defendant shot an acquaintance in the leg, to a conviction for driving under the influence, and to a guilty plea to assault inflicting serious injury. The assault conviction arose out of an altercation in which defendant hit a man in the head with a large stick, causing a concussion and breaking the man's jaw and ribs. Given the extent of this history, particularly defendant's prior use of a large stick as a dangerous weapon and his multiple beatings of the victim, the trial court properly could have determined that no reasonable juror could have concluded that defendant's criminal history was insignificant. Therefore, the trial court did not err by not submitting the (f)(1) circumstance. *See id.* at 375-76, 444 S.E.2d at 910.

[22] Second, defendant contends the trial court erred by failing to submit the mitigating circumstance of defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7). Defendant testified that he was twenty-nine years old at the time of trial, which would have made him twenty-seven at the time of the crime. Defendant argues, however, that the evidence showed his emotional age to be younger and that testimony regarding his immaturity, dependence on family for housing and transportation, and lack of experience and knowledge required the trial court to submit the (f)(7) circumstance.

Defendant correctly notes that chronological age is not determinative. *See State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986). The factor of a defendant's age " 'must be considered as relative and . . . weighed in the light of varying conditions and circum-

stances.' " *State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983) (quoting *Giles v. State*, 261 Ark. 413, 421, 549 S.W.2d 479, 483, *cert. denied*, 434 U.S. 894, 54 L. Ed. 2d 180 (1977)). The evidence here showed that defendant completed high school and that his general knowledge was "sufficient for most purposes." He has average intelligence, with no major disturbance of mood or thinking, and was gainfully employed prior to his arrest. No testimony linked defendant's immaturity and impulsive nature to his age; rather, those traits apparently stemmed from a personality disorder and somewhat dysfunctional family life. Considering these "conditions and circumstances," we conclude that the trial court properly declined to submit the (f)(7) circumstance. These assignments of error are overruled.

Next, defendant assigns error to the trial court's failure to submit six nonstatutory mitigating circumstances. Defendant timely requested all six in writing. To show error in this regard, defendant must establish that the jury could reasonably have found the circumstances to have mitigating value and that the record contains sufficient evidence of the circumstances to require their submission. *State v. Benson*, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988). Defendant has not met that burden here.

[23] The following two circumstances were not supported by sufficient evidence: "The defendant had provided child support for his child by another woman for several years," and "defendant was the sole supporter of [the victim] while they were living together." The evidence showed only that the woman with whom defendant conceived a child received government support; there was no evidence that defendant paid money to the government agency for the support of his child. Similarly, while the record shows that defendant supported the victim while they lived together, it does not show that he was her "sole supporter." Thus, the trial court did not err by failing to submit these circumstances.

[24] The trial court also declined to submit the circumstance, "The defendant became dependent upon alcohol and marijuana as a young adolescent and remained so during his adulthood to the degree that they [a]ffected his judgment and behaviors," concluding it was redundant. Trial judges may consolidate related mitigating circumstances to eliminate redundancy. *See State v. Greene*, 324 N.C. 1, 19-21, 376 S.E.2d 430, 441-43 (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). We agree that the portion of the circumstance

referring to alcohol dependence was subsumed within the circumstance, "The defendant has a history of chronic alcohol dependency and abuse." As to the portion referring to marijuana dependence, the evidence did not support the circumstance. Dr. Rollins testified that defendant had abused marijuana but did not state that he was dependent upon it. Rollins did testify that defendant both abused and was dependent upon alcohol, and he described the difference between abuse and dependence. Because the evidence was insufficient to support submission of a mitigating circumstance concerning defendant's dependence on marijuana, the trial court properly refused to submit it.

[25] Another circumstance requested but not submitted was: "The defendant never developed a normal father[-]son relationship with his father." This was subsumed within two submitted circumstances: "The defendant's mental and/or emotional disturbances were caused in part by the emotional instability of his family," and "defendant had grown up in a dysfunctional family with much discord between his parents and with both parents being 'workaholics' with limited time for their children." Thus, the trial court did not err by refusing to submit the requested circumstance. *See State v. Spruill*, 338 N.C. 612, 661, 452 S.E.2d 279, 305-06 (1994), *cert.denied*, — U.S. —, — L. Ed. 2d —, 64 U.S.L.W. 3242 (1995).

[26] Defendant also argues that the trial court should have submitted the circumstance: "That within a short time following the crime defendant exhibited remorse and sorrow *and has continued to do so*." (Emphasis added.) The court deleted the emphasized portion but submitted the remainder. Defendant contends the record supported the omitted portion in that defendant cried on the stand when asked on direct examination about his reaction to the victim's death and the sexual offense committed against her. We conclude this evidence showed defendant's continuing remorse and sorrow, and the mitigating circumstance thus should have been submitted as requested.

Assuming *arguendo* that the error was of constitutional dimension under *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and its progeny, we conclude it was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b); *State v. Hill*, 331 N.C. 387, 415-17, 417 S.E.2d 765, 779-80 (1992) (failure to submit nonstatutory mitigating circumstance harmless beyond a reasonable doubt where error did not preclude jury from considering any mitigating evidence), *cert. denied*, — U.S. —, 122 L. Ed. 2d 684, *reh'g denied*, — U.S. —, 123

L. Ed. 2d 503 (1993). The jury saw defendant on the stand and heard the evidence relevant to the circumstance, and the court instructed on the "catchall" circumstance, N.C.G.S. § 15A-2000(f)(9), which no juror found to exist. The trial court's ruling did not preclude defendant from presenting, or the jury from considering, any mitigating evidence.

[27] Finally, defendant argues the trial court should have submitted the circumstance that "the defendant at no time resisted arrest or attempted to flee from Johnston County, North Carolina." As with the preceding circumstance, we conclude the trial court should have granted defendant's request. However, the jury knew from the evidence that defendant cooperated with the police and never tried to escape from the police station. Further, the trial court submitted and instructed on the "catchall" circumstance. Thus, we hold that the failure to submit this circumstance was harmless beyond a reasonable doubt. This assignment of error is overruled.

PRESERVATION ISSUES

[28] Defendant contends the trial court committed constitutional error by denying his motion for disclosure of the aggravating circumstances upon which it intended to rely. As defendant concedes, we have considered and rejected his contention. *See, e.g., State v. McKoy*, 323 N.C. 1, 44, 372 S.E.2d 12, 36 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369, *on remand*, 327 N.C. 31, 394 S.E.2d 426 (1990).

[29] Defendant contends the trial court erred by denying his motion for separate juries for the guilt and sentencing phases. Defendants are not entitled to separate juries "unless the original jury is unable to reconvene." *State v. Holden*, 321 N.C. 125, 133, 362 S.E.2d 513, 520 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). We see no reason to reconsider our position on this issue.

[30] Defendant argues that the trial court committed constitutional error by denying his motion to prohibit death-qualifying questions during *voir dire*. As defendant recognizes, we have decided this issue contrary to his position. *See, e.g., State v. Conner*, 335 N.C. 618, 627-28, 440 S.E.2d 826, 831-32 (1994).

[31] Defendant argues that the trial court erred by allowing the State to exercise peremptory challenges to excuse prospective jurors who indicated opposition to the death penalty. We have rejected this con-

tention. *See, e.g., State v. Skipper*, 337 N.C. 1, 57, 446 S.E.2d 252, 283 (1994). Defendant presents no reason to reverse our precedent.

[32] Defendant also contends the trial court erred by giving an inherently vague instruction regarding the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. We have consistently upheld the instruction given. *See, e.g., State v. Syriani*, 333 N.C. 350, 388-92, 428 S.E.2d 118, 139-41, *cert. denied*, —- U.S. —-, 126 L. Ed. 2d 341 (1993), *reh'g denied*, —- U.S. —-, 126 L. Ed. 2d 707 (1994).

[33] Defendant assigns as error the trial court's instructions regarding Issues Three and Four on the Issues and Recommendation as to Punishment form. We have consistently approved the instructions given. *See, e.g., Lee*, 335 N.C. at 286-87, 439 S.E.2d at 569-70. Defendant presents no reason to revisit this issue.

[34] Defendant contends the trial court erroneously instructed the jury on his burden of proving mitigating circumstances. We have considered and rejected this contention. *See, e.g., State v. Keel*, 337 N.C. 469, 494, 447 S.E.2d 748, 762 (1994), *cert. denied*, —- U.S. —-, 131 L. Ed. 2d 147 (1995). We perceive no reason to overturn our precedent.

[35] Defendant asserts that the trial court committed constitutional error when it defined reasonable doubt in the jury instructions at both phases of the trial. Defendant concedes we have rejected his claim on numerous occasions. *See, e.g., State v. Moseley*, 336 N.C. 710, 716-19, 445 S.E.2d 906, 909-10 (1994), *cert. denied*, —- U.S. —-, 130 L. Ed. 2d 802 (1995). Defendant offers no argument meriting reconsideration of our position on this issue.

[36] Defendant also argues that the trial court's imposition of the death penalty violated his rights under the Eighth Amendment to the United States Constitution. We have repeatedly upheld North Carolina's death penalty statute against such a constitutional challenge. *See, e.g., Skipper*, 337 N.C. at 58, 446 S.E.2d at 284.

[37] Finally, defendant contends the trial court erred by failing to inform the jury about the amount of time defendant would spend in jail if sentenced to life imprisonment. As defendant acknowledges, we have considered and rejected his position. *See, e.g., State v. Green*, 336 N.C. 142, 157-58, 443 S.E.2d 14, 23, *cert. denied*, —- U.S. —-, 130 L. Ed. 2d 547 (1994).

Defendant makes numerous assignments of error that he fails to address in his brief to this Court. These assignments are deemed abandoned, and we therefore decline to address them. N.C. R. App. P. 28(a), (b)(5).

PROPORTIONALITY REVIEW

[38] Having found no error in either the guilt or sentencing phase, we must determine whether: (1) the evidence supports the aggravating circumstances found by the jury; (2) passion, prejudice, or "any other arbitrary factor" influenced the imposition of the death sentence; and (3) the 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).

The jury found defendant guilty of first-degree murder under the theory of malice, premeditation, and deliberation, as well as under the felony murder rule. It also convicted defendant of first-degree sexual offense. The trial court submitted two aggravating circumstances, both of which the jury found: that the murder was committed while defendant was engaged in a sexual offense, N.C.G.S. § 15A-2000(e)(5); and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). We conclude that plenary evidence supports both circumstances. We further conclude, based on our thorough review of the record, that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We therefore turn to proportionality review.

The trial court submitted three statutory mitigating circumstances: that defendant committed the murder while under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); that defendant's capacity 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); and the "catchall," N.C.G.S. § 15A-2000(f)(9). The jury found only the first of these. One or more jurors found fourteen of the nineteen nonstatutory mitigating circumstances submitted. The jury determined that the aggravating circumstances outweighed the mitigating circumstances and recommended a sentence of death.

This murder has several distinguishing characteristics. First, it was a brutal, merciless, and dehumanizing attack, which included severe blunt-trauma injuries and a depraved sexual offense. A defendant who commits a murder "in a particularly egregious manner" is

likely to be sentenced to death. *State v. Harris*, 338 N.C. 129, 162, 449 S.E.2d 371, 387 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 752 (1995). Second, the jury convicted defendant on the basis of both the felony murder rule and the theory of malice, premeditation, and deliberation. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (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). Third, defendant committed the murder at the victim's place of residence. A murder in the home "shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure." *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

Defendant contends this case is similar to *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), one of the cases in which we found a death sentence disproportionate, and that his sentence must therefore be vacated. We disagree. In *Stokes* four males in their late teens and early twenties robbed and beat a man at his warehouse; the victim died fourteen hours after the attack. Two of the cofelons pled guilty to lesser charges. A third, James Murray, pled not guilty; a jury sentenced him to life imprisonment, and we found no error. Stokes was convicted in a separate trial under the felony murder theory. The jury found one aggravating circumstance—that the murder was especially heinous, atrocious, or cruel. It found one or more of the following four statutory mitigating circumstances: that the defendant had no significant history of prior criminal activity, that the defendant was under the influence of a mental or emotional disturbance at the time of the crime, that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, and the defendant's age at the time of the crime (seventeen). *Id.* at 10, 352 S.E.2d at 658. Because the jury did not specify which circumstances it found, we assumed that it found all four. *Id.* at 21, 352 S.E.2d at 664.

In concluding that Stokes' death sentence was disproportionate, we noted that Murray, who received a life sentence, committed "the same crime in the same manner" as Stokes, *id.* at 27, 352 S.E.2d at 667, but that he was older and had a worse criminal record, *id.* at 21, 352 S.E.2d at 664. Further, Murray's jury did not find any of the mitigating circumstances found in Stokes' case. We also noted that no evidence existed as to the identity of the group's ringleader. We held that

Stokes' death sentence was disproportionate in large part because he was "no more deserving of death than his accomplice, . . . indeed he may [have been] less deserving of death in view of the mitigating circumstances involved in [his] case." *Id.* at 27, 352 S.E.2d at 667.

Defendant here, by contrast, acted alone and was twenty-seven at the time of the crime. The jury found only one statutory mitigating circumstance and did not rely on the felony murder rule alone to convict. Stokes' crime, unlike defendant's, did not include a brutal, painful, and pitiless sexual offense and was not committed at the victim's residence. These features distinguish this case from *Stokes* as well as from the six other cases wherein we have held the death sentence disproportionate: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *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).

We have found eleven capitally tried cases in which the two aggravating circumstances and the statutory mitigating circumstance found here were submitted and found. Of those, five were remanded for a new trial or a new sentencing proceeding, thereby eliminating them from our proportionality pool. *See State v. Bacon*, 337 N.C. 66, 106-07, 446 S.E.2d 542, 563-64 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995). Life sentences were imposed in only two of the remaining six cases; the remaining four defendants were sentenced to death. We cannot conclude, therefore, that juries have consistently recommended life sentences in cases similar to this one.

We have affirmed the sentence of death in cases similar to this one. In *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985), the defendant beat his mother-in-law to death in her home with a cast iron skillet, inflicting wounds to her head, neck, and shoulders and breaking her jaw in two places. There, as here, the crime was "a senseless, unprovoked, exceptionally brutal, prolonged and murderous assault." *Id.* at 118, 322 S.E.2d at 126. This case is even more egregious because there was no sexual offense in *Huffstetler* as there was here.

In *State v. Fisher*, 336 N.C. 684, 445 S.E.2d 866, *reconsideration denied*, 337 N.C. 697, 448 S.E.2d 535 (1994), *cert. denied*, —— U.S. ——, 30 L. Ed. 2d 665 (1995), the defendant stabbed his long-time girlfriend

repeatedly in the presence of her daughter, whom he also injured during the attack. In contrast to this case, however, the trial court submitted and the jury found the statutory mitigating circumstance that the defendant had no significant history of prior criminal activity. Here, we have determined that the trial court did not abuse its discretion by refusing to submit that circumstance because it properly could have determined that no reasonable juror could have found defendant's criminal history insignificant. The *Fisher* jury also found that the defendant had acted while under the influence of a mental or emotional disturbance, a mitigating circumstance found here. Finally, the murder in *Fisher* did not involve a brutal and dehumanizing sexual offense, as did the murder here.

In *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518, *cert. denied*, — U.S. —, 129 L. Ed. 2d 883 (1994), the victim died as a result of sharp- and blunt-trauma wounds as well as manual strangulation. The jury found two aggravating circumstances: that the defendant had been previously convicted of a felony involving the use or threat of violence to the person, and that the murder was especially heinous, atrocious, or cruel. The jury found no statutory mitigating circumstances but found all nine of the nonstatutory mitigating circumstances submitted. As here, the evidence showed that the victim suffered painful injuries and may have remained conscious for a period of time prior to death.

Finally, we note that this case involved the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, as well as an egregious sexual offense. We have upheld the death penalty in numerous cases where the jury found the especially heinous, atrocious, or cruel circumstance. *See State v. Moseley*, 338 N.C. 1, 64, 449 S.E.2d 412, 449 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 738 (1995). Further, "[w]e have never found a death sentence disproportionate in a case involving a victim of first-degree murder who was also sexually assaulted." *State v. Payne*, 337 N.C. 505, 537, 448 S.E.2d 93, 112 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995).

Considering the foregoing, as well as the crime and defendant, we conclude that the death sentence in this case was not excessive or disproportionate. We hold that defendant received a fair trial and sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE v. KNIGHT

[340 N.C. 531 (1995)]

STATE OF NORTH CAROLINA v. RICKEY EUGENE KNIGHT

No. 110A94

(Filed 28 July 1995)

1. Searches and Seizures § 130 (NCI4th)— murder—search of defendant's house—knock and announce

There was no error in a first-degree murder prosecution in the admission of a pair of boots, a knife, and defendant's incriminating statement obtained as the result of a search which defendant contends was in violation of the knock and announce principle, but there was evidence that police conducted sequential searches of four residences within one block of one another during the early morning hours; the Strategic Enforcement Team made the initial entry into each house and secured it before the other officers entered and executed arrest and search warrants; defendant's residence was the last to be searched; officers were aware at the time they entered defendant's house that at least one other person involved in this murder had not been apprehended and could have been in defendant's house; the police were also aware that defendant's fiancee and two children were present and feared a hostage situation; officers knew of the brutal injuries inflicted on the victim, which they testified were indicative of overkill; they had reason to believe defendant was armed with a knife and possibly a firearm and were aware of his prior criminal record, including multiple assault and weapons charges; the actual entry occurred thirty to sixty seconds after officers knocked on the front door several times and announced "Police! Search Warrant!" at least two or three times; officers searched the residence and confiscated a pair of boots on which blood was found after defendant was arrested; and defendant was taken to the police station, where he confessed to participating in the murder and told a detective the location of one of the knives used in the murder.

Am Jur 2d, Searches and Seizures §§ 162-170.

What constitutes compliance with knock-and-announce rule in search of private premises—state cases. 70 ALR3d 217.

2. Searches and Seizures § 135 (NCI4th)— execution of search warrant—warrant in possession of officers at scene

There was no error in a first-degree murder prosecution where defendant contended that certain evidence was inadmissible because it was obtained as the result of an illegal search because the search warrant was not in the possession of any of the officers at the scene when the house was first entered and that the initial "once over" of the house was in reality a search for evidence rather than a sweep to ensure officer safety. The evidence showed that the search warrant was in the possession of one of the officers located at the house at the time of entry and that it was read to defendant's fiancee before any search of the house was conducted. However, even assuming that the forced entry was illegal and that the search warrant was not present immediately on the officers' entrance, the admission of the evidence did not violate defendant's constitutional or statutory rights because the police had jurisdiction to question defendant prior to the entry into his home and his confession was not the fruit of his arrest occurring in his home rather than another location, defendant did not contest the validity of the search warrant and the boots and knife were discovered as a result of the later search conducted pursuant to the warrant rather than as a direct result of the entry. The evidence was not obtained as a consequence of any violations of N.C.G.S. chapter 15A and no causal relationship between any such violations and the evidence sought to be suppressed exists.

Am Jur 2d, Searches and Seizures § 211.

3. Evidence and Witnesses § 1278 (NCI4th)— first-degree murder—inculpatory statement—admissible

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress a statement to police and a knife obtained as a result thereof where defendant made no statement until he had been advised of his *Miranda* rights and had signed a *Miranda* rights waiver form; he responded affirmatively when he was asked if he understood his rights and wished to waive them; he was not restrained in any way, and the interrogation was conducted in an unlocked office; officers' weapons were never removed from their holsters in the presence of defendant or used to threaten him; defendant did not appear to be sleepy or under the influence of drugs or alcohol during the interrogation; he appeared to be calm, alert, and ori-

ented, did not appear to be frightened, and was able to converse freely with the officers; an officer testified that he engaged defendant in casual conversation to develop rapport, denied threatening defendant or making any promises to induce defendant's inculpatory statement, denied ever telling defendant that defendant needed to make a statement to save his life or avoid the death penalty, and denied telling defendant that he probably saved his life by confessing; another officer testified that he was present when defendant was read his *Miranda* rights and signed the waiver form; that defendant was oriented, did not smell of alcohol, and did not appear to be physically or mentally impaired; that he had engaged defendant in general conversation to develop rapport with defendant; denied threatening defendant in any way or making any promises to induce defendant's inculpatory statement; denied that defendant had been told to confess or else he would face the death penalty; and denied that defendant was told that he had probably just saved his own life by confessing; another officer testified that when defendant was arrested at his home in the early morning hours of 28 May 1992 before being taken to the police station, he was awake, oriented, and coherent; defendant's speech was not slurred, and he did not appear to be under the influence of alcohol. Upon a review of the totality of the circumstances, it is clear that defendant was not coerced or threatened into confessing his participation in this murder; and the trial court did not err in concluding that defendant freely, knowingly, and intelligently waived his *Miranda* rights and that defendant's inculpatory statement to the police was given voluntarily.

Am Jur 2d, Criminal Law § 797; Evidence § 556.

Admissibility of pretrial confession in criminal case—Supreme Court cases. 113 L. Ed. 2d 757.

4. Criminal Law § 76 (NCI4th)— first-degree murder—pretrial publicity—motion for change of venue

The trial court in a first-degree murder prosecution did not err by denying defendant's motion for a change of venue where defendant argued that there was extensive pretrial publicity focusing on the racial, homosexual, and mutilation aspects of the crime and the information submitted by defendant indicated that the case had been the subject of pretrial publicity which had aroused some controversy in the community, but defendant made

no showing that any of the prospective jurors would be unable to set aside this pretrial publicity and decide the case solely on the evidence presented at trial. The trial court's ruling did not prohibit defendant from renewing his motion if the actual jury *voir dire* had revealed such prejudice against him, defendant failed to use all of his peremptory challenges, and defendant made no showing during *voir dire* that it was reasonably likely that the jurors would base their decision on the pretrial publicity rather than on the information at trial. The transcript demonstrates that the actual jurors seated on defendant's jury were thoroughly questioned on their exposure to pretrial publicity and that each juror who actually sat on defendant's jury unequivocally stated that he or she could put aside any preconceived opinions as to defendant's guilt and that he or she would decide defendant's case solely upon the evidence presented in the courtroom. N.C.G.S. § 15A-957.

Am Jur 2d, Criminal Law § 378.

Change of venue by state in criminal case. 46 ALR3d 295.

5. Criminal Law § 474 (NCI4th)— first-degree murder—jury selection—indictment not read in entirety

Defendant was not entitled to a new trial for first-degree murder where he argued that the trial court read the bill of indictment to all the prospective and eventual jurors during jury selection. The court drew from the indictment the name of defendant, the name of the victim, the date of the crime, and the elements of the charge but did not read the indictment in its entirety and in particular did not recite the language indicating that twelve or more grand jurors had concurred in issuing the indictment. N.C.G.S. § 15A-1213 and N.C.G.S. § 15A-1221(b).

Am Jur 2d, Trial § 187.

6. Jury § 137 (NCI4th)— first-degree murder—jury selection—questions regarding victim's HIV status

The trial court did not err in a first-degree murder prosecution in a ruling which defendant contended prevented him from questioning prospective jurors about whether the victim's HIV-positive status would affect their ability to be fair and impartial. The trial court did not enter a blanket ruling prohibiting defend-

ant from asking questions about the victim's HIV status, as defendant contended, but ruled that questions about the issue of homosexuality were relevant to identify prospective jurors who might think gay bashing was permissible, stated that questions about HIV should be left out of jury selection, but deferred ruling on the line of questioning until he had a concrete question or answer before him. None of the prospective jurors mentioned any knowledge of the victim's HIV-positive status during *voir dire*, little evidence in connection with the victim's HIV-positive status was introduced at trial, and neither the State nor defendant mentioned it during opening or closing arguments. Assuming that the evidence was relevant to a prospective juror's qualifications to be fair and impartial, defendant has shown no abuse of discretion or prejudice arising to the level of fundamental unfairness from the trial court's refusal to allow him to pursue this line of questioning; the evidence of defendant's guilt was overwhelming and his attorney conceded guilt during closing arguments.

Am Jur 2d, Jury § 275.

Examination and challenge of federal case jurors on basis of attitudes toward homosexuality. 85 ALR Red. 864.

7. Evidence and Witnesses § 1501 (NCI4th)— first-degree murder—bloody clothing of victim—admissible—use in prosecutor's argument

The trial court did not err during a first-degree murder prosecution by admitting the victim's bloody clothes into evidence and allowing the prosecutor to brandish them before the jury during closing argument. The clothing was not excessively displayed or discussed at trial, was used to illustrate the testimony of the doctor who performed the autopsy, was not mentioned other than in chain of custody testimony after the autopsy testimony until the prosecutor made reference to it in his closing argument, and the transcript merely reflects that the prosecutor briefly displayed the clothing incident to a legitimate argument and then closed up those exhibits and continued with his closing argument.

Am Jur 2d, Homicide § 413.

Admissibility, in homicide prosecution, of deceased's clothing worn at time of killing. 68 ALR2d 903.

8. Evidence and Witnesses § 2797 (NCI4th)— first-degree murder—prosecutor's questions—not insulting and impertinent

There was no error in a first-degree murder prosecution where defendant contended that the prosecutor asked impertinent and insulting questions of two witnesses which could not possibly have elicited relevant evidence, but the first question was clearly relevant and nothing about the form of the question was insulting or impertinent, and the trial court sustained defendant's objection to the second and instructed the jury to disregard the question. No incompetent evidence was placed before the jury as a result of this question and there is no evidence to support defendant's assertion that this question destroyed the fundamental dignity and solemnity of the trial or led the jurors to take a flippant attitude towards defendant's guilt and this trial.

Am Jur 2d, Witnesses §§ 743 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Mills, J., at the 3 May 1993 Mixed Session of Superior Court, Forsyth County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 13 April 1995.

Michael F. Easley, Attorney General, by Thomas F. Moffitt, Special Deputy Attorney General, for the State.

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

PARKER, Justice.

Defendant was tried capitally on an indictment charging him with the first-degree murder of Carlos Colon Stoner ("victim"). The jury returned a verdict finding defendant guilty as charged. During a capital sentencing proceeding, the jury was unable to unanimously agree as to its sentencing recommendation, and the trial court imposed a mandatory sentence of life imprisonment. For the reasons discussed herein, we conclude that defendant's trial was free of prejudicial error and uphold his conviction and sentence.

On the morning of 27 May 1992, the body of Carlos Stoner was discovered in Washington Park in Winston-Salem, North Carolina. The body was lying half on and half off the Greenway transversing the park.

Dr. Patrick Lantz, the county medical examiner, performed an autopsy on the victim's body. He testified that the victim had been stabbed more than twenty-seven times and that a number of his wounds would have been individually fatal. There was a stab wound at the base of the victim's skull extending into his brain stem, which Dr. Lantz believed had been inflicted prior to the victim's death. Dr. Lantz testified that the victim's heart was still beating at the time this wound was inflicted based on the amount of bleeding near the wound. This wound would have incapacitated the victim although his heart could have continued beating for a period of several minutes after the wound was inflicted.

The victim also had a very large gaping wound in his chest, approximately seven inches by three inches, where his rib cage had been split open. This wound exposed the victim's heart and right lung. Dr. Lantz testified that the victim had likely been alive when he received this wound and could have lived up to five minutes after it was inflicted.

Several other wounds penetrated the victim's lungs and the space surrounding his heart. According to Dr. Lantz these smaller wounds would have leaked blood slowly. Death from these wounds would have taken anywhere from a matter of minutes to possibly more than an hour after they were inflicted.

The victim's penis had been severed from his body and inserted into his mouth. Dr. Lantz testified that this castration occurred at or near the time of the victim's death.

The autopsy further revealed that the victim had a blood alcohol level of 280 milligrams per deciliter (.28). The victim was HIV-positive.

Dwayne Doby ("Doby") testified against defendant at trial. The State's evidence tended to show that on the evening of 26 May 1992, Doby was at a party on Academy Street in Winston-Salem. According to Doby he was standing in the yard of Wendy Britton's home on Academy Street with a group of people including defendant and Mark Smith. The men were drinking beer when the victim walked past them. The victim was drunk and shouting. Smith hollered at the victim and told him to be quiet. The victim rolled up his sleeves and said he was going to "whup [sic] somebody's a—." Doby testified that he did not see the victim fight anyone and that he did not see anyone

strike the victim at that time. Smith walked over to where the victim was standing and talked with him for a while.

After Smith returned to the party, the victim again began shouting at the people at the party. Smith and defendant went across the street to where the victim was standing. The men shouted at each other for a while, and then the victim was invited to come have a drink at the party. The victim drank part of a beer and was asked to leave the party. The victim then walked up Academy Street to the Circle K.

Doby testified that as the victim was walking away from the party, Andrew Gilbert arrived at the party. Shortly thereafter, Smith approached Doby and asked him to drive Smith, Gilbert, and defendant up the road to pick up the victim. The men planned to beat up the victim in a local park. Doby got in the front seat of his truck, and the other men got in the back. Doby drove to the Circle K. Smith got out of the truck and talked to the victim, who agreed to go off with the other men. The victim got in the passenger side of the truck, and the men drove to another local store to buy beer. At this time the victim tried to get out of the truck, but defendant had his hand on the victim's shoulder and told him to get back in the truck.

Doby drove his truck to the Greenway in Washington Park. Doby drove down the Greenway to a clearing, turned around, and parked on the pathway facing out of the park. When he turned the truck lights off, he was still able to see what was going on outside the truck. He testified that the area was well lit from nearby streetlights, the moon, and lights from a Duke Power supply lot located across the street from the park. Doby testified at trial that he could see all the other persons present, the path, and the clearing where the truck was parked.

After he parked the truck, Doby got out and walked around to the back of the truck. Gilbert told Doby to get back in the truck. The victim had not yet exited the truck, and Doby heard defendant ask him to do so. Doby testified that the victim was visibly drunk and difficult to understand. The victim stepped out of the truck and put his hands on the side of the truck. Defendant told the victim to step away from the truck; and when he refused, defendant hit him in the jaw. Defendant elbowed him in the chest, and the victim started to fall. Gilbert had a knife in his hands and started stabbing the victim. Doby saw Gilbert make several slashing motions and heard Gilbert claim that he had stabbed the victim three times before he hit the ground. Smith kicked and beat on the victim after he had fallen to the ground.

Once the attack started, Doby heard the victim grunt a few times; and then he was quiet.

After this initial attack on the victim, Smith and Gilbert got back in the truck; and Doby rolled it approximately fifteen feet down the Greenway. Defendant continued to beat on the victim and asked Gilbert for the knife. Doby saw defendant stab the victim repeatedly before returning to the truck. When he returned to the truck, defendant claimed he had stabbed the victim thirteen or fourteen times with the knife. Doby saw defendant wipe the blood off his hands and the knife with the victim's hat. Gilbert threw the knife out of the truck during the trip back to the party on Academy Street. The men made a pact not to tell anyone about the murder.

Approximately one hour later, defendant asked Doby for a ride to defendant's house. Defendant went inside and retrieved a hunting knife, which was approximately eleven inches long. He asked Doby to drive him back to the Greenway so he could make sure the victim was dead. Doby drove defendant back to Washington Park and dropped him off. Doby circled the block twice and then picked defendant up on Broad Street. At that time he noticed that defendant had a great deal of blood on his hands. Defendant still had the knife with him.

Defendant got into the truck and told Doby that the victim had still been alive. Doby testified that defendant told him that the victim had been asking for help and that he had kicked the victim in the head. Next, defendant claimed he took his knife and stuck it in the victim's neck and twisted it, a trick his father had learned in Vietnam. Defendant told the victim, "[F]—- you, n———-. You don't deserve help." Then, he cut open the victim's rib cage. Next, he cut off the victim's penis and inserted it into the victim's mouth.

Defendant told Doby that he did not feel anything and that he did not care for the man he just killed. He asked Doby if he "wanted to go back and kill another one the next night."

The men returned to the party and made another pact with Gilbert and Smith not to say anything about the murder. Gilbert threatened Doby and told the group that he would kill anyone who said anything about the murder. Doby told the police he had never met defendant and Gilbert before the night of the murder and that he was frightened of them.

Doby was extremely upset when he returned home at approximately 4:00 a.m. He told his fiancée he had just witnessed a murder.

Several hours later she called her mother, who convinced Doby to talk with the police. He spoke with the police late on the afternoon of 27 May 1992 and made a full statement about his participation in the murder. In this statement Doby indicated that defendant was the most culpable participant in the crime and told the police he thought defendant was armed with a knife and might have a cache of weapons inside his home.

At approximately 4:00 a.m. on 28 May 1992, the police entered defendant's residence to conduct a search of the premises and arrest defendant. The search revealed a pair of boots that were later determined to have blood on them.

Defendant was arrested and taken to the police station. After being given his *Miranda* warnings, defendant confessed to his participation in this murder. In this confession defendant claimed he did not intend to kill the victim when he took him to the park, that he did not check the victim to determine if he was alive when he returned to the park for the second attack, and that he did not castrate the victim. After making this statement to the police, defendant told them where the knife used in the second attack was located and called his fiancée to get it from their couch for the police.

Mark Smith also testified against defendant at trial. Smith's testimony about the events surrounding the murder basically corroborated Doby's testimony. Smith testified that when the men left the party to pick up the victim, he heard defendant say, "I've never killed a n—— before. I want to see what it's like."

Defendant's evidence tended to show that he was so intoxicated the night of the murder that he could not premeditate and deliberate at the time of the crime. Tommy McGee testified that he spent most of the afternoon of 26 May 1992 and the early morning hours of 27 May 1992 with defendant, who consumed a large amount of beer during that time period. McGee testified that the two men drank two twelve-packs of beer during that afternoon and that he saw defendant drink eight to twelve more beers at the party on Academy Street. At the party defendant was talking loudly, slurring his speech, and leaning on a tree for balance.

Pamela McGrew ("McGrew") testified that she was defendant's fiancée and the mother of his two children. She testified that defendant had been drinking all day on 26 May 1992 from about 10:00 a.m. According to McGrew defendant did not have anything to eat on the

day of the murder. She testified that prior to the party on Academy Street, defendant was visibly drunk, had bloodshot eyes, smelled of alcohol, and bumped into furniture. She testified that at the party, defendant was stumbling, had red eyes, smelled strongly of alcohol, and was talking loudly and profanely.

McGrew saw the four men leave the party shortly after the victim departed; she thought the men were going out to purchase more beer for the party. Approximately twenty-five minutes later, they returned to the party. McGrew claimed that defendant was wobbly, had bloodshot eyes, and smelled of alcohol at that time. She saw defendant leave the party a second time and return approximately fifteen minutes later. McGrew admitted that defendant was accustomed to drinking large quantities of beer and that the amount he consumed on 26-27 May 1992 was not unusual for him although the amount he drank that night was beyond his normal pattern.

Defendant's evidence also tended to show that the victim was dead when defendant returned to Washington Park for the second attack on the victim. Dr. Page Hudson, former Chief Medical Examiner for North Carolina, testified for defendant as an expert in forensic pathology. Dr. Hudson opined that the victim was already dead when his penis was severed from his body based on his review of the autopsy report indicating semen emission and little blood loss associated with that wound. He testified that one of the wounds penetrated the victim's liver and would have killed the victim in minutes to hours if left unattended. He testified that although the victim may have been alive when he suffered the wound to the base of his neck, he could equally possibly have been dead at that time. He based this opinion on the theory that the blood pooled around the wound could have been the result of hydrostatic pressure after death rather than pressure exerted by a beating heart. He further testified that the massive chest wound would have been sufficient to kill the victim and that the other wounds to the heart and lungs were life-threatening but not immediately fatal.

Defendant presented evidence tending to contradict Doby's testimony and statements to the police. Defendant presented evidence that contrary to Doby's testimony, the moon was not full the night of the murder and would not have provided enough moonlight to allow a person to see well in the dark. Darrell Wilson, a private investigator, testified that he went to the murder scene at night and found no artificial light illuminating the area. Mark Miller testified that while he

was in the Forsyth County jail on 18 September 1992, Dwayne Doby told him that he was facing life imprisonment for "cutting a man's dick off and putting it in his mouth."

In his closing argument defendant's attorney conceded that defendant was guilty of second-degree murder in this case but not first-degree murder.

Defendant did not testify during the guilt phase of this trial.

Additional facts will be presented as necessary for the discussion of specific issues.

[1] Defendant first contends the trial court erred in denying his motion to suppress his boots, knife, and incriminating statement which were obtained as the result of an illegal and unconstitutional forced entry, search, and arrest at his residence on 28 May 1992, in violation of the "knock and announce" principle.

In *Wilson v. Arkansas*, —— U.S. ——, 131 L. Ed. 2d 976 (1995), the United States Supreme Court held that the "common law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." *Id.* at ——, 131 L. Ed. 2d at 977. In *Wilson*, the Court indicated that although failure to comply with the "knock and announce" principle may render a search or seizure of a dwelling unconstitutional, countervailing law-enforcement interests may establish the reasonableness of an entry conducted in violation of this principle. *Id.* at ——, 131 L. Ed. 2d at 979.

The North Carolina "knock and announce" priciple was set forth in *State v. Sparrow*, 276 N.C. 499, 512, 173 S.E.2d 897, 905 (1970), in which this Court stated:

> Ordinarily, a police officer, absent invitation or permission, may not enter a private home to make an arrest or otherwise seize a person unless he first gives notice of his authority and purpose and makes a demand for and is refused entry. Without special or emergency circumstances, an entry by an officer which does not comply with these requirements is illegal.

See also State v. Covington, 273 N.C. 690, 698, 161 S.E.2d 140, 146 (1968) (holding that in the absence of hostile action from within the house, entrance must be demanded and denied before a forcible entry is lawful when there is neither a search nor an arrest warrant for the defendant). This common-law principle has been codified in N.C.G.S.

§ 15A-251, which requires the police to comply with the "knock and announce" principle to execute a search warrant in a private residence in the absence of a danger to human life, and in N.C.G.S. § 15A-401(e)(1) and (2), which require compliance with the "knock and announce" principle to execute an arrest warrant on private property in the absence of probable cause to believe that compliance would endanger human life.

Defendant contends that in this case, the police had no cause to believe that compliance with the "knock and announce" principle would endanger human life. He argues that even though the Winston-Salem police officers were acting pursuant to valid search and arrest warrants, this forced entry into his home at 4:00 a.m. violated his constitutional rights to be free from unreasonable searches and seizures as well as his statutory rights pursuant to N.C.G.S. §§ 15A-251 and 15A-401(e)(1) and (2). He argues that all the evidence discovered as a result of this illegal forced entry into his home was required to be suppressed by N.C.G.S. § 15A-974 and that the trial court erred as a matter of law by denying his pretrial motion to suppress this evidence. We reject defendant's arguments for the following reasons.

The scope of appellate review of a denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

A careful review of the record reveals that in the instant case, unlike in *State v. Sparrow*, exigent circumstances existed justifying the forced entry of the Winston-Salem police officers into defendant's residence after notification and a brief delay. The evidence presented during the *voir dire* tended to show the following.

During the early morning hours of 28 May 1992, the police conducted sequential searches of four residences located within one block of one another in Winston-Salem. The Strategic Enforcement Team ("S.E.T.") made the initial entry into each house and secured it before the other officers were allowed to enter and execute arrest and search warrants. Defendant's residence was the last of these four houses to be searched; and at the time the officers entered his residence, they were aware that at least one other person involved in this murder had not yet been apprehended and could have been present in

defendant's home. The police were also aware that defendant's fiancée and the couple's two children were present in the home and feared a possible hostage situation unless they entered defendant's residence quickly.

At the time the police entered the residence, they knew of the brutal injuries inflicted on the victim. The police knew that the victim had been stabbed over twenty-seven times, including a deep wound to the back of the neck and an extensive wound in his chest that exposed his heart and his right lung. Additionally, the victim had been castrated and his penis inserted into his mouth. Several officers testified that the brutality of this murder was indicative of "overkill."

Based on Doby's statement, the police knew that after the initial attack, defendant returned to the murder scene to ensure the victim was dead. According to Doby the victim was not dead when defendant returned for the second attack. At that time defendant stabbed the victim in the back of the neck, split his chest open, and castrated him.

Further, based on Doby's statement, the police had reason to believe that the defendant was armed with a knife and possibly a firearm. Doby had informed the police that he thought defendant had a cache of weapons inside his home and that defendant had told Doby that the people around him were always armed. The police were aware of defendant's prior criminal record, which included eight charges of carrying a concealed weapon, six charges of assault on a female, and other assaults including misdemeanor assault with a deadly weapon.

The actual entry into defendant's residence occurred after the S.E.T. knocked on the front door several times and announced, "Police! Search Warrant!" at least two or three times. After waiting thirty to sixty seconds and hearing no response from inside the residence, the police used a battering ram to open the door. Officers entered the premises, conducted a quick sweep of the residence to look for weapons, and placed defendant under arrest. After defendant was arrested, officers searched the residence and confiscated a pair of defendant's boots, which were later determined to have traces of blood on them.

Defendant was taken to the police station, where he confessed to his participation in the murder of Carlos Stoner to Detectives Young and Peddle. After making this confession, defendant told Detective Young that one of the knives used in the murder was located in his

couch. Defendant contacted his fiancée, McGrew, who let Detective Chapple into the house and gave him the knife.

Based on our review of the evidence presented at the *voir dire* on defendant's motion to suppress, we conclude that there was competent evidence to support the trial court's findings of fact that "[i]t was reasonable to believe . . . that the defendant was a dangerous person and probably armed with at least a hunting knife and possibly firearms"; that "the officers were appropriately and legitimately concerned about their own safety"; that "there was still at least one other suspect, other than the defendant, who had not been arrested"; that "it was possible" this other suspect was at defendant's house; that "the officers were legitimately concerned for the safety of Miss McGrew and the two children in safely effecting the defendant's arrest"; that "[t]here was some legitimate concern that a hostage situation might be created if they did not act promptly"; and that "[i]t had been the understanding of several of the detectives involved that the entry should be and would be quick and safe. They had serious concerns that if the entry was not forced, it would not be safe."

These findings of fact are binding on this appeal and support the trial court's conclusions of law that although the police officers gave appropriate notice of their identity and purpose, they had probable cause to believe that further delay in entering defendant's residence or the giving of specific notice from outside the house to defendant that he was being placed under arrest would endanger their own safety as well as the safety of the other occupants of the house. The trial court did not err in concluding that the forced entry into the house did not violate any of defendant's constitutional rights or any of the provisions of chapter 15A of the North Carolina General Statutes. Under the totality of the circumstances, the entry into defendant's house was reasonable. On this basis the trial court did not err in admitting into evidence defendant's boots, his confession, and his knife.

[2] Defendant further contends that the challenged evidence was inadmissible because it was obtained as the result of an illegal search after entry into his house. Defendant contends that the search warrant was not in the possession of any of the officers at the scene when the house was first entered and that the initial "general once-over of the entire house and the cabinets" was in reality a search of defendant's house for evidence rather than a sweep of the residence to ensure officer safety. Defendant argues that in violation of N.C.G.S.

§ 15A-252, the search warrant was not read to McGrew until ten minutes after the police entered the residence at which time the search for evidence had already been conducted. He claims that it is immaterial that nothing was seized before the warrant was read to McGrew and that the trial court erred in denying his motion to exclude all the evidence discovered as a result of this substantial violation of this statute pursuant to N.C.G.S. § 15A-974(2). We disagree.

The evidence presented at the pretrial hearing tended to show that the search warrant for 1138 Bank Street was in the possession of one of the officers located at defendant's house at the time of entry and that it was read to McGrew before any search of defendant's home was conducted. Detective Best testified that he was present during the initial entry into the residence by the members of the S.E.T. and entered the residence after it was secured by those officers. After being inside the residence approximately one minute, he returned to the front yard and obtained the search warrant from either Lieutenant Culler or Sergeant Newsome, the officers in charge of the search of defendant's residence. According to Best there was a different search warrant package for each of the searches being conducted that morning, and the supervisor for each location had the search warrant for that location. He testified that he reentered the residence, stood in the hall, and read the search warrant aloud in a voice anyone in the house could hear. Best testified that at that time, he was within five to ten feet of both defendant and McGrew, who appeared to be in control of the premises. Best also testified that no search of the premises was conducted until after the search warrant was properly executed.

Sergeant Newsome testified that he was responsible for three of the search warrant packages that night. He testified that after the searches were initiated, he went to each location to see how the searches were progressing. Although he was not present when the S.E.T. entered defendant's residence, Newsome testified that the search warrant for that location was in the possession of one of the officers present on the scene at the time of entry, most probably Lieutenant Culler. Newsome testified that he arrived at defendant's residence approximately ten minutes after the initial entry into the residence and that when he arrived, Detective Best was reading the final portion of the search warrant to the occupants of the house. Sergeant Newsome testified that the search warrant was read prior to the actual search of the premises being conducted and prior to any evidence being seized.

Officer Nelson testified that he was the first member of the S.E.T. to enter defendant's residence. Although he did not have the search warrant in his possession, he testified that another officer had it in his possession. He testified that the members of the S.E.T. secured the premises and conducted a sweep of the residence to look for weapons that could be used against them. He testified that it takes approximately a minute to secure a residence after entry.

Based on our review of the evidence in the record, we conclude that there was competent evidence to support the trial court's findings of fact that the search warrant was on the premises when the police entered defendant's residence on 28 May 1992 and that it was read to McGrew before any search was undertaken in the house. The trial court did not err in concluding that the execution of the search warrant did not violate any provisions of chapter 15A and in admitting at trial the evidence obtained as a result of the search of defendant's residence. This evidence was not required to be excluded pursuant to N.C.G.S. § 15A-974(2).

Even assuming *arguendo* that the forced entry into defendant's residence to execute the warrants was illegal and that the search warrant was not present on the premises immediately upon the officers' entrance into the defendant's residence, we conclude that admission of the evidence at issue did not violate defendant's constitutional or statutory rights.

In *New York v. Harris*, 495 U.S. 14, 109 L. Ed. 2d 13 (1990), the United States Supreme Court held that even when the police conducted an illegal warrantless entry into a defendant's home to arrest him, his later confession at the police station was not required to be suppressed as a fruit of that illegal entry as long as the statement was not the product of defendant's being in unlawful custody. Since the police had probable cause to arrest him before the illegal entrance was made, the police had a justification to question him prior to the arrest; hence, his confession was not an exploitation of the illegal entry, and the confession was not the result of being arrested in the defendant's home instead of at another location. *Id.* at 19-20, 109 L. Ed. 2d at 21-22.

In the instant case, even if the initial entrance into defendant's residence was illegal, his later confession was not the product of being in unlawful custody. The police had probable cause to arrest defendant and were acting pursuant to a valid warrant for his arrest when they entered his residence. Defendant was properly notified of

his *Miranda* rights and waived them. Based on Doby's statement to the police about this murder, the police had justification to question defendant prior to the entry into his home. Finally, defendant's confession was not the fruit of the fact that his arrest occurred in his home rather than at another location. Assuming *arguendo* that the entry into defendant's residence was illegal, the admission of defendant's confession and the knife obtained as a result thereof into evidence did not violate defendant's constitutional right to be free from unreasonable searches and seizures.

In *Segura v. United States*, 468 U.S. 796, 82 L. Ed. 2d 599 (1984), the United States Supreme Court held that although an illegal entry into a defendant's residence to prevent the destruction of evidence rendered inadmissible any evidence discovered as a direct result of the illegal entry, the illegal entry and securing of a defendant's residence from within for over nineteen hours while waiting for a valid search warrant to arrive did not render the seizure of the residence unreasonable or taint the evidence later discovered pursuant to the valid search warrant if the search warrant and the information upon which it was based were independent of and unrelated to the illegal entry. *Id.* at 811, 82 L. Ed. 2d at 613.

In the instant case, even if the police officers illegally entered the home and conducted the initial sweep of the residence for weapons while waiting for the search warrant to arrive, under *Segura* this conduct did not constitute an unreasonable seizure requiring the evidence consisting of defendant's boots, his confession, and his knife to be excluded at trial. Defendant does not contest the validity of the search warrant in this case. The search warrant and the information upon which it was based were totally unrelated to the police entry into defendant's residence. The information supporting the warrant was provided by Doby's statement, and the warrant was issued more than an hour before the entry into defendant's residence occurred.

The evidence at issue was not discovered as a direct result of the entry but as a result of the later search conducted pursuant to the valid search warrant. As indicated above, there was sufficient competent evidence to support the trial court's finding of fact that the search warrant was read to McGrew prior to any search of defendant's residence. The boots were not examined or seized until after the search warrant was properly executed, and the knife was not discovered until several hours later.

The delay of ten to fifteen minutes between the time the officers entered the residence and the time the warrant allegedly arrived was not as extensive as the nineteen-hour delay before the warrant arrived in *Segura*, and the evidence in the instant case clearly supports the trial court's finding that the officers only conducted a sweep of the house for weapons and other persons before the warrant was executed. Admission of the evidence consisting of defendant's boots did not violate defendant's rights to be free from unreasonable searches and seizures.

N.C.G.S. § 15A-974(2) requires exclusion of evidence obtained as a result of a substantial violation of chapter 15A of the North Carolina General Statutes. For evidence to be excluded under this statute, there must be a causal relationship between the violation and the evidence sought to be suppressed. *State v. Hunter*, 305 N.C. 106, 113, 286 S.E.2d 535, 539 (1982). The evidence at issue was not obtained as a consequence of any violations of chapter 15A, and no causal relationship between any such violations and the evidence sought to be suppressed exists in the instant case. Therefore, the evidence at issue was not required to be suppressed pursuant to this statute.

[3] Next, defendant contends that the trial court erroneously denied his motion to suppress his 28 May 1992 statement to the police about his involvement in this murder in violation of his constitutional right against compulsory self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 23 of the North Carolina Constitution. He argues that the trial court erred by concluding that defendant knowingly and voluntarily waived his constitutional rights before making his statement to the authorities and that both his confession and the hunting knife obtained as a result thereof should have been excluded.

Defendant argues that the following circumstances rendered his inculpatory statement and *Miranda* waiver involuntary and unknowing: (i) the physical circumstances surrounding his interrogation by the police were coercive; (ii) the police officers made coercive threats to induce his confession; (iii) the police officers conducting his interrogation engaged in coercive techniques to induce his confession; and (iv) defendant did not understand his constitutional rights. Defendant had a limited educational background; and at the time of the interrogation, he was frightened and his mental acuity was diminished by alcohol consumption. We disagree.

The voluntariness of defendant's statement must be determined by looking to the totality of the circumstances surrounding the statement. *State v. Mlo*, 335 N.C. 353, 363, 440 S.E.2d 98, 102, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 841 (1994); *State v. Hicks*, 333 N.C. 467, 482, 428 S.E.2d 167, 176 (1993). Some of the factors to be considered include (i) whether defendant was in custody, (ii) defendant's mental capacity, (iii) the physical environment of the interrogation, and (iv) the manner of the interrogation. *State v. Hicks*, 333 N.C. at 482-83, 428 S.E.2d at 176. The State bears the burden of proving that a defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary. *State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994). Only if all the evidence tends to show that police investigators made promises or threats to a defendant whose confession is the product of hope or fear generated by such promises or threats will a confession be ruled involuntary as a matter of law. *State v. Chamberlain*, 307 N.C. 130, 143-44, 297 S.E.2d 540, 548 (1982).

The trial court held a *voir dire* to determine the admissibility of the defendant's statement, and its findings of fact after such a hearing are conclusive and binding on this Court if they are supported by competent evidence even though the evidence is conflicting. *State v. Simpson*, 314 N.C. 359, 368, 334 S.E.2d 53, 59 (1985). We conclude that the evidence presented at the pretrial hearing on defendant's motion supported the trial court's findings of fact and that none of the trial court's conclusions of law based on those findings were erroneous.

Detective Young testified that he and Detective Peddle interviewed defendant at approximately 5:30 a.m. on 28 May 1992 at the Winston-Salem police station. Defendant made no statement until he had been advised of his *Miranda* rights and had signed a *Miranda* rights waiver form. Defendant responded affirmatively when he was asked if he understood his rights and wished to waive them. Defendant was not restrained in any way, and the interrogation was conducted in an unlocked office. Although the officers may have had their weapons in their holsters, these weapons were never removed in the presence of defendant or used to threaten him. Defendant did not appear to be sleepy or under the influence of drugs or alcohol during the interrogation; rather, he appeared to be very calm, alert, and oriented. Defendant did not appear to be frightened and was able to converse freely with the officers.

Young testified that he engaged defendant in casual conversation to develop rapport. Young testified that defendant stated that he did

not know what the big deal was because it was "just another dead n——." Young informed defendant that he was charged with murder. Defendant asked Young several times what that meant; and Young explained that defendant would be tried for murder and, in the worst-case scenario, could face the death penalty. He asked defendant if he wanted to tell his side of the story and told defendant that he was willing to listen. When defendant made no response, the detectives started to leave the room. At that time defendant stopped them and indicated he wished to tell them his version of the story. At approximately 6:00 a.m. defendant confessed to his participation in the murder of Carlos Stoner.

Young denied threatening defendant or making any promises to induce defendant's inculpatory statement. He denied ever telling defendant that defendant needed to make a statement to save his life or avoid the death penalty. He also denied telling defendant that he probably saved his life by confessing. Young denied telling defendant that this murder "will be the one they'll fire up the electric chair for."

Young testified that after defendant made a taped statement, he asked defendant where the knife used in the murder was located. Defendant told him it was inside his couch at home and that if he could call his fiancée, he would tell her to get it for the police. Defendant made the phone call, and Young notified Detective Chapple to return to defendant's house to retrieve the knife.

Peddle testified that he was present when defendant was read his *Miranda* rights and signed the waiver form. He testified that defendant was oriented, did not smell of alcohol, and did not appear to be physically or mentally impaired. He engaged defendant in general conversation to develop rapport with defendant. Peddle denied threatening defendant in any way or making any promises to induce defendant's inculpatory statement. He denied that defendant had been told to confess or else he would face the death penalty. He denied that after making his statement, defendant was told that he had probably just saved his own life by confessing.

Chapple testified that when defendant was arrested at his home in the early morning hours of 28 May 1992, he was awake, oriented, and coherent. Defendant's speech was not slurred, and he did not appear to be under the influence of alcohol. Chapple testified that at approximately 6:00 a.m., he returned to defendant's house and was given a large knife by McGrew.

Defendant testified that he was scared and nervous but that he signed the *Miranda* waiver form and confessed because he thought it would save his life. He admitted that the contents of the statement were true. Defendant further admitted that he had not consumed any alcohol for six hours prior to his interrogation. He acknowledged that he understood the terms in the *Miranda* waiver and that he signed the form. Although defendant testified that he dropped out of school in the ninth grade, he was able to read the *Miranda* form in court without difficulty. He admitted that no weapons were drawn on him during the interrogation and that Young's alleged statement that defendant's confession would probably save his life was made after his confession had been recorded.

Based upon our review of the motions transcript, we conclude that the trial court's factual findings were supported by substantial competent evidence and are binding on this appeal. Upon a review of the totality of the circumstances, it is clear that defendant was not coerced or threatened into confessing his participation in this murder; and the trial court did not err in concluding that defendant freely, knowingly, and intelligently waived his *Miranda* rights and that defendant's inculpatory statement to the police was given voluntarily. Defendant's confession and the hunting knife obtained as a result thereof were properly admitted into evidence at trial. This assignment of error is overruled.

[4] Next, defendant argues that the trial court erroneously denied his pretrial motion for a change of venue. In support of his motion, defendant argued that there was extensive pretrial publicity focusing on the racial, homosexual, and mutilation aspects of the crime. In support of his argument, defendant submitted twenty-five newspaper articles discussing the case, telecast summaries from two local television stations, and affidavits from four attorneys in Forsyth County. The State asked the trial court to deny the motion until the jury selection process was under way in order to be better able to determine at such time if it would be possible to pick a jury that would give defendant a fair trial in Forsyth County. Accordingly, the trial court denied defendant's pretrial motion for a change of venue. Defendant did not renew this motion after jury selection.

Defendant contends that because the trial court denied his pretrial motion without making any findings of fact or conclusions of law, it is impossible to determine if the trial court applied the correct legal standard. Defendant further argues that the trial court's ruling

was erroneous as a matter of law and violated his constitutional right to due process of law. We reject defendant's arguments for the following reasons.

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 pretrial publicity mandates a change of venue is whether "it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed." *State v. Jerrett*, 309 N.C. 239, 255, 307 S.E.2d 339, 347 (1983). Defendant has the burden of proving the existence of a reasonable likelihood that he cannot receive a fair trial in that county on account of prejudice from such pretrial publicity. *State v. Madric*, 328 N.C. 223, 226, 400 S.E.2d 31, 33 (1991). To meet this burden defendant

> 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.

State v. Jerrett, 309 N.C. at 255, 307 S.E.2d at 347-48 (citations omitted). 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. *State v. Madric*, 328 N.C. at 226, 400 S.E.2d at 33.

"Only in the most extraordinary cases can an appellate court determine solely upon evidence adduced prior to the actual commencement of jury selection that a trial court has abused its discretion by denying a motion for change of venue due to existing prejudice against the defendant." *Id.* at 227, 400 S.E.2d at 34. The existence of pretrial publicity by itself does not establish a reasonable likelihood that defendant cannot receive a fair trial in the county where the crime was committed. *State v. Soyars*, 332 N.C. 47, 53, 418 S.E.2d 480, 484 (1992).

After reviewing the information submitted by defendant in support of his pretrial motion for change of venue, we conclude that the trial court did not err in concluding that defendant had not made a sufficient showing of prejudice. While the information submitted by the defendant indicated that this case had been the subject of pretrial publicity which had aroused some controversy in the community, defendant made no showing that any of the prospective jurors in Forsyth County would be unable to set aside this pretrial publicity and decide this case solely on the evidence presented at trial.

The trial court was not required to make findings of fact or conclusions of law in connection with the denial of this pretrial motion. The transcript clearly shows that the trial court's ruling did not prohibit defendant from renewing this motion if the actual jury *voir dire* had revealed such prejudice against him.

A review of the actual *voir dire* of prospective jurors reveals that the trial court did not err by denying defendant's pretrial motion for change of venue. First, defendant failed to use all of his peremptory challenges. When the actual jury was seated, defendant still had one unused peremptory challenge remaining. Further, defendant made no showing during this *voir dire* that it was reasonably likely that the jurors in his case would base their decision on the pretrial publicity rather than on the information presented at trial.

This Court has previously noted that the potential jurors' responses to questions on *voir dire* are the best evidence of whether pretrial publicity was prejudicial or inflammatory. *State v. Richardson*, 308 N.C. 470, 480, 302 S.E.2d 799, 805 (1983). If each juror states unequivocally that he or she can set aside pretrial information about a defendant's guilt and arrive at a determination based solely on the evidence presented at trial, the trial court does not err in refusing to grant a change of venue. *State v. Moore*, 335 N.C. 567,

586, 440 S.E.2d 797, 808, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 174, *reh'g denied*, —— U.S. ——, 130 L. Ed. 2d 532 (1994).

In the instant case the transcript demonstrates that the actual jurors seated on defendant's jury were thoroughly questioned on their exposure to pretrial publicity. The transcript further shows that each juror who actually sat on defendant's jury unequivocally stated that he or she could put aside any preconceived opinions as to defendant's guilt and that he or she would decide defendant's case solely upon the evidence presented in the courtroom. Although, as defendant contends, some prospective jurors were somewhat equivocal, during the entire jury *voir dire*, only two indicated that they definitely had formed opinions about the case based on pretrial publicity and could not decide the case based on the evidence. None of these people remained on the jury, however.

As defendant has failed to meet his burden of proof necessary to prevail on this issue, we reject his argument and overrule this assignment of error.

[5] Next, defendant argues that he is entitled to a new trial because the trial court erroneously read the bill of indictment to all the prospective and eventual jurors during jury selection, in violation of N.C.G.S. § 15A-1213 and N.C.G.S. § 15A-1221(b). N.C.G.S. § 15A-1221(b) provides that "at no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury." N.C.G.S. § 15A-1221(b) (1988). N.C.G.S. § 15A-1213 prohibits the trial judge from reading the pleadings to the jury. N.C.G.S. § 15A-1213 (1988).

Defendant's murder indictment alleged that "on or about [27 May 1992] and in [Forsyth County] the defendant [Rickey Eugene Knight] unlawfully, willfully and feloniously and of malice aforethought did kill and murder Carlos Colon Stoner." At the start of jury selection, the trial court addressed all the prospective jurors as follows:

> This is a case which we're beginning to select the jury on entitled the State of North Carolina against Rickey Eugene Knight. Rickey Eugene Knight is charged in a bill of indictment that on or about the 27th of May 19 hundred and 92 here in Forsyth County, he did unlawfully, wilfully and feloniously and of malice aforethought kill and murder Charles [sic] Colon Stoner. And that's a charge of first degree murder.

After the initial panel of prospective jurors was exhausted, the trial court called a second panel into the courtroom and addressed these potential jurors in a similar fashion. Defendant did not object at trial to either comment.

N.C.G.S. § 15A-1221(a)(2) requires the trial court to inform prospective jurors about the case in accordance with section 15A-1213. N.C.G.S. § 15A-1213 requires the trial court to identify the parties and their counsel and briefly inform the prospective jurors of the name of the defendant, the charge, the date of the alleged offense, the name of the victim as alleged in the pleadings, defendant's plea, and any affirmative defense of which defendant has given proper notice. "To comply with these requirements, the trial court may draw 'information from the bills of indictment to the extent necessary to identify the defendant and explain the charges against him and the circumstances under which he was being tried.' " *State v. Faucette*, 326 N.C. 676, 689, 392 S.E.2d 71, 78 (1990) (quoting *State v. Leggett*, 305 N.C. 213, 218, 287 S.E.2d 832, 835-36 (1982)).

In the instant case the trial court drew from the indictment the name of defendant, the name of the victim, the date of the crime, and the elements of the charge for which defendant was being tried. " '[T]he statement of the trial court was consistent with the spirit of each statute in question,' and the trial court did not give the jurors 'a distorted view of the case before them by an initial exposure to the case through the stilted language of indictments and other pleadings.' " *Id.* at 689, 392 S.E.2d at 78 (quoting *State v. Leggett*, 305 N.C. at 218, 287 S.E.2d at 836). As in *State v. Faucette*, the trial court did not read the indictment in its entirety and in particular did not recite the language indicating that twelve or more grand jurors had concurred in issuing the indictment. *See id.* at 688, 392 S.E.2d at 78. We find no error in the trial court's comments to the prospective jurors.

[6] In his next assignment of error, defendant contends that the trial court erroneously issued a blanket ruling that prevented him from questioning prospective jurors about whether the victim's HIV-positive status would affect their ability to be fair and impartial. The fact that the victim was HIV-positive was featured in the pretrial publicity surrounding the case and was also introduced at trial. Defendant contends the issues concerning AIDS and the AIDS virus are extremely controversial and arouse the passions and prejudice of many members of our society. He, therefore, argues that the views of

prospective jurors about these issues were relevant to determining their fitness and competency to serve as jurors on his case.

Defendant contends the trial court's blanket ruling prevented him from discovering whether the victim's HIV-positive status would make any jurors unfairly prejudiced against him or unfairly sympathetic toward the victim. Defendant contends that this ruling violated his right pursuant to N.C.G.S. § 15A-1214(c) to question prospective jurors to determine their fitness and competency to serve on his jury in order to make effective use of his challenges for cause and his peremptory challenges. He further argues that this ruling violated his constitutional right to due process of law. We find defendant's arguments unpersuasive.

Initially, we note that the trial court did not enter a blanket ruling prohibiting defendant from asking any questions about the victim's HIV-positive status during jury *voir dire*. A review of the trial transcript reveals that defendant wanted to question prospective jurors both about the victim's homosexuality and his HIV-positive status. The issue arose during discussion of the State's motion to have the evidence of the victim's homosexuality and HIV-positive status excluded at trial. After the trial court refused to make a ruling on this pretrial motion, the State requested that this information not be mentioned during jury *voir dire*. The trial court ruled that questions about the issue of homosexuality were relevant to identify prospective jurors who might think "gay bashing" was permissible. The trial court stated that questions about HIV should be left out of jury selection but refused to make a blanket ruling prohibiting such questions if the fact that the victim was HIV-positive arose during a prospective juror's response to other questions. The trial judge deferred ruling on this line of questioning until he had a concrete question or answer before him during the jury *voir dire*. At that time counsel for the defense stated that they would not directly ask prospective jurors about AIDS and HIV.

During the jury *voir dire*, none of the prospective jurors mentioned any knowledge of the victim's HIV-positive status, and this line of questioning was not pursued. Little evidence in connection with the victim's HIV-positive status was introduced at trial, and neither the State nor defendant mentioned it during opening or closing arguments.

Pursuant to N.C.G.S. § 15A-1214(c), counsel may question prospective jurors concerning their fitness or competency to serve as

jurors to determine whether there is a basis to challenge for cause or whether to exercise a peremptory challenge. N.C.G.S. § 15A-1214(c) (1988). "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. Locklear*, 331 N.C. 239, 247, 415 S.E.2d 726, 731 (1992). The trial judge has broad discretion to regulate jury *voir dire*. *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162, *reh'g denied*, —— U.S. ——, 130 L. Ed. 2d 532 (1994).

"In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby." *Id.* The right to an adequate *voir dire* to identify unqualified jurors does not give rise to a constitutional violation unless the trial court's exercise of discretion in preventing a defendant from pursuing a relevant line of questioning renders the trial fundamentally unfair. *Morgan v. Illinois*, 504 U.S. 719, 730 n.5, 119 L. Ed. 2d 492, 503 n.5 (1992); *Mu'Min v. Virginia*, 500 U.S. 415, 425-26, 114 L. Ed. 2d 493, 506, *reh'g denied*, 501 U.S. 1269, 115 L. Ed. 2d 1097 (1991).

Assuming *arguendo* that this evidence was relevant to a prospective juror's qualifications to be fair and impartial in this case, defendant has shown no abuse of discretion or prejudice arising to the level of fundamental unfairness from the trial court's refusal to allow him to pursue this line of questioning. The evidence of defendant's guilt was overwhelming, and his attorney conceded his guilt during closing arguments. The possibility of juror prejudice against defendant from the victim's HIV-positive status does not rise to the level of fundamental unfairness in the instant case.

We conclude that the trial court's ruling that defendant could not directly pursue this line of questioning unless the victim's HIV-positive status was revealed in the answer of a prospective juror did not violate defendant's rights under N.C.G.S. § 15A-1214(c) or his constitutional right to due process of law. This assignment of error is overruled.

[7] Next, defendant contends that the trial court erroneously admitted the victim's bloody clothes into evidence and allowed the prosecutor to brandish them before the jury during closing argument. Defendant argues that this evidence was irrelevant and inadmissible under Rules 401, 402, and 403 of the North Carolina Rules of Evidence because there was no dispute that the victim died from multiple stab

wounds, that the murder was bloody and gruesome, or that defendant participated in the stabbing of the victim. Defendant further claims that the prosecutor's closing argument, during which he allegedly brandished the victim's bloody clothing in front of the jury, was an improper, inflammatory appeal to emotion and prejudice. Defendant contends that the evidentiary errors and improper argument were prejudicial to him because they made the jury want to convict him of the highest degree crime possible and led to an erroneous finding of premeditation and deliberation. We disagree.

Initially, we note that at trial defendant objected to the admission of this evidence solely on the basis of Rule 403 of the North Carolina Rules of Evidence and has technically waived appellate review on the issue of the relevance of this evidence. N.C. R. App. P. 10(b)(1). However, even if defendant had properly preserved this issue for appeal, the clothing of the victim introduced at trial was clearly relevant and admissible under Rules 401 and 402 of the North Carolina Rules of Evidence.

Bloody clothing of a victim that is corroborative of the State's case, is illustrative of the testimony of a witness, or throws any light on the circumstances of the crime is relevant and admissible evidence at trial. *See State v. Holder*, 331 N.C. 462, 485-86, 418 S.E.2d 197, 210 (1992) (murder victim's bloody shirt properly admitted to illustrate testimony of forensic pathologist); *State v. Miley*, 291 N.C. 431, 435-36, 230 S.E.2d 537, 540 (1976) (victim's bloody shirt admissible because it corroborated State's theory of the case and helped the jury better understand the testimony of a witness); *State v. Sparks*, 285 N.C. 631, 636-37, 207 S.E.2d 712, 715 (1974) (victim's bloody shirt admissible because its appearance helped throw light on the circumstances of the crime), *death sentence vacated*, 428 U.S. 905, 49 L. Ed. 2d 1212 (1976).

In the instant case the bloody jacket, shirt, and T-shirt that the victim was wearing at the time of his murder were admitted into evidence at trial to illustrate the testimony of Dr. Lantz, who used the clothing to illustrate his testimony that the wounds he observed on the victim's body during the autopsy corresponded with the holes in the clothes the victim was wearing at the time of his death. Dr. Lantz testified that although the distortion caused by the large gaping wound to the victim's chest and the fact that some clothing had been pulled to the side or raised during the stabbing made it impossible to line up all the slits in the clothing with the wounds, the holes in the

clothes corresponded with the victim's wounds. The clothes that the victim was wearing at the time of his murder were clearly relevant and admissible at trial.

Pursuant to Rule 403 of the North Carolina Rules of Evidence, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" to a defendant. N.C.G.S. § 8C-1, Rule 403 (1988). "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 by admitting this clothing into evidence at trial. As in *State v. Holder*, 331 N.C. at 485-86, 418 S.E.2d at 210, in which this Court concluded that the admission of the victim's bloody shirt did not violate Rule 403, in the instant case the victim's bloody clothing was not excessively displayed or discussed at trial and was used to illustrate the testimony of the doctor who performed the autopsy on the victim's body. Other than Officer Mitchell's chain-of-custody testimony, this evidence was not mentioned after Dr. Lantz's testimony until the prosecutor made reference to it in his closing argument.

During his closing argument the prosecutor unwrapped the packaging around the victim's bloody clothes and showed them to the jury in conjunction with the following argument:

> The body of Carlos Stoner is the best evidence of what happened to him. This is real evidence, right here, ladies and gentlemen. This isn't eyewitness testimony[,] corroboration, substantive, illustrative, expert, whatever. This is real evidence, these are Mr. Stoner's real clothes. This is his real blood. This is where his life bled out. [These are] the relics. This is all that's left of Mr. Stoner.
>
> And I want you to look at that. Because I can't ask Mr. Stoner to come in here and tell you how much he suffered. I can't ask Mr. Stoner to come in here and say what happened to him. What did it feel like to lay [sic] there feeling blow after blow, stab after stab go into my body, to feel my eyebrows stabbed, my ears, my neck, my face, my chest, my arms, my legs.
>
> Mr. Stoner can't come in here and tell you how terrifying it is to lay [sic] on your back with wounds to your heart and lungs so

bad that you're incapacitated enough that you just have to lay [sic] there because you can't breathe enough to even roll over.

Mr. Stoner can't come in here and tell you about laying [sic] in this isolated spot on the Greenway wondering is somebody going to come along and find me before I die so I can get to a hospital, have somebody get to me so I can tell what happened. Mr. Stoner can't do that. This is the closest we'll ever get to it. These clothes right here. Mr. Stoner's t-shirt. There's a logo on it, says Parents Magazine. Parents Magazine. Parents Magazine.

Mr. Knight cut Mr. Stoner's rib cage open right through a logo that says Parents Magazine.

Although he did not object to this argument or the display of the victim's clothing at trial, defendant now argues that this argument and display constituted an inflammatory appeal to emotion and prejudice and that it was shocking, gruesome, and unfairly theatrical.

Counsel is 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), *sentence vacated on other grounds*, 336 N.C. 508, 444 S.E.2d 443 (1994). In the absence of any objection at trial to a jury argument, the standard of review to determine if the trial court erred by not intervening *ex mero motu* is whether the allegedly improper argument was so prejudicial and grossly improper that it interfered 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). 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 to the victim's bloody clothes or the stab wounds and injuries the victim suffered while wearing those clothes. As indicated above, the bloody clothing was relevant to shed light on the circumstances of the crime and to illustrate the testimony of Dr. Lantz. Further, the transcript is devoid of support for defendant's contention that the prosecutor theatrically unwrapped and brandished these clothes before the jury. The transcript merely reflects that the prosecutor briefly displayed the cloth-

ing incident to this legitimate argument and then closed up those exhibits and continued with his closing argument.

We conclude that the trial court did not err by admitting this evidence into trial or by failing to intervene *ex mero motu* to prevent the prosecution from displaying this clothing during the State's argument that this was the best evidence of what had happened to the victim.

[8] In his final assignment of error, defendant contends that he is entitled to a new trial because the prosecutor improperly engaged in prosecutorial misconduct by knowingly asking impertinent and insulting questions of two witnesses during trial that could not possibly have elicited relevant evidence. Defendant contends that these questions were posed for the sole purpose of badgering, degrading, and humiliating defendant and his witnesses. He claims the effect of these questions destroyed the fundamental dignity and solemnity of the trial and influenced the jurors to have a flippant attitude towards defendant's guilt and the trial process itself, in violation of his right to a fair trial. We disagree.

The first incident about which defendant complains occurred during the prosecutor's redirect examination of Dr. Lantz, the pathologist who performed the autopsy on the victim. During his direct testimony, Dr. Lantz acknowledged that the victim's body fluids showed a high alcohol content of .28. During cross-examination, defendant inquired about the anesthetic effect of alcohol on the human body and whether a blood alcohol level of .28 would lessen the sensory perception of pain. Dr. Lantz responded that "[i]t would lessen it, but not abolish it." During the State's redirect examination of Dr. Lantz, the following exchange occurred:

> Q. And what level of alcohol concentration would they have to have in their blood in order for this chart to show that they did not feel any pain?
>
> A. That's near the botom [sic] of the chart. Blood alcohol concentration of point three five to point five zero, stage of influence of alcohol is coma, causing complete unconsciousness. Coma, anesthesia or lack of pain, depressed o[r] abolished reflexes, subnormal temperature, incontinence of urine and feces, embarrassment of circulation and respiration, and possible death.
>
> Q. All right. So [a] person would have to be in a coma or near death before they would no longer be able to feel pain under the influence of alcohol alone, is that correct?

A. Alcohol is not that good of an anesthetic. A person basically would have to be comatose before they would no longer experience pain.

Q. All right. Dr. Lantz, would you recommend heart surgery in which you opened up someone through the rib cage in which you used alcohol alone as an anesthetic?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. As I said before, alcohol is a very poor anesthetic. To achieve anesthesia or abolish the pain sense, you—alcohol has to be in such a concentration to cause someone to be comatose. And at that point, it's very close to the point of death.

Counsel "may not needlessly badger or humiliate [a witness] by asking insulting and impertinent questions which he knows will not elicit competent or relevant evidence." *State v. Daye*, 281 N.C. 592, 596, 189 S.E.2d 481, 483 (1972). However, in the instant case the prosecutor's question was not posed merely to badger, degrade, or humiliate either defendant or Dr. Lantz but was clearly relevant under Rule 401 of the North Carolina Rules of Evidence to address the factual issue raised by defendant concerning alcohol's ability to blunt pain perception. N.C.G.S. § 8C-1, Rule 401 (1992). The analogy to heart surgery was apt, in light of the witness' earlier testimony that the victim's chest had been split open during the course of the stabbing, exposing his heart and right lung. The prosecutor's question clarified and refuted defendant's suggestion that the victim's alcohol consumption had anesthetized him from the pain of the massive wounds inflicted upon him. Nothing about the form of the question posed by the prosecutor was insulting or impertinent.

The second incident about which defendant complains under this assignment of error occurred during the prosecutor's cross-examination of Thomas McGee, who testified during direct examination that on the day of the murder, he and defendant consumed a large quantity of alcohol, which had had an effect on defendant's behavior. During cross-examination by the State, the following exchange occurred:

Q. Would you say you had as much beer to drink as Rickey Knight that night?

A. Close, if not just as much.

Q. Well, did all the beer you drink [sic] make you want to go out and cut up somebody like a fish?

[DEFENSE COUNSEL]: Objection. Motion to strike.

THE COURT. Sustained. Disregard that.

A defendant is entitled to a new trial on the basis of an improper question if there is a reasonable possibility that such an improper question affected the outcome of his trial. N.C.G.S. § 15A-1443(a) (1988); *State v. Whisenant*, 308 N.C. 791, 794-95, 303 S.E.2d 784, 786 (1983). Merely asking an improper question to which an objection is sustained does not automatically result in prejudice to a defendant. *State v. Whisenant*, 308 N.C. at 794-95, 303 S.E.2d at 786; *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979). When the trial court sustains a defendant's objections to improper questions and instructs the jury to disregard such questions, any possible prejudice to the defendant is cured. *State v. Walker*, 319 N.C. 651, 655, 356 S.E.2d 344, 346 (1987).

Although the prosecutor's question was improper, there is no reasonable possibility that such an improper question affected the outcome of defendant's trial, in light of all the evidence against defendant, including his own confession conceding his initial participation in the stabbing and his return to ensure the victim was dead. There is no evidence to support defendant's assertion that this question destroyed the fundamental dignity and solemnity of the trial or his assertion that this question led the jurors to take a flippant attitude towards defendant's guilt and this trial. No incompetent evidence was placed before the jury as a result of this question. The trial court properly sustained defendant's objection and instructed the jury to disregard the question. This cured any possible prejudice to defendant from the prosecutor's improper question. This assignment of error is overruled.

Having reviewed the trial transcripts, the record, the briefs of the parties, and oral arguments, we conclude that defendant received a fair trial free of prejudicial error.

NO ERROR.

STATE v. ATKINS

[340 N.C. 565 (1995)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
RANDY LYNN ATKINS	)	

No. 9A94

(Filed 27 July 1995)

Pursuant to N.C.G.S. § 15A-1418, Defendant's Motion for Appropriate Relief filed in this Court on 21 June 1995 is allowed for the purpose of entering the following orders:

Defendant's Motion for Appropriate Relief is hereby remanded to the Superior Court, Buncombe County.

It is further ordered that an evidentiary hearing be held on the aforesaid motion and that the resulting order containing the findings of fact and conclusions of law of the trial judge determining the motion to be transmitted to this Court so that it may proceed with the appeal or enter an order terminating the appeal. Time periods for perfecting or proceeding with the appeal are tolled pending receipt of the order of disposition of the motion in the Trial Division.

By order of the Court in Conference, this 27th day of July, 1995.

Orr, J.
For the Court

ALL STAR RENTAL, INC. v. WRIGHT

No. 237P95

Case below: 118 N.C.App. 584

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

BATTLE v. PETERSON

No. 224P95

Case below: 118 N.C.App. 734

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995. Petition by defendants (Peterson, Criado and Kobs) for discretionary review as to an additional issue denied 27 July 1995.

BENNETT v. BRANCH BANKING AND TRUST CO.

No. 223P95

Case below: 118 N.C.App. 735

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

BLINSON v. OCCIDENTAL LIFE INS. CO.

No. 164P95

Case below: 118 N.C.App. 584

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

CITY OF CHARLOTTE v. HELMS

No. 118P95

Case below: 117 N.C.App. 613

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

COLLINS v. NORTH CAROLINA PAROLE COMMISSION

No. 199PA95

Case below: 118 N.C.App. 544

Notice of appeal by plaintiff pursuant to G.S. 7A-30 (substantial constitutional question) retained by order of the Court 27 July 1995. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 27 July 1995.

DARE COUNTY BOARD OF EDUCATION v. SAKARIA

No. 229A95

Case below: 118 N.C.App. 609

Notice of appeal by defendants pursuant to G.S. 7A-30 (substantial constitutional question) retained by order of the Court 27 July 1995. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

DEMOCRATIC PARTY OF GUILFORD CO. v.
GUILFORD CO. BD. OF ELECTIONS

No. 116A95

Case below: 117 N.C.App. 633

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 27 July 1995.

IN RE APPEAL OF HARPER

No. 243P95

Case below: 118 N.C.App. 698

Petition by respondents (State Board of Elections and Frank H. Harper) for temporary stay allowed 20 June 1995 pending determination of the petition for discretionary review. Petition by respondents (State Board of Elections and Frank H. Harper) for writ of supersedeas denied 27 July 1995. Petition by respondents (State Board of Elections and Frank H. Harper) for discretionary review pursuant to G.S. 7A-31 denied and stay dissolved 27 July 1995.

IN RE SKIDMORE

No. 194P95

Case below: 118 N.C.App. 584

Petition by petitioner (Cornelia D. Skidmore) for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

JENKINS v. RICHMOND COUNTY

No. 188P95

Case below: 118 N.C.App. 166

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

JOHNS v. AUTOMOBILE CLUB INS. CO.

No. 192P95

Case below: 118 N.C.App. 424

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

McGAHREN v. SAENGER

No. 213P95

Case below: 118 N.C.App. 649

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995. Notice of appeal by plaintiffs pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 27 July 1995. Petition by plaintiffs for discretionary review pursuant to 7A-31 denied 27 July 1995.

MELTON v. CITY OF ROCKY MOUNT

No. 173P95

Case below: 118 N.C.App. 249

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

NATIONSBANK OF NORTH CAROLINA v. BROWN

No. 214P95

Case below: 118 N.C.App. 576

Motion by defendants to withdraw petition for discretionary review allowed 21 July 1995.

PLUMMER v. HENDERSON STORAGE CO.

No. 242P95

Case below: 118 N.C.App. 727

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

STATE v. BURWELL

No. 238P95

Case below: 118 N.C.App. 736

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

STATE v. CRAWFORD

No. 234P95

Case below: 118 N.C.App. 338

Petition by defendant (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

STATE v. DELLINGER

No. 215PA95

Case below: 118 N.C.App. 529

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 27 July 1995.

STATE v. FUNDERBURK

No. 225P95

Case below: 118 N.C.App. 736

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

STATE v. GRIFFIN

No. 218P95

Case below: 118 N.C.App. 587

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

STATE v. HARDEN

No. 171P95

Case below: 118 N.C.App. 338

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

STATE v. HILL

No. 233A91-3

Case below: Superior Court

Petition by defendant for writ of certiorari to review the decision of the Buncombe County Superior Court denied 3 July 1995.

STATE v. HUGHES

No. 187P95

Case below: 118 N.C.App. 573

340 N.C. 361

Petition by Attorney General for writ of supersedeas denied 27 July 1995. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied and temporary stay dissolved 27 July 1995.

STATE v. LYNTHACUM

No. 217P95

Case below: 118 N.C.App. 588

Petition by defendant discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

STATE v. MULLICAN

No. 190A95

Case below: 118 N.C.App. 585

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 July 1995.

STATE v. PARTON

No. 163P95

Case below: 118 N.C.App. 585

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

STATE v. PATTON

No. 255P95

Case below: 119 N.C.App. 229

Petition by Attorney General for writ of supersedeas and motion for temporary stay allowed 27 June 1995.

STATE v. POE

No. 264P95

Case below: 119 N.C.App.(20 June 1995

Motion by the Attorney General for temporary stay allowed 7 July 1995.

STATE v. RAMSEY

No. 236P95

Case below: 118 N.C.App. 736

Notice of Appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 27 July 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

STATE v. SHOFF

No. 244PA95

Case below: 118 N.C.App. 724

Petition by defendant for writ of supersedeas and motion for temporary stay denied 19 June 1995. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 27 July 1995. Petition by defendant for discretionary review allowed 27 July 1995 only as to the one issue of whether the appeal was interlocutory.

STATE v. SNYDER

No. 210PA95

Case below: 118 N.C.App. 540

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 27 July 1995.

STATE EX REL. COBEY v. COOK

No. 140P95

Case below: 118 N.C.App. 70

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995.

STATE EX REL. TUCKER v. FRINZI

No. 306A95

Case below: 119 N.C.App.(5 July 1995)

Petition by Attorney General for writ of supersedeas allowed 27 July 1995. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 27 July 1995.

TAYLOR v. TAYLOR

No. 191A95

Case below: 118 N.C.App. 356

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 27 July 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 July 1995. Petition by defendant for writ of supersedeas denied 27 July 1995. Motion by plaintiff to dismiss defendant's petition for discretionary review dismissed 27 July 1995.

STATE v. GARNER

[340 N.C. 573 (1995)]

STATE OF NORTH CAROLINA v. DANIEL THOMAS GARNER

No. 342A93-2

(Filed 28 July 1995)

1. Constitutional Law § 372 (NCI4th)— capital trial—no arbitrary prosecutorial discretion—death penalty not unconstitutional

The trial court properly denied defendant's motion to exclude the death penalty from consideration in his first-degree murder trial on the ground that the district attorney selected cases for capital prosecution in Robeson County in an arbitrary manner in violation of defendant's constitutional rights since the only limitation on the prosecutor's discretion pertinent to this case is that the decision to prosecute capitally may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including prosecution due to defendant's decision to exercise his constitutional rights; defendant did not show that the district attorney had an improper motive in deciding what charges to proceed with or which first-degree murder cases to try capitally; and a showing that one first-degree murder case was tried noncapitally in the county notwithstanding the existence of aggravating circumstances because of a mistake on the part of the assistant district attorney who prosecuted the case did not render the prosecutorial system for capital cases invalid as a whole. U.S. Const. amends. VII and XIV; N.C. Const. art. I, §§ 19, 23 and 27.

Am Jur 2d, Criminal Law §§ 627, 628; Prosecuting Attorneys § 24.

2. Jury § 222 (NCI4th)— jury selection—opposition to death penalty—excusal for cause—adequacy of questioning by court

The trial court adequately questioned prospective jurors to determine whether they could follow the law despite their personal opposition to the death penalty prior to excusing them for cause where the court, upon learning that a prospective juror had reservations about the death penalty, asked the juror whether there were any circumstances in which he or she could vote in favor of the death penalty, and each juror said "No."

Am Jur 2d, Jury §§ 199, 279.

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

3. Jury § 232 (NCI4th)— death-qualification of jury—prejudice from racial composition not shown

There was no merit to defendant's contention that he was prejudiced because death-qualification of the jury resulted in a racially imbalanced jury where defendant cited no case for his proposition that a jury which is racially disparate after death-qualification results in prejudice to defendant, and defendant failed to show that the jury in his case was racially disparate or that the jury composition prejudiced him.

Am Jur 2d, Jury § 262.

4. Jury § 141 (NCI4th)— jury selection—exclusion of question about parole

The trial court properly refused to permit defense counsel to ask a prospective juror in a capital trial a question concerning the length of time defendant would serve in prison if convicted and sentenced to life imprisonment. Furthermore, where the court then instructed that "life means life," it will be assumed that the jury followed the court's instruction and did not consider the possibility of parole in reaching its verdict.

Am Jur 2d, Jury § 205.

5. Searches and Seizures § 69 (NCI4th)— search of defendant's jacket—residence of third party—consent by third party

The trial court properly concluded that a search of defendant's jacket in a third party's residence was conducted with a valid consent, that defendant had no reasonable expectation of privacy, and that a pistol and car keys seized from the jacket were admissible in evidence where the third party consented to a search of her residence and signed the consent to search form; defendant's jacket was lying in a pile of clothing on the living room floor of the residence; and the officer who conducted the search did not know the jacket belonged to defendant when he discovered it there.

Am Jur 2d, Searches and Seizures §§ 92 et seq.

Authority to consent for another to search or seizure. 31 ALR2d 1078.

Comment Note.—Nature of interest in, or connection with, premises searched as affecting standing to attack legality of search. 78 ALR2d 246.

Admissibility of evidence discovered in warrantless search of property or premises authorized by one having ownership interest in property or premises other than relative. 49 ALR Fed. 511.

6. Criminal Law § 454 (NCI4th)— capital sentencing—prosecutor's argument—prior life sentence—death penalty only additional punishment—error cured by court's actions

The trial court did not err by failing to grant a mistrial when the prosecutor argued to the jury in a capital sentencing proceeding that defendant had already received a life sentence for another murder and the only way to give defendant additional punishment for the two murders at issue was to give him the death penalty where the court promptly sustained defendant's objection and allowed his motion to strike; the court then instructed the jury to "disregard that comment" of the prosecutor; and the court's actions therefore cured any possible error created by the prosecutor's argument.

Am Jur 2d, Jury § 290; Trial §§ 708, 711.

7. Criminal Law § 1347 (NCI4th)— capital sentencing—course of conduct aggravating circumstance—instructions—consideration of prior and subsequent crimes

Defendant's commission of a prior convenience store robbery and murder of the store clerk and his subsequent shooting of a taxicab driver were sufficiently connected to two murders by defendant at a motel to support the trial court's instruction permitting the jury to find the "course of conduct" aggravating circumstance for the two motel murders based on the convenience store and taxicab crimes where defendant committed the convenience store robbery and murder only four days before the double motel murders; defendant shot the taxicab driver less than three weeks after the motel murders; there was a span of only twenty-two days from the convenience store crimes to the shooting of the taxicab driver; the *modus operandi* for each crime was similar in that defendant used the same pistol to kill, or attempt

to kill, each victim and had one or two accomplices with him during each crime; and numerous witnesses testified that these acts were robberies for the purpose of obtaining money to buy drugs. Therefore, the trial court did not err by failing to give defendant's requested instruction which would have permitted the jury to find the course of conduct aggravating circumstance based only on the two motel murders.

Am Jur 2d, Criminal Law §§ 598, 599.

Sufficiency of evidence, for purposes of death penlty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

8. Criminal Law § 454 (NCI4th)— capital sentencing—prosecutor's closing argument—jurors in position of victims—no due process violation—no gross impropriety

The prosecutor's closing arguments in a capital sentencing hearing wherein he repeatedly asked the jurors to place themselves in the position of the murder victims did not prejudice defendant and thus did not deny him due process where the arguments did not manipulate or misstate the evidence and did not implicate specific constitutional rights of defendant, such as the right to counsel or the right to remain silent; the trial court also instructed the jurors that the arguments of counsel were not evidence and that their decision was to be made on the basis of the evidence alone; and the weight of the evidence was overwhelming as to the pecuniary gain and course of conduct aggravating circumstances. Furthermore, those arguments were not so grossly improper as to require the trial court to intervene in the absence of an objection by defendant.

Am Jur 2d, Trial §§ 664 et seq., 708, 711.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3d 8.

9. Criminal Law § 445 (NCI4th)— capital sentencing—prosecutor's jury argument—disapproval of taxpayers educating defendant—no gross impropriety

Assuming impropriety in the prosecutor's argument in a capital sentencing proceeding expressing his disapproval of defend-

ant being educated at Shaw University at taxpayer expense while discussing the nonstatutory mitigating circumstance that defendant had sought to better himself educationally during his confinement, the argument was not so prejudicial to defendant's case as to amount to gross impropriety where the evidence in the case was overwhelming; defendant had already been convicted in one case where he assaulted a man with a pistol in an attempt to kill him and in another case where he killed and robbed a convenience store clerk; those two crimes were similar in nature, time, and motivation to the crime in this case; in this case, defendant slit the throat of a motel clerk, later shot and killed him, and also shot and killed a second motel clerk before robbing the motel; defendant bragged to two other people about his deeds; and the outcome of the sentencing proceeding was not changed as a result of the allegedly improper argument.

Am Jur 2d, Trial §§ 678, 708, 711.

Counsel's reference in criminal case to wealth, poverty, or financial status of defendant or victim as ground for mistrial, new trial, or reversal. 36 ALR3d 839.

Prosecutor's appeal in criminal case to self-interest or prejudice of jurors as taxpayers as ground for reversal, new trial, or mistrial. 60 ALR4th 1063.

10. Criminal Law § 1360 (NCI4th)— capital sentencing—impaired capacity mitigating circumstance—insufficient evidence

The evidence in a capital sentencing hearing was insufficient to support a finding of the statutory mitigating 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 where defendant's evidence of his voluntary intoxication came from witnesses who testified that defendant showed up at Army formations with alcohol on his breath, that defendant drank beer with an Army buddy regularly, and that he had failed a random drug test, and defendant's evidence of mental disorder consisted of testimony from family and friends that he underwent a radical and abrupt character change in the month before the murders which was indicative of a "mental breakdown." 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.

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

When intoxication deemed involuntary so as to constitute a defense to criminal charge. 73 ALR3d 195.

11. Criminal Law § 1363 (NCI4th)— capital sentencing—accomplice not tried capitally—not mitigating circumstance

The trial court did not err by failing to submit as a nonstatutory mitigating circumstance in a capital sentencing proceeding that defendant's accomplice had not been and may not be tried capitally.

Am Jur 2d, Criminal Law §§ 598, 785.

12. Criminal Law § 482 (NCI4th)— conversation between witness and juror—adequacy of court's inquiry

The trial court conducted an adequate inquiry into an alleged contact between a State's witness and a juror to meet its duty to ensure the impartiality of the jury where the prosecutor informed the court that a State's witness told him that he had begun a conversation with a juror during a lunch recess after he testified but ended it upon realizing that the person was a juror, the court called the jury into the courtroom and asked the jurors if any of them had been in contact with the witness after he testified, none responded, and the court resumed the trial.

Am Jur 2d, Trial §§ 1607, 1608.

Prejudicial effect, in civil case, of communications between witnesses and jurors. 52 ALR2d 182.

Prejudicial effect, in criminal case, of communications between witnesses and jurors. 9 ALR3d 1275.

13. Criminal Law § 1349 (NCI4th)— capital sentencing—statutory mitigating circumstances—instructions—mitigating value

The trial court did not permit the jury to determine whether statutory mitigating circumstances found by the jury had mitigating value where the court first instructed as to the statutory mitigating circumstances; the court told the jurors that if they found

a statutory mitigating circumstance to exist they should mark "yes" in the space provided but did not specifically instruct that statutory mitigating circumstances are deemed by law to have mitigating value; and the court then instructed on nonstatutory mitigating circumstances and told the jurors to mark "yes" in the space provided if one or more jurors believed defendant's evidence supporting such a circumstance and further believed that the circumstance had mitigating value. The instructions are in accord with the law and could not have caused a juror reasonably to understand the trial court's final instruction regarding nonstatutory circumstances to refer back to all of the mitigating circumstances.

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

14. Criminal Law § 1363 (NCI4th)— capital sentencing—adjustment to prison life—mitigating value

The trial court did not err by failing to instruct that if any juror found by a preponderance of the evidence that defendant had the ability to adjust to prison life, the juror must give that circumstance mitigating value.

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

15. Criminal Law § 1351 (NCI4th)— mitigating circumstances—burden or proof—"satisfy you"

The trial court's use of the words "satisfy you" to explain the burden of proof applicable to mitigating circumstances was not error.

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

16. Jury § 114 (NCI4th)— capital sentencing—denial of individual jury voir dire

The trial court did not err by denying defendant's motion for individual jury *voir dire* in a capital sentencing proceeding.

Am Jur 2d, Jury §§ 194, 195, 198, 199.

17. Jury 226 (NCI4th)— capital sentencing—death qualification of jury—excusal without rehabilitation

The trial court did not err by denying defendant the right to examine each juror challenged by the State during death qualification prior to his or her excusal and by excusing jurors that defendant was not permitted to question.

Am Jur 2d, Jury §§ 199, 279.

18. Homicide § 135 (NCI4th); Indictment, Information, and Criminal Pleadings § 31 (NCI4th)— first-degree murder—short form indictment—misspelling of defendant's name

The "short form" indictment in N.C.G.S. § 15-144 was sufficient to charge defendant with first-degree murder. Furthermore, the misspelling of defendant's name in the indictment was not fatal.

Am Jur 2d, Homicide § 207.

19. Criminal Law § 1323 (NCI4th)— nonstatutory mitigating circumstances—finding of mitigating value

The trial court did not err by failing to instruct in accord with defendant's request to prohibit jurors from rejecting nonstatutory mitigation evidence if they found that it had no mitigating value.

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

20. Criminal Law § 1325 (NCI4th)— capital sentencing—mitigating circumstances—instructions—use of "may"

The trial court did not err by instructing that each juror "may" consider any mitigating circumstance found in sentencing issue two when answering issues three and four.

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

21. Criminal Law § 1332 (NCI4th)— capital sentencing—requested instruction—verdict binding on court

The trial court did not err by refusing to give defendant's requested instruction that the jury's verdict in a capital sentencing proceeding "bound" the trial court and was not merely a recommendation.

Am Jur 2d, Trial §§ 1830 et seq.

Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence. 8 ALR4th 1028.

22. Constitutional Law § 371 (NCI4th)— death penalty statute—constitutionality

North Carolina's death penalty statute, N.C.G.S. § 15A-2000, is constitutional and not based upon subjective discretion or applied arbitrarily, capriciously, or pursuant to a pattern of discrimination based upon race, gender, or poverty.

Am Jur 2d, Criminal Law §§ 625 et seq.

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

Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, where defendant pled guilty to two counts of first-degree murder; the jury found the aggravating circumstances that the murders were committed for pecuniary gain and were part of a course of conduct which included the commission of crimes of violence against another person; the evidence showed that defendant slit the throat of a motel clerk whom he later shot and killed, and that he also shot and killed a second motel clerk before robbing the motel; and defendant had previously been convicted of a murder and robbery and also of an assault with a deadly weapon with intent to kill inflicting serious injury and attempted armed robbery.

Am Jur 2d, Criminal Law §§ 627, 628.

Justice 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 judgments imposing two sentences of death entered by Battle, J., on 3 September 1993 in the Superior Court, Robeson County. Heard in the Supreme Court 10 April 1995.

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.

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

MITCHELL, Chief Justice.

Defendant, Daniel Thomas Garner, was indicted on 22 May 1989 in two separate bills of indictment for the 31 October 1988 first-degree murders of Timmy Oxendine and Roger Ray Strickland. On 23 August 1993, defendant pled guilty to both counts of first-degree murder. Immediately following the entry and acceptance of the guilty pleas, the trial court held a capital sentencing proceeding pursuant to

N.C.G.S. § 15A-2000. The jury recommended a sentence of death in both cases, and the trial court sentenced defendant accordingly.

The State's evidence at the proceeding tended to show that the killings of Oxendine and Strickland were the culmination of a twenty-four day crime spree during which the defendant committed assaults, robberies and murders in the Robeson and Cumberland County areas of North Carolina. At the capital sentencing proceeding, the State introduced evidence tending to show that Kendrick Page testified that he spent the evening of 31 October 1988 at a Halloween party. He left the party sometime after midnight with his cousin. The two of them went to Rowland, Robeson County, North Carolina, where they met another cousin. Rowland Police Officer Frank McCree spotted the three men and advised them to stay out of trouble. As the three cousins were walking past the Rowland Motel, one of them observed that a motel room door was open. He suggested to the others that perhaps the guest was leaving and would give them the key so they could use the room for the remainder of the night. The three men entered the room and saw a person lying on the floor, bleeding. The men left the room and called 911 for emergency assistance.

Officer McCree responded to the call. He discovered a male victim lying face down in one of the motel rooms. When Officer McCree turned the victim over, he discovered that the victim's neck had been cut. Officer McCree then went to the motel office to contact the manager where he discovered a second victim with a bullet wound to his head.

Rowland Chief of Police Daniel Bradshen participated in the investigation of the murders. During the course of his investigation, he discovered that $700.00 was missing from the motel cash register.

Special Agent April Sweatt of the State Bureau of Investigation examined the crime scene at the Rowland Motel on 1 November 1988. Special Agent Sweatt observed that the cash register drawer in the office was open and empty, with the exception of approximately $3.00 in loose change. The victim located in the office area was identified as Timmy Oxendine. He had a single bullet wound to the back of his head, and his wallet was lying beside him. A spent shell casing fired from a .25-caliber semiautomatic weapon was recovered from the office area. The victim discovered in the motel room was identified as Roger Strickland. He had a bullet wound to the back of his neck, and his throat had been cut. A spent .25-caliber shell casing was located in the motel room.

Dr. Robert Andrews, pathologist, testified that Timmy Oxendine died from a bullet wound to the head. He also testified that Roger Strickland had two potentially fatal wounds, the cut to his neck and throat and the bullet wound. The bullet wound was the probable cause of death. Dr. Andrews extracted bullet fragments from both victims. These bullet fragments from both victims were tested by the State Bureau of Investigation, and it was stipulated that they all had been fired from the .25 caliber pistol later seized from defendant.

William Jackson, a taxicab driver in Fayetteville, testified concerning other crimes defendant committed after the two murders giving rise to this appeal. Mr. Jackson testified that he was dispatched on 18 November 1988 to pick up a passenger at the Express Stop convenience store on Ramsey Street at approximately 10:00 a.m. Mr. Jackson identified defendant as his passenger. When Mr. Jackson arrived at the Express Stop, defendant was seated in a white car being driven by a blonde-haired woman. Defendant kissed the driver, left the white car, entered the cab, and directed Mr. Jackson to drive him to a location on Highway 401 north of Fayetteville. Mr. Jackson identified the woman who was with defendant as Sherry Faulkner. Defendant continued to direct Mr. Jackson to a location on a dirt road in a rural portion of the county where there was a path leading off the road. Defendant told Mr. Jackson that there was a house at the end of the path and asked Mr. Jackson to drop him off at the start of the path. Mr. Jackson did not see a house.

Defendant got out of the cab and began searching his pockets as if he were searching for his wallet. At this point, Mr. Jackson observed the white car being driven by defendant's girlfriend approaching. Mr. Jackson commented to defendant that his girlfriend must have his wallet. Defendant then took a pistol from his pocket and shot Mr. Jackson twice in the chest. Defendant paused and then shot Mr. Jackson once in the head. Mr. Jackson slumped over in the seat and pretended to be unconscious. Defendant's girlfriend pulled up beside the cab, and Mr. Jackson heard her talking with defendant. The engine in the cab was still running. Mr. Jackson sat up in the cab, put it in gear, and drove away as fast as he could. Defendant entered the passenger side of the white car, and the car began to chase Mr. Jackson's cab. Mr. Jackson eventually got away. He was hospitalized for his injuries for over a month; a .25-caliber projectile was recovered from his spleen, a second projectile was later removed in a separate surgical procedure, and a third projectile remains lodged in his neck.

Defendant was subsequently convicted of assault upon Mr. Jackson with a deadly weapon with intent to kill inflicting serious injury and attempted robbery with a dangerous weapon. He was sentenced to sixty years imprisonment.

Sergeant Jeffrey Stafford of the Fayetteville Police Department testified that he investigated another robbery and homicide which occurred at the BTO convenience store on 27 October 1988. The victim, Eva Harrelson, had been shot twice in the head with a .25-caliber weapon, and approximately $1,100 was missing from the store. Officer Stafford testified that defendant had been convicted of the crimes at the BTO convenience store and as a result was currently serving his sentence of life imprisonment plus twenty-five years. Officer Stafford also testified that Dana Adams had participated in the robbery and murder at the BTO convenience store and had split the proceeds with defendant. Ms. Adams had pled guilty to accessory after the fact to murder and received a seven-year sentence. Ms. Adams had also participated in the Rowland Motel murders which resulted in defendant's convictions leading to this appeal. Ms. Adams had held one of the victims at gunpoint during the robbery.

Officer Stafford further testified that Dana Adams was a topless dancer who also worked for an escort service. Dana Adams and Sherry Faulkner danced together and were close friends. Defendant met Ms. Adams and Ms. Faulkner at a topless bar that he visited while his wife was out of town in late September 1988. Prior to his association with Ms. Adams and Ms. Faulkner, defendant had no criminal record.

A State Bureau of Investigation firearms expert testified that the bullets and spent shell casings recovered in the Eva Harrelson convenience store murder case, the William Jackson assault case, and the Rowland Motel murders case all had been fired from defendant's .25-caliber Beretta pistol seized from the 1081 Glen Reilly Road residence.

James McCleod testified that he was incarcerated with defendant in the Cumberland County jail in November 1988; defendant confessed to him regarding the BTO convenience store robbery and murder and the Rowland Motel robbery and murders. Defendant told Mr. McCleod that Dana Adams and defendant needed money. Ms. Adams told defendant that someone sold drugs from the Rowland Motel and that there was over $10,000 in the motel safe. When defendant and Ms. Adams arrived at the motel to rob it, they found two

homosexuals coming out of one of the motel rooms putting on their clothes. Defendant robbed the two men and then took one to a room and cut his throat. Defendant forced the other man to lie down behind the counter in the office area. This victim begged for his life, but defendant shot this victim in the back of the head because he "didn't want to leave behind any evidence." Defendant also told Mr. McCleod about shooting the taxicab driver, William Jackson.

Brad Dickens, a friend of defendant's, testified that he had met defendant through Dana Adams and Sherry Faulkner. Mr. Dickens recognized the .25-caliber Beretta pistol that had been introduced into evidence as one that he had seen in defendant's possession. Defendant had told Mr. Dickens about the BTO convenience store robbery and murder and about the Rowland Motel murders. Defendant told Mr. Dickens that his girlfriend and he checked into the motel and then asked the clerk to come to the room, claiming that there was a problem with the electricity. When the clerk arrived, defendant cut his throat and then went to the office where he killed the other clerk and robbed the motel. Mr. Dickens testified that defendant kept a box cutter in his car.

Defendant also presented evidence during the capital sentencing proceeding. Defendant did not testify but offered evidence from family, friends, and Army officers to the effect that he underwent an abrupt and radical character change a month before committing the Rowland Motel murders. Defendant had been a nice young man who married his high school sweetheart, and his life had been normal until he met Sherry Faulkner and Dana Adams, the topless dancers. Defendant's subsequent conduct was indicative of a mental breakdown.

[1] By his first assignment of error, defendant contends that the trial court erred by denying his motion to exclude the death penalty from consideration. Prior to trial, defendant filed a motion to exclude the death penalty from consideration, alleging that the District Attorney selected cases for capital prosecution in Robeson County in an arbitrary manner in violation of defendant's constitutional rights. The trial court held a pretrial hearing after which it denied defendant's motion.

Defendant argues that the evidence at the hearing showed that the District Attorney, who chose to try defendant for his life, acted arbitrarily in deciding which first-degree murder cases to pursue capitally. Further, defendant argues that as a matter of law the North

Carolina death penalty statute is arbitrarily applied in Robeson County. Therefore, defendant's sentences of death were obtained in violation of his constitutional rights under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 19, 23, and 27 of the North Carolina Constitution.

Judge Battle made the following material findings of fact:

1. Mr. Richard Townsend, the elected District Attorney for this district, has held office since January 1, 1989. Since that date some one hundred and fifty-one persons have been charged in bills of indictment with the crime of first degree murder. Of these, some four have been tried capitally as of this date. Of course, a number of cases are still pending.

2. In the case of State versus John Edward Butler, 89 CRS 018633, the defendant was indicted for the crime of first degree murder. There was evidence in the case of the existence of one or more aggravating factors as set forth in G.S. 15A-2000. Notwithstanding this, the defendant was tried for first degree murder, but the case was not tried as a capital case. The District Attorney has testified at this hearing that this was an error on the part of the assistant district attorney who prosecuted the case. So far as the evidence before this Court shows, this is the only occasion this has happened.

3. In the case of State versus Billy Ogene Hammonds, 90 CRS 007880, the defendant was indicted for the crime of first degree murder. There was evidence of one or more aggravating factors as set forth in G.S. 15A-2000. Notwithstanding this, the State accepted a plea of guilty to the lesser included offense of second degree murder and the defendant received a life sentence.

4. In the case of State versus Jimmy Neal Oxendine, 89 CRS 001890, the defendant was indicted for the crime of first degree murder. There was evidence of one or more aggravating factors as listed in G.S. 15A-2000. Notwithstanding this, the defendant was allowed to plead guilty to the crime of second degree murder and received a sentence of life plus thirty years for the murder and a related offense.

5. In the case of State versus Darrell Devon McLean, 91 CRS 000861, the defendant was indicted for the crime of first degree murder. There was evidence of one or more aggravating circumstances as set forth in G.S. 15A-2000. Notwithstanding this, the

defendant was allowed to plead guilty to the crime of second degree murder and received a sentence of life plus ten years for the murder charge and a related offense.

6. In the companion cases of State versus Robert Lee Vandroff, 90 CRS 006812, and State versus Daniel A. Jones, 90 CRS 006813, the defendants were each indicted for the crime of first degree murder and there was evidence of one or more aggravating factors as set forth in G.S. 15A-2000. Notwithstanding this, the two defendants were allowed to plead guilty to the charge of second degree murder and each received a life sentence.

7. There have been other cases since January 1, 1989, in which defendants were charged with first degree murder and there was evidence of one or more aggravating factors in which the State has elected not to try the defendants capitally, but to accept a plea to a lesser offense than first degree murder.

8. The reason the State accepts a plea to second degree murder as opposed to first degree murder is because under the law of North Carolina the State is precluded from accepting a plea to first degree murder and not proceeding to try the defendant capitally where aggravating factors are present.

9. The decision as to whether to try a defendant capitally or whether to accept a plea to a lesser offense than first degree murder is made by the District Attorney. In making this decision, the District Attorney considers such factors as: (a) the relative strength or weakness of the State's case to obtain a conviction of first degree murder. Included in this would be the question of the strength of the State's case as to the identification of the defendant as the perpetrator of the crime; (b) the presence or absence of legal questions or problems that might cause the State difficulty in the trial of the case; (c) the wishes and desires of the relatives of the victim; (d) the District Attorney's opinion as to the relative likelihood of the State being able to obtain a death recommendation from a jury.

10. There is no evidence before the Court that the District Attorney in making these decisions is in any way influenced by the race, sex or national origin of the defendant or the victim.

11. In making his decision to proceed to try these cases as a capital trial, the District Attorney has been influenced by the fact that the defendant is charged with two murders in this county and

that the defendant has been convicted of a murder in Fayetteville arising out of the same episode.

These findings by the trial court are supported by the evidence presented at the hearing and are binding on appeal. *State v. Barnett*, 307 N.C. 608, 300 S.E.2d 340 (1983).

This Court has consistently recognized that a system of capital punishment is not rendered unconstitutional simply because the prosecutor is granted broad discretion. *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369, *reh'g denied*, 471 U.S. 1050, 85 L. Ed. 2d 342 (1985); *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). The trial court properly noted that the only limitation on this discretion pertinent to this case is that the decision to prosecute capitally may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *Bordenkircher v. Hayes*, 434 U.S. 357, 54 L. Ed. 2d 604, *reh'g denied*, 435 U.S. 918, 55 L. Ed. 2d 511 (1978); *Oyler v. Boles*, 368 U.S. 448, 7 L. Ed. 2d 446 (1962). Such arbitrary classifications include prosecution due to a defendant's decision to exercise his statutory or constitutional rights. *United States v. Goodwin*, 457 U.S. 368, 73 L. Ed. 2d 74 (1982).

In order for a selective enforcement claim to prevail, the defendant must show the prosecutorial system was motivated by a discriminatory purpose and had a discriminatory effect. *Wayte v. United States*, 470 U.S. 598, 84 L. Ed. 2d 547 (1985). Defendant here has not shown that the District Attorney had an improper motive in deciding what charges to proceed with or which first-degree murder cases to try capitally. We do recognize that the decision whether to try a first-degree murder case as a capital case is not a matter within the district attorney's discretion. *State v. Britt*, 320 N.C. 705, 360 S.E.2d 660 (1987); *accord State v. Case*, 330 N.C. 161, 410 S.E.2d 57 (1991) (defendant may not plead guilty to first-degree murder under an arrangement whereby the State agrees not to submit aggravating circumstances which could be supported by the evidence). The trial court found as a fact that the case of *State v. Butler* had been handled erroneously in this manner. However, the District Attorney testified at the hearing that this was an error on the part of the assistant district attorney who prosecuted the case, and the trial court found that this was the only occasion where this has happened. We conclude that this one, isolated incident did not render the prosecutorial system for

capital cases invalid as a whole. Further, defendant has not shown that the District Attorney acted in an arbitrary manner or that his selection of this case for capital prosecution was an unconstitutional exercise of power.

Contrary to defendant's assertion, the trial court did not conclude that the death penalty statute was arbitrarily applied in any constitutional sense in Robeson County. The trial court's conclusion was only that

> [t]he application of the North Carolina death penalty statute is arbitrary *in the sense that* two people with similar backgrounds who commit identical crimes can be treated differently, that is one can be tried for his life while the other can be allowed to plead to second degree murder or some other lesser offense based on the factors set forth above.

(Emphasis added). This Court has repeatedly held that North Carolina's death penalty statute, N.C.G.S. § 15A-2000 (Supp. 1994), is constitutional. *E.g., State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 895 (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). Therefore, we conclude that Judge Battle properly denied defendant's motion.

[2] By his next assignment of error, defendant contends that the trial court erred by failing to adequately question prospective jurors in order to determine whether they could follow the law despite their personal opposition to the death penalty prior to excusing them for cause. We do not agree.

The standard for determining whether a prospective juror may be excused for cause because of 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). In its application of the constitutional standard enunciated in *Witt*, this Court has consistently held that where a prospective juror's answers clearly disclose that his views would impair his ability to act in accordance with his instructions and his oath, such juror is properly excused for cause. *See State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 895 (1995). In this case, a reading of the jury *voir dire* reveals that poten-

tial jurors who expressed personal opposition to the death penalty were clear and unequivocal in their opposition. Upon learning that a prospective juror had reservations about the death penalty, the trial court asked the juror whether there were any circumstances in which he or she could vote in favor of the death penalty. Each juror said "No." Therefore, we conclude that these prospective jurors were properly excused.

[3] Defendant also argues that the trial court's inadequate examination of jurors, prior to excusing them for cause on the basis of their expressed opposition to the death penalty, resulted in a racially imbalanced jury. We disagree. While defendant cites numerous cases for the broad desirable goal of eliminating racial discrimination from the jury selection process, he fails to cite a single case for his proposition that a jury which is racially disparate after death-qualification results in prejudice to defendant. Furthermore, defendant has shown neither that the jury in this case was racially disparate, nor that the jury composition prejudiced him. Therefore, we conclude that this assignment of error is without merit.

[4] By another assignment of error, defendant contends that the trial court erred by sustaining the State's objection to defendant's proper inquiry of a prospective juror concerning the length of time defendant would serve in prison if convicted. This Court has repeatedly held that the length of time that a person may serve if sentenced to life imprisonment is not a proper subject for consideration by a jury. *See State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, — U.S. —, 130 L. Ed. 2d 547 (1994); *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547, *cert. denied*, — U.S. —, 130 L. Ed. 2d 162, *reh'g denied*, — U.S. —, 130 L. Ed. 2d 532 (1994); *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118. It was for this reason that the trial court sustained the State's objection and instructed the jury that "life means life." In addition, defendant has failed to show any prejudice due to the trial court's exclusion of this question. This Court has stated, "We will assume the jury followed the court's instruction and did not consider the possibility of parole in reaching its verdict." *State v. Lee*, 335 N.C. at 266, 439 S.E.2d at 558. This assignment of error is without merit.

[5] By another assignment of error, defendant contends that the trial court erred by denying his motion to suppress evidence seized during the course of an unconstitutional search of his personal property.

Defendant filed a pretrial motion to suppress evidence of a .25-caliber Beretta pistol and a set of car keys seized from his jacket,

which was located inside a residence at 1081 Glen Reilly Road in Fayetteville. Defendant argues that law enforcement officers conducted a warrantless search of his property on the basis of consent given by a third party who had no legal authority to give such consent to search defendant's personal belongings. Therefore, he contends that the search and seizure of his property was unreasonable under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 20 of the North Carolina Constitution. We disagree.

After conducting a pretrial hearing on defendant's motion to suppress, the trial court made the following relevant findings of fact:

> 5. Detective Binder asked Angela Weems for permission to search the residence and told her that he was looking for a pistol that might be involved in a shooting. Angela Weems consented to the search of her residence and signed the consent to search form, which has been introduced in evidence in this hearing as State's Voir Dire Exhibit Number One.
>
> 6. Thereafter, Lieutenant Binder told the other officers there at the residence to go ahead with the search.
>
> 7. Deputy Ronnie Kelly had been placed in charge of the so called great room in the residence, and at that point, proceeded to search the residence to see if he could find the weapon that might have been involved in the shooting.
>
> 8. In the great room of the residence, Deputy Kelly observed a pile of clothes. The clothes appeared to be both mens' and womens' clothes and were just lying on the floor in a state of disarray. Deputy Kelly proceeded to pick up the items and to squeeze them to see if he could find any weapon. Upon picking up the jacket that has been introduced into evidence at this hearing as State's Voir Dire Exhibit Two and upon squeezing the jacket, Deputy Kelly felt what he believed to be a firearm. He notified Lieutenant Binder of this; and upon identification personnel subsequently arriving, a firearm was removed from the jacket and that is the twenty-five caliber Beretta that was introduced into evidence at this hearing as State's Voir Dire Exhibit Three. Car keys were also found in the jacket, and they have been received in evidence as State's Voir Dire Exhibit Four.
>
> 9. No one at any time asked the Defendant for permission to search anything. Deputy Kelly was not aware at the time he

> located the coat lying in the pile of clothes whether the coat belonged to the Defendant or someone else. The coat did in fact belong to the Defendant.

We note these findings are supported by the evidence presented at the hearing and are thus binding on appeal. *State v. Barnett*, 307 N.C. 608, 300 S.E.2d 340. Based upon these findings, the trial court concluded as a matter of law that the search was conducted with valid consent. The trial court further concluded that defendant had no reasonable expectation of privacy in the jacket because it was found lying in a pile of clothes in the living room of Angela Weems' residence.

A search is not unreasonable if lawful consent to search is given. *Id.* A third party may give permission to search where the third party possesses " 'common authority over or other sufficient relationship to the premises or effects sought to be inspected.' " *Id.* at 615-16, 300 S.E.2d at 344 (quoting *United States v. Matlock*, 415 U.S. 164, 171, 39 L. Ed. 2d 242, 250 (1974)). In this case, the trial court found that Angela Weems consented to the search of her residence and signed the consent to search form. Furthermore, defendant's jacket was lying in a pile of clothing on the living room floor of the residence, and Deputy Kelly did not know the jacket belonged to defendant when he discovered it there. These facts fully support the trial court's conclusion of law that the search was conducted with valid consent, and defendant had no reasonable expectation of privacy. This assignment of error is without merit.

[6] By another assignment of error, defendant contends that the trial court erred by failing to grant a mistrial after "the prosecutor made an utterly improper and incurably misleading argument which insinuated that there was no such thing as multiple or consecutive life sentences in North Carolina." In his closing argument, the prosecutor stated:

> MR. TOWNSEND [prosecutor]: Now, you know, ladies and gentlemen, we spent—when the lawyers were talking with you about the punishment in this case, you know, the lawyers spent a lot of time and they said, you know, something like this. You know, ladies and gentlemen, he is going to be punished either way. If you give him the death penalty, he'll be punished and if you give him life imprisonment, he's going to be punished for these two murders. But think about it, ladies and gentlemen. This defendant got a life sentence for the death or murder of Eva Harrelson. So he has got a life sentence, and the Judge told you that a life sen-

tence means a life sentence and that under the law is what it means.

MR. CAMPBELL [defense counsel]: Object.

MR. TOWNSEND: And his two lawyers have repeatedly mentioned to you—

THE COURT: Well, wait a minute. I am going to sustain that objection.

MR. TOWNSEND: Okay. But think about it, ladies and gentlemen. He has come in here and he is wanting you to give a life sentence for the killing of Timothy Strickland.

MR. CAMPBELL: Objection.

THE COURT: Overruled.

MR. TOWNSEND: Well, is that going to add one day's amount of time—

MR. CAMPBELL: Object.

THE COURT: Well, objection sustained as to that line of argument.

MR. TOWNSEND: Ladies and gentlemen, the only way that you can punish this defendant for these two murders is to give him the death penalty because otherwise he is not going to get an additional day of time.

MR. CAMPBELL: Object and move to strike.

THE COURT: The objection is sustained and disregard that comment of the attorney, members of the jury.

Defendant contends that although the trial court sustained his objection to this argument, affidavits from jurors showed that the prosecutor's remarks had a significant influence on the jury's verdict, and the only cure for the misconduct was a mistrial.

This Court has held that where the trial court immediately sustains the defendant's objection to a prosecutor's comment and instructs the jury to disregard the offending remark, the impropriety is cured. *See State v. Maynor*, 331 N.C. 695, 417 S.E.2d 453 (1992); *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991). In this case, the trial court promptly sustained defendant's objection and allowed his motion to strike. The trial court then instructed the jury to "disregard

that comment" of the prosecutor. The trial court's actions therefore cured any possible error created by the prosecutor's argument. For this reason, we conclude that the trial court did not err in failing to grant a mistrial.

[7] By another assignment of error, defendant contends that the trial court erred by failing to give the following requested limiting instruction on the meaning of the phrase "course of conduct" as used in the aggravating circumstance set out in N.C.G.S. § 15A-2000(e)(11):

> [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.

This language is taken almost verbatim from *State v. Lee*, 335 N.C. at 277, 439 S.E.2d at 564. Instead, the trial court gave the following pattern jury instruction on the course of conduct aggravating circumstance:

> A murder is part of such a course of conduct if you find from the evidence beyond a reasonable doubt that in addition to killing the victim in the particular case under consideration, the defendant on or about the alleged date was engaged in a course of conduct which involved the commission of another crime or crimes of violence against another person or persons and that these other crimes were included in the same course of conduct in which the killing of the victim was also a part.

It is well established that when a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance. *State v. Farmer*, 333 N.C. 172, 424 S.E.2d 120 (1993); *State v. Lamb*, 321 N.C. 633, 365 S.E.2d 600 (1988); *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). However, the trial court is not required to give the instruction in the exact language of the request. *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).

Defendant concedes that the jury would have likely found as an aggravating circumstance that defendant engaged in a course of conduct which included his commission of violent crimes against another

even if the requested instruction had been given, because this case involved two murders at the Rowland Motel. However, he argues that the trial court's instruction was overly broad in that it allowed the jurors to find the course of conduct aggravating circumstance based on two other unrelated crimes, of which defendant had already been convicted, thereby giving undue weight to this aggravating circumstance. We disagree.

In determining whether to give a course of conduct instruction, the trial court must consider several factors, among them " 'the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons.' " *State v. Lee*, 335 N.C. at 277, 439 S.E.2d at 564 (quoting *State v. Price*, 326 N.C. 56, 81, 388 S.E.2d 84, 98, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated on other grounds*, — U.S. —, 122 L. Ed. 2d 113, *on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993), *sentence vacated on other grounds*, — U.S. —, 129 L. Ed. 2d 888, *on remand*, 337 N.C. 756, 448 S.E.2d 827 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 224, *reh'g denied*, — U.S. —, — L. Ed. 2d —, 63 U.S.L.W. 3818 (1995)). Here, each of the crimes occurred within a short period of time. The State's evidence tended to show that four days before the double murder at issue in this case, defendant robbed the BTO convenience store and killed the clerk. The State's evidence further tended to show that less than three weeks after the Rowland Motel shootings, defendant shot a taxicab driver. There was a span of only twenty-two days from the murder of the clerk and robbery at the BTO convenience store on 27 October to the shooting of the taxicab driver on the morning of 18 November. The time frame was sufficiently close to support the submission of this aggravating circumstance. Further, the *modus operandi* was similar in that evidence tended to show that defendant used the same pistol to kill, or attempt to kill, each victim and had one or two accomplices with him during each crime. Finally, the evidence of motivation was strong. Numerous witnesses testified that these acts were robberies for the purpose of obtaining money to buy drugs.

Therefore, we find that the convenience store robbery and murder and the assault on the taxicab driver were sufficiently connected to the instant crimes to support the particular instruction given by the trial court on the course of conduct aggravating circumstance. This assignment of error is without merit.

By his next assignment of error, defendant contends that the trial court erred by failing to intervene to correct grossly improper conduct by the prosecutor during closing arguments.

[8] Defendant first argues that he is entitled to a new sentencing hearing because the prosecutor repeatedly and explicitly asked the jurors to place themselves in the position of the victims:

> [H]ow would you like or how would you feel if on October 31, 1988, Daniel Garner went to wherever you were at on that day and told you, Mr. or Ms. Juror, you're going to die today? I have personally decided that you're going to die today. How would it make you feel, ladies and gentlemen? Think about it. I have decided that you're going to die because I'm going to take whatever little bit of money you have.
>
> . . . .
>
> . . . How much money do you have in your wallet or in your pocket or in your purse? Think about it. That's the price of your life to Daniel Garner.
>
> . . . .
>
> And think about it too, ladies and gentlemen when the lawyers get up here that if it was your [sic] death of your family member or your friend, if he would get up here and try and mitigate the premeditated killing of one of your loved ones by putting it off on anybody and everybody or anything in the world that they can think of.

The prosecutor later continued in the same manner, arguing that one of the victims "could have easily been one of your family members, of your friends or even you."

In support of his position, defendant cites *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). In *McCollum*, this Court stated that an argument " 'asking the jurors to put themselves in place of the victims will not be condoned.' " *Id.* at 224, 433 S.E.2d at 152 (quoting *United States v. Pichnarcik*, 427 F.2d 1290, 1291 (9th Cir. 1970)). The prosecutor in *McCollum* repeatedly asked the jurors to imagine the victim as their own child. Based on the evidence in that case, however, we concluded that the prosecutor's statements did not deny defendant due process. In reaching that conclusion, we said:

> The prosecutor's arguments here did not manipulate or misstate the evidence, nor did they implicate other specific rights of the accused such as the right to counsel or the right to remain silent. The trial court instructed the jurors that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. Moreover, the weight of the evidence against the defendant with respect to the two aggravating circumstances submitted to the jury was heavy . . . . All of these factors reduced the likelihood that the jury's decision was influenced by these portions of the prosecutor's closing argument.

McCollum, 334 N.C. at 224-25, 433 S.E.2d at 152-53.

Likewise, the prosecutor's arguments here did not manipulate or misstate the evidence. The arguments did not implicate specific constitutional rights of defendant, such as the right to counsel or the right to remain silent. The trial court also instructed the jurors that the arguments of counsel were not evidence and that their decision was to be made on the basis of the evidence alone. Furthermore, the weight of the evidence against defendant was overwhelming as to the aggravating circumstances. Several witnesses testified that the murders were committed for pecuniary gain, and the double murders in this case were committed just four days after defendant robbed a convenience store and killed the clerk and less than three weeks before he assaulted a taxicab driver, indicating a course of conduct. Therefore, the prosecutor's arguments did not prejudice defendant and, thus, did not deny him due process.

Further, defendant failed to object to the prosecutor's arguments. Therefore, our review on appeal is limited to the question of whether the arguments of the prosecutor were so grossly improper as to require the trial court to intervene *ex mero motu*. *Id.* at 225, 433 S.E.2d at 153. Where, as here, it is apparent that the prosecutor's arguments did not deny defendant due process, we are compelled to conclude that those arguments were not so grossly improper as to require the trial court to intervene in the absence of an objection by defendant. *See State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979) (appellate courts ordinarily will not review the exercise of the trial judge's discretion in this regard unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations).

[9] Defendant next argues that the prosecutor acted improperly by stepping well outside the record to express his own personal and highly prejudicial opinion that defendant was draining taxpayers' resources during his incarceration. In discussing the nonstatutory mitigating circumstance that defendant had sought to better himself educationally while in confinement, the prosecutor argued, without objection by defendant, that:

> [Y]ou know, this morning, ladies and gentlemen, I learned something that I didn't know. Shaw University, a good university, it's a private university; and as y'all know who have children, a private university is right expensive. But did you know until this morning, ladies and gentlemen, that all of us right here are paying for his education at Shaw through Shaw University?
>
> And I don't have [sic] anything wrong, ladies and gentlemen, with him taking trade classes to perhaps do something while he is in prison over there. But we are paying as taxpayers for his private education on that private college Shaw. I find that incredible, ladies and gentlemen, and it doesn't really sit well with me. I know there is [sic] plenty of deserving people out there on the streets of Robeson County that wouldn't have that same opportunity that Daniel Garner is getting through the citizens and taxpayers of this state. That's a real shame, ladies and gentlemen. That's the way I see it.

As a general rule, "[c]ounsel is afforded wide latitude in closing argument to the jury at sentencing and may argue the law and facts in evidence and all reasonable inferences drawn therefrom." *State v. Payne*, 337 N.C. 505, 525, 448 S.E.2d 93, 105 (1994) (citing *State v. Artis*, 325 N.C. 278, 323, 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)), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995). Assuming *arguendo* that the prosecutor's argument was improper, however, defendant has failed to show how the prosecutor's argument was so prejudicial to his case as to amount to "gross impropriety." The evidence in this case was overwhelming. Defendant had already been convicted in one case where he assaulted a man with a pistol in an attempt to kill him and in another case where he killed and robbed a convenience store clerk. These two crimes were similar in nature, time, and motivation to the crime in this case. Here, defendant slit the throat of a motel clerk, then later shot and killed him. He also shot and killed a second motel clerk

before robbing the motel. Finally, he bragged to two other people about his deeds. We cannot say that the outcome of the sentencing proceeding was changed as a result of any of the allegedly improper arguments of the prosecutor. Accordingly, those arguments were not "grossly improper." This assignment of error is without merit.

[10] By another assignment of error, defendant contends that the trial court erred by failing to submit the mitigating circumstance that defendant's ability 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) (1994 Supp.). Defendant argues that there was substantial evidence from which a reasonable juror could have found this circumstance to exist. Evidence tended to show that in the month or so prior to the crime spree, defendant had acted substantially out of character. His family, friends, and Army officers testified to the effect that "he was not the same boy." Defendant's radical and abrupt character change together with evidence revealing a family history of mental illness, his substance abuse, his attraction to a cult, and indications that he was under a great deal of stress all supported the inference that defendant had suffered a mental breakdown in the month before the murders and that he did not appreciate the criminality of his conduct.

A trial court must submit any statutory mitigating circumstance supported by the evidence to the jury. N.C.G.S. § 15A-2000(b); *State v. Miller*, 339 N.C. 663, 455 S.E.2d 137 (1995). Defendant correctly notes that expert testimony is not necessary to establish the existence of the (f)(6) mitigating circumstance. *See State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118. "However, this circumstance has only been found to be supported in cases where there was evidence, expert or lay, of some mental disorder, disease, or defect, or voluntary intoxication by alcohol or narcotic drugs, to the degree that it affected defendant's ability to understand and control his actions." *Id.* at 395, 428 S.E.2d at 142.

Defendant's evidence of his voluntary intoxication came from witnesses who testified that defendant showed up at Army formations with alcohol on his breath, that defendant drank beer with an Army buddy regularly, and that he had failed a random drug test. Defendant's evidence of a mental disorder consisted of testimony from family and friends that he underwent a radical and abrupt character change in the month before the murders which was indicative of a "mental breakdown." We conclude that this evidence, without

more, would not support a reasonable inference that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. This assignment of error is without merit.

[11] By another assignment of error, defendant contends that the trial court erred by failing to submit as a nonstatutory mitigating circumstance that defendant's accomplice, Dana Adams, had not been and may not be tried capitally. We disagree. This Court has held that the treatment of an accomplice by the criminal justice system is not a proper subject for consideration by a capital jury. *See 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). This assignment of error is without merit.

[12] By another assignment of error, defendant contends that the trial court erred by failing to conduct an adequate inquiry into an improper contact between a juror and State's witness William Jackson. William Jackson, the taxicab driver who had been shot by defendant, testified on Thursday, 26 August 1993. At the opening of court on Monday, 30 August 1993, the prosecutor informed the trial court that he had spoken with Mr. Jackson. Mr. Jackson told the prosecutor that he had encountered a juror during the lunch recess on Thursday and begun a conversation. Upon realizing that the person was a juror, Mr. Jackson ended the conversation. Mr. Jackson was not in the courtroom when the prosecutor relayed this information to the trial court. Defense counsel requested that the trial court identify the juror with whom Mr. Jackson had conversed and then conduct an inquiry of that juror.

The trial court called the jury into the courtroom and made the following inquiry:

> THE COURT: Members of the jury, you remember last Thursday one of the witnesses was a Mr. William Jackson who was the taxicab driver?
>
> MR. SMITH [juror]: Yes, sir.
>
> (Jurors nodding their heads.)
>
> THE COURT: There has been some question raised about possibly one member of the jury might have run into Mr. Jackson accidentally or something at lunch last Thursday after he testi-

fied. Any one of you remember running into Mr. Jackson at lunch or anywhere outside the courtroom?

(No response from the jurors.)

THE COURT: All right. You may proceed.

Defendant contends that the trial court's response was insufficient to meet its statutory and constitutional duty to regulate the jury and ensure the jury's impartiality throughout the trial. We disagree.

"In the event of some contact with a juror, it is the duty of the trial judge to determine whether such contact resulted in substantial and irreparable prejudice to the defendant." *State v. Willis*, 332 N.C. 151, 173, 420 S.E.2d 158, 168 (1992). The scope of the inquiry is within the trial judge's discretion. *State v. Harrington*, 335 N.C. 105, 436 S.E.2d 235 (1993). The trial court in the present case asked the jurors if any of them had been in contact with Mr. Jackson after he had testified. None responded. With no response from the jurors, the trial court could do little more without running the risk of itself interfering with the jury's proper functioning. Under these circumstances, the trial court acted within its discretion. This assignment of error is without merit.

[13] By another assignment of error, defendant contends that the trial court erred by instructing the jury that it could determine whether any mitigating circumstance, either statutory or nonstatutory, had mitigating value. Statutory mitigating circumstances are deemed to have mitigating value and must be given some weight by the jury if found to exist. *State v. Mahaley*, 332 N.C. 583, 598, 423 S.E.2d 58, 67 (1992), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 649 (1995).

A review of the record shows that the trial court first instructed the jury as to the statutory mitigating circumstances: "It is your duty to consider the following mitigating circumstances and any others which you find from the evidence." The trial court described the statutory circumstances submitted and then instructed the jurors that "[i]f one or more of you find by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreperson write yes in the space provided after this mitigating circumstance on the form." After explaining how to address the three statutory mitigating circumstances, the trial court explained the nonstatutory mitigating circumstances, instructing: "Now, members of the jury, you should also consider the circumstances, listed as num-

bers 4 through 29 on the form, which you find arise from the evidence and which you find have mitigating value." The trial court then reviewed each of the twenty-six nonstatutory mitigating circumstances. The trial court differentiated between the statutory and nonstatutory circumstances by stating:

> In regards to these circumstances, that is numbers 4 through 29 [the nonstatutory mitigating circumstances], the defendant has offered evidence in support of each of them. This evidence is uncontradicted. Therefore, in regards to each of the circumstances listed as 4 through 29, if one or more of you believe the defendant's evidence and further believe that the circumstance has mitigating value, you would write yes by that circumstance.

Defendant argues that a juror reasonably could have understood the trial court's final instruction regarding nonstatutory circumstances to refer back to all of the mitigating circumstances which the trial court had dealt with in its instructions, both statutory and nonstatutory. Moreover, defendant contends that the fact that the trial court never explicitly told the jury that statutory mitigating circumstances are deemed by law to have mitigating value increased the likelihood that jurors interpreted the final instruction in an unconstitutional manner.

We have recently rejected this argument in *State v. Daniels*, 337 N.C. 243, 274-75, 446 S.E.2d 298, 318. In *Daniels*, the trial court instructed the jury as to the statutory mitigating circumstances before it gave its instructions as to the nonstatutory circumstances. We determined that the instructions were given in accord with the law and that the jury was able to follow the instructions as they were given. This Court reasoned:

> "We presume 'that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.' " *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (quoting *Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)) (alteration in original), *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 602 (1993)).

Id. at 275, 446 S.E.2d at 318. Likewise, in this case, the instructions are in accord with the law, and we conclude that the jury was able to follow the instructions as they were given. This assignment of error is without merit.

[14] By another assignment of error, defendant contends that the trial court erred by failing to instruct that if any juror found by a preponderance of the evidence that defendant had the ability to adjust to prison life, the juror must give that nonstatutory circumstance mitigating value. Defendant argues that two of the submitted nonstatutory mitigating circumstances related to his ability to adjust to incarceration:

> (21) That the defendant has adjusted well to confinement.
>
> . . . .
>
> (29) That the defendant while incarcerated has in the past and can in the future effect [sic] the lives of others in a positive way.

Defendant contends that these circumstances were shown by uncontroverted evidence and thus should have been submitted as though they were statutory mitigating circumstances, so that the jury could not reject their mitigating value. We disagree.

The Supreme Court of the United States has held that an ability to adjust to prison life is a relevant mitigating circumstance. *Skipper v. South Carolina*, 476 U.S. 1, 90 L. Ed. 2d 1 (1986). However, this Court has noted that in *Skipper* it was the fact that the defendant was precluded from introducing *evidence* concerning his ability to adjust to prison life that concerned the Supreme Court. *See State v. Basden*, 339 N.C. 288, 451 S.E.2d 238 (1994); *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995). In the present case, defendant was allowed to present evidence concerning his ability to adjust to prison life. The jury heard evidence that defendant participated in educational and religious programs while in jail. One jail minister testified that defendant had good relationships with his fellow inmates and that he relied on defendant to help control unruly participants in Bible study classes. In addition, the submission of the two mitigating circumstances listed above, as well as the catchall mitigating circumstance, allowed the jury to fully consider the evidence as presented by defendant. "*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." *State v. Basden*, 339 N.C. at 304, 451 S.E.2d at 247. This assignment of error is without merit.

[15] Defendant, in other assignments of error, raises eight additional issues which he concedes have been decided against him by this

Court. First, defendant contends that the trial court's use of the words "satisfy you" to explain the burden of proof applicable to mitigating circumstances was reversible error. Defendant acknowledges that this issue was decided against him in *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93.

[16] Second, defendant contends the trial court erred by denying his motion for individual jury *voir dire*. This Court held contrary to defendant's position in *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992), and *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986). Defendant has shown nothing from the record in this case to justify a different result.

[17] Third, defendant contends the trial court erred by denying him the right to examine each juror challenged by the State during death qualification prior to his or her excusal and by excusing jurors that defendant was not permitted to question. Defendant acknowledges that this issue was decided against his position in *State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993).

[18] Fourth, defendant contends the trial court erred by denying his motions to quash the murder indictments. Defendant was indicted using the "short form" indictment in N.C.G.S. § 15-144. This form of indictment has long been held valid. *See State v. Puckett*, 211 N.C. 66, 189 S.E. 183 (1937). In addition, defendant objects to the indictments on the ground that they misidentified defendant as "Daniel Thomas Gardner." The misspelling of defendant's name in the indictment is not fatal. *State v. Sawyer*, 233 N.C. 76, 62 S.E.2d 515 (1950).

[19] Fifth, defendant contends the trial court erred by failing to instruct in accord with his request to prohibit jurors from rejecting nonstatutory mitigation evidence if they found that it had no mitigating value. This Court has held to the contrary in *State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298, and *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765.

[20] Sixth, defendant contends the trial court erred by instructing 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. We have recently addressed and rejected this argument. *State v. Basden*, 339 N.C. 288, 451 S.E.2d 238; *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252.

[21] Seventh, defendant contends the trial court erred by refusing to give his requested instruction that the jury's verdict "bound" the trial court and was not merely a recommendation. Defendant argues that this diminished the jury's sense of responsibility in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985). This Court has consistently upheld the pattern jury instruction—that it would be the jury's duty to recommend a sentence of death if the jury found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty—as constitutional. *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252; *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. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983).

[22] Finally, defendant contends that the North Carolina death penalty statute is unconstitutional and that the death sentences in this case were imposed in an arbitrary and discriminatory manner. This Court has repeatedly held that North Carolina's death penalty statute, N.C.G.S. § 15A-2000, is constitutional and not based upon subjective discretion, applied arbitrarily, capriciously, or pursuant to a pattern of discrimination based upon race, gender, or poverty. *State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298; *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118.

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

[23] Having concluded that defendant's capital sentencing proceeding was free from prejudicial error, we turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. We have thoroughly examined the record, transcripts, and briefs in the present case. We conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentences of death in this case were imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

In conducting proportionality review, we must determine whether the sentences of death in the present case are "excessive or disproportionate to the penalty imposed in similar cases, considering

both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 354, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983); *accord* N.C.G.S. § 15A-2000(d)(2).

> In essence, our task on proportionality review is to compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and the defendant's character, background, and physical and mental condition.

State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503. The pool of available cases from which those roughly similar with regard to the crime and defendant may be drawn for comparison purposes has been defined as

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

Williams, 308 N.C. at 79, 301 S.E.2d at 355. 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. 66, 107, 446 S.E.2d 542, 564 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 1083 (1995). Simply, the pool includes only those cases found to be free of error in both the guilt-innocence and penalty phases of the trial.

In the present case, defendant pled guilty to two counts of first-degree murder, and the jury recommended a sentence of death for each murder. As to each of the murders, the jury found as aggravating circumstances: (1) that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6), and (2) that the murder was part of a course of conduct which included the commission of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). The jury also found the following mitigating circumstances: (1) that prior to 1 October 1988, defendant had no significant history of prior criminal activity; (2) that defendant had demonstrated since his early teens that he was a hard-working person; (3) that prior to 4 October 1988, defendant had an exemplary and outstanding military record; (4) that defendant was, prior to October of 1988, a good mechanic in the military and was an outstanding example for other soldiers; (5) that defendant, but for this criminal conduct, has always been respectful to others; (6) that sickness and death of defendant's mother between his ages of nine and eleven was a devastating event in his life; (7) that defendant was abandoned by his father at birth; (8) that defendant was a good son; (9) that defendant was a good husband; (10) that defendant had adjusted well to confinement; (11) that defendant had sought to better himself educationally while in confinement; (12) that defendant had sought and continued to seek spiritual guidance; (13) that defendant while in confinement assisted the jail ministry with fellow prisoners; (14) that defendant had successfully completed a course of Christian study; and (15) the catchall mitigating circumstance of any other circumstance or circumstances arising from the evidence which one or more of the jurors deemed to have mitigating value.

In our proportionality review, we must compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162. We do not find this case similar to any of the cases in which this Court has found the death penalty disproportionate and entered a sentence of life imprisonment; each of those cases is distinguishable from the present case.

In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), the evidence tended to show that the defendant hid in the bushes at a bank and waited for the victim to make a night deposit. When the victim arrived, the defendant demanded the money bag. When the victim hesitated, the defendant fired a shotgun, striking him in both legs. The victim later died of cardiac arrest caused by the loss of blood from the shotgun wounds. The jury found only the aggravating circumstance of murder for pecuniary gain. *Benson* is easily distinguishable from the present case. Here, in addition to the pecuniary gain aggravating circumstance, the jury also found the aggravating circumstance that the murder was part of a course of conduct which included the commission of crimes of violence against another person. Further, defendant in the present case committed two murders rather than a single murder such as that committed by the defendant in *Benson*.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), the defendant and several others planned to rob the victim's place of business. During the robbery, one of the assailants beat the victim to death. *Stokes* is also easily distinguishable from the present case because the jury found only one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel. In the present case, the jury found two aggravating circumstances. More importantly, defendant in the present case, unlike the defendant in *Stokes*, killed two victims rather than one.

In *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), the only aggravating circumstance found by the jury was that the murder for which the defendant was convicted was part of a course of conduct which included the commission of other crimes of violence against another person. In the present case, the jury found that aggravating circumstance and that the murder was committed for pecuniary gain. Also, defendant in the present case murdered two victims, while the defendant in *Rogers* killed only one.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the defendant and two companions went to the victim's home intending to rob and murder him. After gaining entry into the victim's home, the men killed him and stole his money. The jury found as aggravating circumstances that the murder was committed during the commission of a robbery or burglary and that it was committed for pecuniary gain. In concluding that the death penalty was disproportionate in *Young*,

this Court focused on the failure of the jury to find either the aggravating circumstance that the murder was especially heinous, atrocious, or cruel or the aggravating circumstance that the murder was committed as part of a course of conduct which included the commission of violence against another person. The present case is easily distinguishable from *Young* because, among other things, the jury found as an aggravating circumstance that the murder was committed as part of a course of conduct which included the commission of crimes of violence against another person. Furthermore, defendant in this case murdered two victims, unlike the defendant in *Young*.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the single aggravating circumstance found by the jury was that the murder was committed against a law enforcement officer engaged in the performance of his official duties. In the present case, the jury found two entirely different aggravating circumstances. *Hill* is easily distinguishable from this case in which defendant used the same .25-caliber pistol to shoot both of his victims, and he also slashed the throat of one of his victims.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant was on foot and waved down the victim as the victim passed in his truck. Shortly thereafter, the victim's body was discovered in the truck. He had been shot twice in the head, and his wallet was gone. The single aggravating circumstance found was that the murder was committed for pecuniary gain. *Jackson* is easily distinguishable from the present case in which the jury found the additional aggravating circumstance that the murder was part of a course of conduct which included the commission of crimes of violence against another person. Moreover, defendant murdered two victims here, rather than one.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the evidence tended to show that the defendant and a group of friends were riding in a car when the defendant taunted the victim by telling him that he would shoot him and by questioning whether the victim believed that the defendant would shoot him. The defendant shot the victim but then immediately directed the driver to proceed to the emergency room of the local hospital. In concluding that the death penalty was disproportionate there, we focused on the defendant's immediate attempt to obtain medical assistance for the victim and the lack of any apparent motive for the killing. In contrast, the evidence in the present case tended to show that defendant made no efforts to

assist any of his victims. Furthermore, defendant committed these murders for pecuniary gain.

In conclusion, we have never found the death penalty to be disproportionate for a convicted murderer of multiple victims. We have even said that the fact that defendant is a multiple killer is "[a] heavy factor to be weighed against the defendant." *State v. Laws*, 325 N.C. 81, 123, 381 S.E.2d 609, 634 (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 57, *cert. denied*, 502 U.S. 876, 116 L. Ed. 2d 174, *reh'g denied*, 502 U.S. 1001, 116 L. Ed. 2d 648 (1991).

In performing our statutory duty of proportionality review, it is also appropriate for us to compare the case before us to other cases in the pool used for proportionality review. *Lawson*, 310 N.C. at 648, 314 S.E.2d at 503.

> If, after making such comparison, we find that juries have consistently returned death sentences in factually similar cases, we will have a strong basis for concluding that the death sentence under review is not excessive or disproportionate. If juries have consistently returned life sentences in factually similar cases, however, we will have a strong basis for concluding that the death sentence in the case under review is disproportionate.

McCollum, 334 N.C. at 242, 433 S.E.2d at 163. However, the factors to be considered and their relevance during proportionality review in a given capital case "will be as numerous and as varied as the cases coming before us on appeal." *Williams*, 308 N.C. at 80, 301 S.E.2d at 355. Therefore, the fact that 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." *State v. Green*, 336 N.C. at 198, 443 S.E.2d at 47.

This Court has observed that in a majority of robbery-murder cases in the proportionality pool, the jury has returned a verdict of life imprisonment. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517. However, the case at bar is significantly different from those cases. First, this was a double murder, in addition to the robbery. Second, defendant had previously been convicted of a murder and robbery, and also of an assault with a deadly weapon with intent to kill inflicting serious injury and attempted armed robbery.

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Here, we conclude that the present case is more similar to cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have consistently returned recommendations of life imprisonment.

In *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985), we concluded that the death sentence was not disproportionate where the jury found the same two aggravating circumstances as in the present case: the murder was committed for pecuniary gain; and the murder was part of a course of conduct which included the commission of crimes of violence against another person. The defendant in *Gardner* also killed two people, but in a restaurant, not a motel. We have consistently stated that "this Court has never found disproportionality in a case in which the defendant was found guilty for the death of more than one victim." *State v. Price*, 326 N.C. at 96, 388 S.E.2d at 107. We conclude that *Gardner* is the case in our proportionality pool most similar to this case.

After comparing this case carefully with all others in the pool used for proportionality review, we conclude that it falls within the class of first-degree murders in which we have previously held that the death penalty was not disproportionate. Having considered and rejected all of defendant's assigned errors, we hold that defendant's capital sentencing proceeding was free of prejudicial error and that the resulting sentences of death were not disproportionate punishment. Therefore, the sentences of death entered against defendant must be and are left undisturbed.

NO ERROR.

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

STATE OF NORTH CAROLINA v. JAMES ADOLPH CAMPBELL

No. 299A93

(Filed 28 July 1995)

1. Indigent Persons § 19 (NCI4th)— first-degree murder—appointment of state psychiatrist as defense witness

There was no error in a first-degree murder trial where the trial court appointed a forensic psychiatrist who worked for a state facility and who had handled the competency determination to assist defendant at trial. Assuming that defendant made an adequate showing of a specific need for an expert, the record establishes that defendant received adequate assistance from the psychiatrist, Dr. Rollins, in the presentation of mitigating evidence in that Dr. Rollins offered his opinions at trial; those opinions were based upon four interviews with defendant, defendant's statement, investigative reports, reports of interviews with defendant's mother and sisters, and Dr. Rollins' interview with defendant's sister; Dr. Rollins testified that defendant had two types of mental disorders, one of personality and one of adjustment; that defendant's ability to understand appropriate standards of behavior was affected by these disorders and was impaired further by his use of marijuana; that defendant began using marijuana when he was eleven or twelve; that defendant's youth was characterized by poverty-related concerns for food, clothing, and shelter; and Dr. Rollins's testimony was the sole supporting evidence for the lone statutory mitigating circumstance found by one or more jurors, mental or emotional disturbance, and also supported two nonstatutory mitigating circumstances, emotional neglect and a history of substance abuse beginning at an early age, that were found by one or more jurors.

Am Jur 2d, Criminal Law §§ 955, 1006.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist. 85 ALR4th 19.

2. Jury § 106 (NCI4th)— first-degree murder—jury selection—group questions required

There was no abuse of discretion in a first-degree murder prosecution where the defendant contended that the trial court prohibited defendant from asking questions of prospective jurors individually and allowed individual questions only if a group

question produced a response from some jurors. Defendant was allowed to question jurors individually at several points during jury selection and the jurors responded individually to group questions if the questions required an individualized response based on their personal situations. It is within the trial court's discretion to regulate the manner and extent of inquiries on *voir dire*.

Am Jur 2d, Jury § 198.

3. Criminal Law § 375 (NCI4th)— first-degree murder—comments by judge—no error

There was no error in a first-degree murder prosecution in a comment by the court that "I think I've tested the jury's attention span for today" during defendant's testimony or in a later comment that on the next day the court would give the jury the law that pertains to this "sad situation." The comment regarding the attention span stated that the court, not defendant, had tested the jury's attention span and simply referred to the court's responsibility to manage the trial. The reference to a sad situation was not an expression of opinion by the court; defendant did not allege self-defense or justifiable homicide but claimed that someone else committed the murder, and the characterization of the situation as sad would seem to be a universal sentiment.

Am Jur 2d, Trial § 276.

4. Criminal Law § 466 (NCI4th)— capital murder—prosecutor's argument—treatment of rape victim by defense attorney

There was no error in a capital first-degree murder prosecution requiring *ex mero motu* intervention where the prosecutor referred in closing argument to the cross-examination of a witness other than the victim in this case who testified that she had been kidnapped and raped by defendant. Defendant's prior crimes were introduced to show a pattern of behavior and the credibility of this witness was therefore important. It is not improper for the prosecutor to refer to the demeanor of a witness during the ordeal of testifying as evidence of her truthfulness, and the prosecutor emphasized that the purpose of the testimony was to aid the jury in determining what happened to the victim in this case.

Am Jur 2d, Trial § 614.

5. Criminal Law § 445 (NCI4th)— capital murder—prosecutor's argument—personal opinion—full prosecution

The Supreme Court could not say in a capital first-degree murder prosecution that there was error requiring correction *ex mero motu* where defendant contended that the prosecutor conveyed to the jury his opinion that the case warranted full prosecution. Even assuming error in the prosecutor's statement that he was not in charge of defendant's prior cases when the charges were dropped, it could not have been prejudicial given the evidence against defendant, including his own pretrial confession. Further, the overall thrust of the argument was to point out why defendant gave a confession that he later contradicted in his trial testimony.

Am Jur 2d, Trial § 554.

6. Criminal Law § 436 (NCI4th)— first-degree murder—prosecutor's argument for conviction—deterrence

There was nothing improper in a first-degree murder prosecution where the prosecutor argued that defendant should be convicted so that he would not commit crimes in the future.

Am Jur 2d, Trial §§ 554, 568.

7. Criminal Law § 1322 (NCI4th)— first-degree murder—sentencing—jury's questions regarding parole eligibility—instructions

The trial court did not err in a first-degree murder prosecution in its instruction given in the sentencing hearing in response to the jury's questions regarding parole eligibility. Although defendant argues that the court should have included in the instruction the statement that "life means life," the court told the jury what was required: that it was not to consider parole in its deliberations. The trial court does not have to instruct the jury in the precise words the defendant requests.

Am Jur 2d, Trial §§ 286, 1443.

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

8. Criminal Law § 475 (NCI4th)— first-degree murder—sentencing— jury's exposure to defendant's escape attempt—questions by court

There was no error in the sentencing hearing in a first-degree murder prosecution in the trial court's inquiries to the jury fol-

lowing a failed escape attempt by defendant where defendant stated that he did not know whether the jurors in question had seen him, one juror stated that she had seen only broken glass, another stated that he had seen broken glass but it would not impact his deliberations, another stated that he had seen a repairman working on the window, and the jury as a whole indicated that it could go by the evidence. Although defendant contends that the court failed to make a thorough inquiry, the court made a proper, individual inquiry of the three jurors, it is apparent from their *voir dires* that the three were aware only of a broken window, which does not readily suggest that defendant attempted to escape, and the entire jury indicated that it could be fair and impartial.

Am Jur 2d, Trial §§ 1544, 1545.

9. Criminal Law § 446 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—desire of community

There was no error in the sentencing hearing in a first-degree murder prosecution where defendant contended that the prosecutor argued that the jury was obligated to return a sentence of death because the community expected it, but the prosecutor merely stated that the law is in accord with the community's view of the appropriate punishment and that the jury should follow the law in reaching its recommendation.

Am Jur 2d, Trial § 648.

Prejudicial effect of prosecuting attorney's argument to jury that people of city, county, or community want or expect a conviction. 85 ALR2d 1132.

10. Criminal Law § 436 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—defendant's enjoyment of murder

There was no error in the sentencing hearing in a first-degree murder prosecution where defendant contended that the prosecutor's argument that defendant had enjoyed the killing was not based on evidence and was extremely inflammatory, but there was evidence to support the prosecutor's argument.

Am Jur 2d, Trial § 572.

11. Criminal Law § 434 (NCI4th)—first-degree murder—sentencing— prosecutor's argument—prior misconduct

There was no error in a first-degree murder prosecution where defendant contended that the prosecutor's argument emphasized the suffering of the victim of defendant's prior misconduct. However, the prosecutor may argue that defendant's criminal history deserves great weight.

Am Jur 2d, Trial § 626.

12. Criminal Law § 432 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—defendant not human

There was no impropriety requiring *ex mero motu* intervention in a first-degree murder prosecution where defendant contended that the prosecution had argued that defendant was not a human being, but the prosecutors characterized defendant's depravity as a void in his character and did not directly call him an animal. The character of a defendant is an appropriate consideration during sentencing.

Am Jur 2d, Trial § 648.

13. Criminal Law § 466 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—credibility of defendant's attorneys

There was no error in a first-degree murder prosecution where defendant contended that arguments by the prosecutor were designed to denigrate the credibility of defendant's attorneys, to punish him for having consulted with his counsel during trial, and to punish his counsel in advance for making arguments that would attempt to convince the jury that a life sentence was the appropriate punishment, but the argument did not implicate defendant's right to counsel.

Am Jur 2d, Trial §§ 683, 686.

Propriety and effect of attack on opposing counsel during trial of a criminal case. 99 ALR2d 508.

14. Criminal Law § 1320 (NCI4th)— first-degree murder—sentencing—instructions—same evidence supporting more than one aggravating circumstance

There was no error in the sentencing hearing in a first-degree murder prosecution where the court did not *ex mero motu* instruct the jury that it could not consider the same evidence as

supportive of more than one aggravating circumstance. Four aggravating circumstances were submitted and four were found, defendant concedes that the circumstances all could have been properly considered without double-counting the evidence, and it need only be determined whether the court should have instructed the jury so as to prevent duplicative use of the evidence. It is unlikely that the court's failure to instruct *ex mero motu* on the duplicative use of evidence had a probable effect on the sentencing recommendation. The murder was particularly savage, the victim was stabbed many times and could have lived for a time after the wounds were inflicted, there was separate evidence to support each aggravating circumstance, and the court's instruction that defendant contends compounded the problem was likely interpreted by the jurors as permission to consider both guilt and sentencing phase evidence rather than as license to use the same evidence to support more than one circumstance.

Am Jur 2d, Trial §§ 1441, 1444.

15. Criminal Law § 1322 (NCI4th)— first-degree murder—sentencing—no instruction on life without parole

There was no plain error in a first-degree murder sentencing hearing where the court failed to inform the jury that defendant would never be paroled, given his expected life span, if he were sentenced and received consecutive life sentences. Under the statutes in effect when the murder was committed, defendant would have been eligible for parole after serving twenty years in prison had he received life; an instruction that he would be ineligible for parole if he received life therefore would have been an incorrect statement of the applicable law. Furthermore, parole eligibility does not reveal anything about the defendant's character or record or any circumstances of the offense and therefore is irrelevant to the sentencing process.

Am Jur 2d, Trial §§ 286, 1443.

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

16. Jury § 226 (NCI4th)— first-degree murder—jury selection—death qualification—rehabilitation

There was no error in a capital murder prosecution where the court denied defendant the right to examine each juror challenged by the State during death qualification prior to his or her

excusal and by excusing jurors whom defendant was not permitted to question.

Am Jur 2d, Criminal Law §§ 679, 680.

17. Criminal Law § 1320 (NCI4th)— first-degree murder—sentencing—instructions—consideration of evidence from both phases of trial

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury that all evidence in both phases of the trial was competent for the jurors' consideration.

Am Jur 2d, Trial §§ 1441, 1444.

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

The trial court did not err in a first-degree murder prosecution by submitting to the jury the "especially heinous, atrocious, or cruel" aggravating circumstance with instructions that allegedly failed adequately to limit the application of the circumstance.

Am Jur 2d, Criminal Law §§ 598, 599.

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

19. Criminal Law § 1351 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—instructions—burden of proof

The trial court did not err in a first-degree murder prosecution in its instructions on the burden of proof applicable to mitigating circumstances through use of the terms "satisfaction" and "satisfy" as defining the burden of proof.

Am Jur 2d, Criminal Law §§ 598, 599.

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

20. Criminal Law § 1323 (NCI4th)— first-degree murder—sentencing—instructions—value of mitigating circumstances

The trial court did not err in a first-degree murder sentencing hearing in its instructions by allowing the jury to reject a mitigating circumstance on the basis that it had no mitigating value.

Am Jur 2d, Trial §§ 1441, 1444.

21. Criminal Law § 1318 (NCI4th)— first-degree murder—sentencing—instructions—use of "may"

The trial court did not err in a first-degree murder sentencing hearing in the use of the term "may" in sentencing recommendation issues three and four because this gave the jury discretion in considering proven mitigating circumstances.

Am Jur 2d, Trial §§ 1441, 1444.

22. Criminal Law § 1373 (NCI4th)— first-degree murder—death sentence—proportionality

A sentence of death for a first-degree murder was not disproportionate where the crime was distinguished by the brutal attack on the victim, which consisted of attempted strangulation and multiple stab wounds to her face and neck; the rape of the victim, which occurred prior to her death; and the kidnapping of the victim; defendant was found guilty of murder based on both the felony murder rule and on malice, premeditation, and deliberation, which indicates a more cold-blooded and calculated crime; the jury found all submitted aggravating circumstances and found only three of thirteen mitigating circumstances submitted; and the jury found that defendant is a recidivist whose prior convictions were for violent felonies.

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 Greeson, J., at the 24 May 1993 Criminal Session of Superior Court, Rowan County, on a jury verdict finding defendant guilty of first-degree murder, robbery with a dangerous weapon, two counts of first-degree rape on a female victim, burning of personal property, and first-degree kidnapping.

Defendant's motion to bypass the Court of Appeals on the convictions other than first-degree murder was allowed 2 August 1994. Heard in the Supreme Court 16 March 1995.

Michael F. Easley, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.

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

WHICHARD, Justice.

Defendant was tried capitally for first-degree murder and found guilty on that and all other charges. After a capital sentencing proceeding, the jury recommended that defendant be sentenced to death for the first-degree murder conviction. The trial court sentenced defendant to death for the first-degree murder conviction; to forty years' imprisonment for the armed robbery with a dangerous weapon conviction; to two terms of life imprisonment for the first-degree rape convictions; to ten years' imprisonment for the burning of personal property conviction; and to thirty years' imprisonment for the kidnapping conviction. All sentences were to run consecutively.

The State's guilt phase evidence tended to show the following:

Brandy McIntyre testified that she left her trailer on the morning of 8 September 1992 to run errands. Katherine Price, the victim, was there when she returned. Price and Brandy walked to a nearby convenience store to purchase food. As they walked, defendant approached them. He asked Brandy what time her husband returned home from work. Brandy told him her husband was at home. Price said nothing during the conversation. When Price and Brandy returned from the store, defendant was at Brandy's trailer talking to Brandy's husband, Thomas. Defendant spoke with Thomas about buying a shotgun for protection during a marijuana purchase. Thomas rolled a joint of marijuana, and the group smoked it. Defendant and Price were in the trailer at the same time for about fifteen minutes. Brandy did not see them talking.

Thomas McIntyre testified that he first met defendant at the trailer on 8 September 1992. He stated that defendant asked him if Price had a boyfriend, and Thomas told him she did. Thomas testified that he rolled a joint and that they all smoked it. He further stated that he never saw Price and defendant talking.

Timothy Corriher testified that on the morning of 10 September 1992, a neighbor stopped at his house to tell him a car had burned near his property. Corriher drove down Lipe Road and found the car. He alerted the police. A trained arson investigator with the Rowan County Sheriff's Department testified that he examined the car and concluded that an accelerant was involved. He also determined that a license plate taken from the car had been issued in Price's name.

Tom Baker testified that on 11 September 1992 he discovered the body of Katherine Price in a field in the Mill Bridge area of Rowan County. An agent processed the field for evidence. The body was found face down about twenty-five or thirty feet off the dirt road underneath some low-hanging limbs of a clump of trees. Two pieces of plaid material were found in the immediate vicinity of the body. One piece consisted of two pieces knotted together.

SBI Agent Jedd Taub, a forensic serologist, testified that he had performed luminol testing on the blood in the field. In his opinion, the arc of blood deposition on the tree branches, leaves, and ground was consistent with multiple stab wounds to the neck. The pattern he observed could have been caused by blood being thrown off a knife as it was pulled back or brought forward.

Dr. Thomas Clark, a forensic pathologist, testified that Price had a combination of fifteen stab wounds and seven incised wounds to her neck; each was one-half to one-and-a-half inches deep. In addition, she had two wounds to her face, her left and right carotid arteries were cut, and one arterial stab had penetrated to her spine and caused profuse bleeding. Dr. Clark further testified that Price died of the stab wounds to her neck. Price could have lived a few minutes after the stabbing. Blood found in her vagina matched defendant's and hers. Because Price's neck was badly decomposed, Dr. Clark could not opine whether Price had been strangled.

Jeffrey Beaver, defendant's brother-in-law, testified that in early September 1992, defendant called him and asked to borrow his gun. Later, defendant came to Beaver's trailer, and they talked. Defendant cried and stated that he was in serious trouble. He stated that he had killed an innocent person two days before and that he could either run, go back to prison, or kill himself. He further told Beaver that he had to get rid of his knife and tennis shoes. Beaver had seen defendant with a red-handled butterfly knife at some point in the past. Beaver heard later that a woman had been killed. He called the police and gave them defendant's name.

Tina Cline testified that she met defendant in May 1992 and began dating him. In August 1992 she became involved with someone else. On 6 September 1992 defendant learned that she was seeing another man, and he came to her house. Cline testified that defendant forced her into his car. He then forced her to drive to his camper and to a wooded area near the airport. Defendant then raped her. She did not report it to the police because she feared his reprisal if the charge was unsuccessful.

The next day defendant called her and told her he was going to commit suicide. He repeatedly asked if she was all right and said he knew he had hurt her. Cline told defendant that he needed help and that she was going to call the sheriff and have him committed.

The day defendant was arrested Cline received a call from the Sheriff's Department. An agent told her defendant was not going to confess to murder, kidnapping, and rape until she got there. Cline went to the Sheriff's Department. Defendant told her that he had killed an innocent girl and that it was Cline's fault because he would not have been looking for another woman if she had not left him.

On 16 September 1992 SBI Agent Bill Lane arrested defendant on the charge of murder. He advised defendant of his constitutional rights; defendant waived his right to counsel. Defendant told Lane that he would locate evidence for them and provide a complete statement but that he first needed to see Teresa Allman, a married woman with whom he was having a sexual relationship, and Tina Cline. He told Lane that Allman did not know about the murder. When Allman was brought to see him, he apologized to her for getting her involved.

Defendant told Agent Lane where several pieces of evidence were, including a red butterfly knife that, according to Dr. Clark's testimony, could have caused Price's wounds. He directed agents to a road near where Price's body was found and showed them where a shirt and belt were located.

After the evidence was gathered, defendant gave a lengthy, detailed confession to the murder. He indicated that he first saw Price the day before the murder when she was walking to the store. At the time he was looking for a gun because he wanted to kill his former girlfriend, Tina Cline. At 6:00 a.m. the day after he first saw Price, defendant walked to the store. A car went past him; Price was driving. She offered him a ride. As she drove, defendant placed a butterfly

knife to her throat. He knew the knife bothered her a lot. He forced her to drive to Airport Road.

When they arrived, he removed the knife and put it away. She offered to smoke marijuana with him. He directed her down a dirt road on the pretext of visiting a friend. She proceeded, despite the desolate nature of the surroundings. He assured her nothing would happen to her. She stopped near a big tree. Defendant continued to assure her. He threw the wrenches and screwdriver from her car and put away the knife. He determined that he would have to kill her because "he couldn't leave the girl there and he couldn't take her with him."

They made small talk, and defendant asked her to have sex with him. Price agreed, but defendant also stated, "you can call it rape." Defendant then sat on the hood of the car and smoked his remaining cigarettes. He raped her again and strangled her until his thumbs were numb. Price was moaning. He tried to strangle her with a piece of flannel shirt, but it tore. She continued to moan. Then he took her outside and put her on the ground. She was moaning. He took his knife and stabbed her throat. He stated, "I sat and watched the blood come out of her throat and she was still moaning and groaning." He stabbed her many more times because he wanted her to die, which she did. He then attempted to dispose of the evidence.

Defendant drove to the bowling alley the next night to see Teresa Allman. He and Allman drove to the place where he had left Price's car. He got out of the car and set Price's car on fire with gasoline he and Allman had obtained.

Defendant also drew and signed a sketch of the murder scene.

Teresa Allman testified that she and defendant began an intimate relationship in July 1992. She further testified that she was with defendant when he burned Price's car. When she visited defendant after his arrest, he told her he had killed an innocent girl and he was sorry.

Three women testified about prior crimes defendant had committed. Jean Killian testified that she had been kidnapped by defendant. Robin Sauls, who dated defendant, testified that defendant had raped her. Ada Teal testified that defendant had jumped in her car one day and directed her to a trailer park. He then directed her to a field and asked her to exit the car while he was holding a knife. She refused. They then drove several places. Ultimately defendant drove her to a

field and raped her. She reported it to police after defendant took her home. The day after defendant raped Teal, he called her and asked her to meet him. On advice from the police, she agreed to do so, but defendant was arrested in the interim.

Defendant presented the following evidence during the guilt phase:

Defendant testified that he had had consensual sex with Sauls. He also stated that, contrary to her testimony indicating that defendant had kidnapped her, Killian had agreed to give him a ride. He further testified that, contrary to Ada Teal's testimony, they had had consensual sex after she agreed to give him a ride.

Defendant testified that he and Allman had an intimate relationship. He indicated that on the Sunday before Price was killed, Allman returned from a trip out of town. They had planned to get together the next day and did so. They drove out to the Mill Bridge area in her car and went down the road that leads to the back of the fields. They had been there several times to have sex.

According to defendant, Price came to his camper shortly after 7:00 a.m. on 9 September 1992. They had met the day before at the McIntyres' trailer. Price told defendant she had a joint for him and asked if he would like to smoke it. They smoked and talked for about thirty minutes. Defendant asked Price if he could kiss her, and she nodded "yes." They then decided to spend the day together and drove out to the Mill Bridge area. Defendant testified that they had consensual sex there.

Defendant testified further that Teresa Allman drove up and got out of her car. She was angry and cursing. According to defendant, Allman stabbed Price and killed her.

During the sentencing phase, the State presented the following evidence:

Jennie Clayton testified that in June 1982, she was a secretary at Windsor Elementary School in Richland County, South Carolina. Defendant was in the school one day seeking directions. Clayton gave defendant directions, and while she was doing so, defendant placed a sharp object against her throat. He demanded the keys to her car. Clayton managed to get away. In November 1982 defendant was convicted of aggravated assault based on this attack.

Linda Shadel testified that defendant took her to a field, tied her to a tree, and left her. She managed to escape. Defendant was

arrested the next day. Some time later he called Shadel and asked her about her dog. He told her that he knew she did not want to press charges and that her husband had forced her to do so. In November 1982 defendant was convicted of housebreaking and grand larceny in connection with his crimes against Shadel.

The State also introduced evidence of defendant's conviction in January 1980 for the assault on Jean Killian.

During the sentencing phase defendant presented evidence that he came from a broken home, that his mother drank excessively, and that he began smoking marijuana when he was twelve or thirteen. Defendant testified that he had had a violent childhood. Defendant's employer testified that defendant was an excellent worker.

Dr. Bob Rollins, a forensic psychiatrist, testified that defendant suffered from mental disorders and that he was under the influence of these disorders at the time of the crime. The disorders impaired his ability to understand and conform to appropriate standards of behavior. Dr. Rollins also testified that defendant's marijuana use on the day of the crime would have impaired his ability to conform to appropriate standards of behavior.

GUILT PHASE

[1] In his first assignment of error, defendant argues that the trial court committed reversible error by appointing Dr. Bob Rollins, a forensic psychiatrist, to assist him at trial because Dr. Rollins also had conducted a pretrial evaluation of defendant and had determined that defendant was competent to proceed. Defendant argues that because Dr. Rollins' diagnosis was of little benefit to him, he was denied his right to expert assistance.

When defendant made his motion for expert assistance, the court asked defense counsel why Dr. Rollins could not act as his expert. Defense counsel responded that because Dr. Rollins had handled the competency determination, it might be difficult for him to proceed further. The State argued that the need for someone else had not been established and that though Dr. Rollins worked for a state facility, he was not necessarily a prosecution witness. The trial court agreed and stated that it knew of no reason why a state psychiatrist could not be a defense witness. The trial court refused to appoint a new psychiatrist for defendant.

Defense counsel sought Dr. Rollins' assistance. Dr. Rollins tried to talk with defendant, but defendant did not want to talk to him. Defendant then renewed his motion for expert assistance. The trial court stated that it could do nothing if defendant did not want to talk to Dr. Rollins. The court then stated that "there was no specific showing that a psychiatrist was needed to begin with for either the trial of the case or for any potential sentencing hearing." Defense counsel ultimately indicated to the court that defendant would cooperate with Dr. Rollins because the court refused to make another psychiatrist available to him.

Assuming *arguendo* that defendant made an adequate showing of a specific need for an expert, *see State v. Johnson*, 317 N.C. 193, 198-99, 344 S.E.2d 775, 778-79 (1986), our review of the record establishes that defendant received adequate assistance from Dr. Rollins in the presentation of mitigating evidence. At trial Dr. Rollins offered his opinions, which were based on four interviews with defendant, defendant's statement, investigative reports, reports of interviews with defendant's mother and sisters, and Dr. Rollins' interview with defendant's sister. Based on this information, Dr. Rollins testified that defendant had two types of mental disorders, one of personality and one of adjustment. He stated that defendant's ability to understand appropriate standards of behavior was affected by these disorders and was impaired further by his use of marijuana. He also indicated that defendant began using marijuana when he was eleven or twelve. He further testified that defendant's youth was characterized by poverty-related concerns for food, clothing, and shelter.

Dr. Rollins' testimony was the sole supporting evidence for the lone statutory mitigating circumstance found by one or more jurors: that the capital felony was committed while defendant was under the influence of a mental or emotional disturbance. It also supported two nonstatutory mitigating circumstances that were found by one or more jurors: "[Defendant] was and is emotionally neglected and has chronic feelings of deprivation, inadequacy and anger, and he is uncomfortable and frightened by these feelings"; and "[Defendant] has a history of substance abuse which began at a very early age as a consequence of a lack of supervision and a lack of family structure." We thus can perceive no prejudice resulting from the appointment of Dr. Rollins to assist defendant in his trial. This assignment of error is overruled.

[2] In his second assignment of error, defendant argues that the trial court committed reversible error during jury selection by prohibiting defendant from asking questions of prospective jurors individually and by requiring questions to be posed to the entire group in the jury box. He notes that the trial court allowed individual questioning of prospective jurors only if a group question produced a response from some jurors.

The governing statute, N.C.G.S. § 15A-1214(c), provides:

> (c) The prosecutor and the defense counsel, or the defendant if not represented by counsel, may personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge. The prosecution or defense is not foreclosed from asking a question merely because the court has previously asked the same or similar question.

N.C.G.S. § 15A-1214(c) (1988).

It is within the trial court's discretion to regulate the manner and extent of inquiries on *voir dire*. *State v. Young*, 287 N.C. 377, 387, 214 S.E.2d 763, 771 (1975), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976). This Court consistently has held that N.C.G.S. § 15A-1214(c) does not preempt the exercise of the court's discretion during jury selection. *State v. Allen*, 322 N.C. 176, 189-90, 367 S.E.2d 626, 633 (1988); *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980). It remains the court's prerogative to expedite jury selection by requiring general questions to be posed to the whole panel.

A trial court's discretionary ruling may be reversed for an abuse of discretion only upon a showing that it 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). Defendant does not argue that the court abused its discretion in conducting jury selection in this manner. Defendant did not object to the procedure, and nothing suggests that the court restricted defendant's ability to examine each prospective juror individually. Our review of the record reveals that defendant was allowed to question jurors individually at several points during jury selection even if the initial question to the group failed to produce a response. Further, the jurors responded individually to group questions if the questions required an individualized response based on their personal situations. We conclude that the

trial court did not abuse its discretion in controlling jury selection in this manner. *See Allen*, 322 N.C. at 190, 367 S.E.2d at 634. This assignment of error is overruled.

[3] Defendant next assigns as error two comments by the court to the jury. He contends that through these comments, the trial court expressed its opinion about the case. The first comment occurred at the end of the second week of the presentation of evidence. Defendant had been on the stand for two and one-half days and had been the only witness to testify during that period. The court interrupted defense counsel's questioning of defendant as follows:

> THE COURT: Excuse me, Mr. Davis. I think I've tested the jury's attention span for today.
>
> DEFENSE COUNSEL: Yes, sir.
>
> THE COURT: I'm going to call it off. You may step down, Mr. Campbell.

Defendant contends that the court's comment about testing the jury's attention span communicated to the jury that the court thought defendant's testimony, out of all the other evidence the jury had heard, was a test of the jury's and the court's attention spans and thus worthy of less attention than other testimony.

N.C.G.S. § 15A-1222 provides that a court "may not express[,] during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1988). Defendant, however, must show that he was prejudiced by the court's remark in order to receive a new trial. *State v. Howard*, 320 N.C. 718, 723, 360 S.E.2d 790, 793 (1987). The comment by the court was not an expression of opinion. The court stated that it, not defendant, had tested the jury's attention span. The court was simply referring to its responsibility to manage the trial. We cannot conclude that this could properly be characterized as an expression of opinion.

Defendant also complains about the following comment by the court, which occurred after the State's final argument in the guilt phase:

> All right. Now, ladies and gentlemen of the jury, you've heard all the evidence. You have heard the arguments of counsel. Tomorrow at nine o'clock, or very shortly thereafter, I'll give you the law that pertains to this particular sad situation.

Defendant contends that this comment was inappropriate because it conveyed the court's evaluation of the case and placed pressure on the jury to render a verdict vindicating the "sad situation."

Again, we do not consider this an expression of opinion by the trial court. Defendant did not allege self-defense or justifiable homicide but claimed that someone else committed the murder. The court's characterization of the situation as "sad" would appear to be a universal sentiment regarding a murder. We conclude that both comments were innocuous and were not prohibited expressions of opinion by the trial court. N.C.G.S. § 15A-1222 therefore was not violated. This assignment of error is overruled.

[4] In his next assignment of error, defendant argues that the prosecution's closing arguments during the guilt phase introduced irrelevant considerations into the fact-finding process; consequently, there is reason to fear that "substantial unreliability" and "bias in favor of death" resulted. *Caldwell v. Mississippi*, 472 U.S. 320, 330, 86 L. Ed. 2d 231, 240 (1985). Defendant did not object to any of the four arguments about which he now complains. Nonetheless, he contends that the trial court should have intervened *ex mero motu*.

First, defendant points to the prosecution's argument that defense counsel had "violated" State's witness Ada Teal during the cross-examination. Specifically, the prosecutor stated:

> Ada Teal testified. You could see in every fiber of her being what she had been through. You could see it. She shook. She cried. At times her body was racked with sobs. She still feels the terror that she went through. James Campbell kidnapped her. He raped her. He terrorized her, and then in this courtroom one more time she was violated by Mr. Locklear, who said, "You invited him into your car. You consented. Your husband doesn't believe you." Oh, really? Why don't you bring him in here? Why don't you bring in Packard Teal if there's any basis to that? "You enjoyed it. You just said this because your husband was mad, and you're divorced now, aren't you?" It was outrageous, reprehensible. No wonder our women don't report rape. No wonder they say, "I can't go through with this. I can't do that." Did Ada Teal get justice in this courtroom? You folks will decide what she went through as you assess all the evidence in this case. But the purpose of her testimony and the purpose of Jean Killian's testimony was for you to decide what happened to Katherine Price. Did James Adolph Campbell do it, and did she consent?

Defendant contends the prosecutor was punishing him for having his counsel cross-examine a State's witness and that the prosecutor blamed defendant and his counsel for the reluctance of unknown rape victims to prosecute their attackers. Further, the jury was invited to convict defendant on the issue of whether Teal received justice during the trial. Defendant maintains that the argument was not supported by the evidence or the relevant law. We disagree.

Because defendant failed to object to this argument, he must show that it was so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. We have stated that " 'the impropriety . . . must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *State v. Price*, 326 N.C. 56, 84, 388 S.E.2d 84, 100 (quoting *State v. Artis*, 325 N.C. 278, 323, 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)), *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated on other grounds*, — U.S. —, 122 L. Ed. 2d 113, *on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993), *sentence vacated on other grounds*, — U.S. —, 129 L. Ed. 2d 888, *on remand*, 337 N.C. 756, 448 S.E.2d 827 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 224, *reh'g denied*, — U.S. —, 131 L. Ed. 2d 879 (1995).

Defendant's prior crimes were introduced to show a pattern of behavior. The credibility of Teal therefore was important. Defendant claimed that he did not kidnap and rape Teal but that the encounter was consensual. It is not improper for the prosecutor to refer to the demeanor of a witness during the ordeal of testifying as evidence of her truthfulness. *State v. Cummings*, 323 N.C. 181, 192, 372 S.E.2d 541, 549 (1988) (prosecutor may argue to the jury about the demeanor of a witness, a matter which is before it), *sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 602 (1990), *on remand*, 329 N.C. 249, 404 S.E.2d 849 (1991). Further, the prosecutor emphasized that the purpose of Teal's testimony was to aid the jury in determining what happened to Price, the victim here, not to bring justice to Teal. This argument thus did not require *ex mero motu* intervention.

[5] In this same assignment of error, defendant argues that the second prosecutor conveyed his opinion to the jury that defendant's case warranted full prosecution. The prosecutor argued:

> Briar [sic] Rabbit was going back to the briar patch, back to the place that he knew the probation violations, parole violations would get him. But you know what? No plea bargain. No deal, no prison time, the State is seeking a penalty of death. The plan went awry. . . . Prison doesn't scare him. He gives a statement because what is his experience with the court system? Plea bargain, charges—charges dropped. And I might add that neither Ms. Symons or I were either one prosecuting in this county when those charges [against defendant] were dropped. . . . But that's not happening in this case.

We cannot say that the prosecutor's statement that he was not in charge of defendant's prior cases when the charges were dropped was so grossly improper as to require the court to intervene *ex mero motu*. Even assuming *arguendo* that the argument was improper, we conclude that it could not have been prejudicial given the evidence against defendant, including his own pretrial confession. It is unlikely that this one statement impacted the jury's verdict. Further, the overall thrust of this argument was to point out why defendant gave a confession that he later contradicted in his trial testimony. The prosecutor conveyed the idea that defendant was not accustomed to being tried capitally because of the system's reaction to his prior crimes; because he did not expect that course of action, he felt free to tell the truth in his pretrial statement.

[6] Defendant also contends that the prosecutor improperly argued deterrence to the jury. Defendant failed to object to this argument. The prosecutor argued:

> There's going to be time in the morning after [you are] instructed by the Court to do your duty. As I stated, it's been a long trial, and I'm sorry, frankly, that I have talked as long as I have. But it is important to the State of North Carolina, and it is important to the Kathy Prices of the future that you do your duty, and you find him guilty of everything he's charged with. Thank you.

We have held that specific deterrence arguments suggesting that the defendant should be convicted so that he cannot kill again are not improper. *See State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994); *State v. Zuniga*, 320 N.C. 233, 268-69, 357 S.E.2d 898, 920-21, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). Here, the prosecutor argued that the jury should convict defendant so he could not commit crimes in the future. There was nothing improper in this argu-

ment; thus, *ex mero motu* intervention was not required. This assignment of error is overruled.

SENTENCING PHASE

[7] Defendant next assigns as error the court's response to the jury's written questions submitted during sentencing deliberations. The jury asked several questions, including, "Life sentence, what is minimum time? What is least time served? Could he be released early because of our over-crowded prisons? And what about good behavior?" In response to these questions, the court stated:

> Now, . . . I'm just going to say this. This is just not of your concern. You're to take the instructions that I gave you in this case, and you're not to concern yourself with anything else. That's not—that's just not for your concern. All right, take charge of the jury.

Defendant argues that the court should have included in the instruction the statement that "life means life."

Defendant concedes that he did not request the instruction but argues that its omission was plain error. We disagree. A defendant's eligibility for parole is not a proper matter for consideration by a jury. *State v. Brown*, 306 N.C. 151, 182, 293 S.E.2d 569, 589, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982). As defendant suggests, we have approved the inclusion of the language "life means life" in response to such inquiries; however, we have not required it. *Compare State v. Lee*, 335 N.C. 244, 266-67, 439 S.E.2d 547, 557-58, *cert. denied*, — U.S. —, 130 L. Ed. 2d 162, *reh'g denied*, — U.S. —, 130 L. Ed. 2d 532 (1994) *with Brown*, 306 N.C. at 181-82, 293 S.E.2d at 588-89. Here, the court told the jury what was required: that it was not to consider parole in its deliberations. The trial court does not have to instruct the jury in the precise words the defendant requests. *Brown*, 306 N.C. at 182, 293 S.E.2d at 589. We assume that the jury followed the court's instructions and did not consider the possibility of parole in its deliberations. *Lee*, 335 N.C. at 266-67, 439 S.E.2d at 558. The response did not constitute plain error. This assignment of error is overruled.

[8] In another assignment of error, defendant argues that the trial court mishandled the inquiries it made of the jury following a failed escape attempt by defendant out of the presence of the jury. Because of this alleged mishandling, defendant asserts that his Sixth Amendment right to an impartial jury was violated.

During a recess defendant and his attorneys met in an unused jury room located next to the one in which defendant's jury met. According to *voir dire* testimony, defendant and one of his attorneys were alone in the unused room. Juror Mary Johnston and a bailiff were in the room next door. Defendant broke a window pane and went onto the ledge outside the room in an attempt to escape. The bailiff heard the noise, looked out the window, and saw the broken glass. The bailiff instructed Johnston to remain inside. He then went to the room next door. A sheriff's deputy retrieved defendant from outside the window, while another held his weapon on defendant.

The court conducted an inquiry of Johnston outside the presence of the jury as follows:

> THE COURT: Ms. Johnston, it has become necessary to bring you in because during the recess, a matter has occurred. And unbeknownst to this Court, you were in the jury room. And I just happen to have to know at this time what if anything that you know to make sure that you can still be a fair and impartial juror.
>
> JOHNSTON: I don't know anything except that I saw glass through a window. And nothing was said to me about anything except that I was not to leave the room.
>
> THE COURT: All right. Do you know of anything at this time that you've seen or heard that would prevent you from being a fair and impartial juror during this sentencing hearing?
>
> JOHNSTON: No.

The court then sent Johnston back to the jury room. After some discussion with defense counsel and the prosecutors, the court brought Johnston back in and instructed her not to discuss its inquiry or to consider it during deliberations. She stated that she would comply. Defendant did not ask that she be removed.

After a recess following the *voir dire* of Johnston, defense counsel informed the court that jurors Morgan and Lingle might have observed the attempted escape. The court asked defendant if he knew whether the two jurors had seen him. Defendant replied, "I seen them at the moment. I can't say they honestly seen me a good bit. But I don't really know." The court then brought in Morgan and Lingle individually and conducted a *voir dire*. Morgan indicated that he had observed broken glass and that it would not impact his deliberations. Lingle stated that he had seen a repairman working on the window.

The court then reunited the jury and asked if it had made any observations that could prevent a decision based solely on the evidence. The jury indicated that it could go by the evidence; the presentation of evidence then proceeded.

Defendant complains because the court never determined what Johnston understood had happened in the room next door, where she knew defendant was when the glass broke. He contends that her responses to the court's inquiries regarding her ability to be fair were not illuminating because it was not clear what she thought had happened. Further, defendant argues the court should have instructed her to keep what she had seen to herself. Thus, according to defendant, she could have told the other jurors what she had seen and what she thought had happened without discussing the court's inquiry of her.

Defendant also contends the court failed to make a thorough inquiry of Morgan and Lingle. It did not ask them what they thought had happened, nor did it determine whether the two jurors had already discussed the matter with the other jurors.

We have stated that "[w]hen there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial." *Barts*, 316 N.C. at 683, 343 S.E.2d at 839. The trial court made a proper, individual inquiry of the three jurors. From their *voir dires* it is apparent that all three were aware only of a broken window, a circumstance which does not readily suggest that defendant attempted to escape. Johnston, Morgan, and Lingle each told the court nothing had occurred that would impair their ability to be fair and impartial jurors. Further, the entire jury indicated that it could be fair and impartial. We conclude that the trial court correctly determined that the three jurors' exposure to the sound and sight of a broken window was not prejudicial and that the entire jury could be fair and impartial. This assignment of error is overruled.

[9] In his next assignment of error, defendant contends the trial court erred by failing to intervene *ex mero motu* on five occasions during the State's closing arguments. He argues that the comments were grossly improper and that the trial court abused its discretion by not taking corrective action even absent objections by defendant. We disagree.

Defendant first points to a statement that he interprets as suggesting to the jury that it was obligated to return a sentence of death because the community expected it. The prosecutor argued:

> Now, for the crime that he committed against Katherine Price, a crime so horrendous, and for his prior crimes, so reprehensible, justice can be done with only one verdict, one punishment, death. This crime and this man call out for that. And our society and our community call out for that. It is the only appropriate punishment in this case. How will you come to decide what is the appropriate punishment? You will follow the law.

Defendant cites our decision in *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985).

Defendant's reliance on *Scott* is misplaced. There, the prosecutor argued: "[T]here's a lot of public sentiment at this point against drinking and driving, causing accidents on the highway." *Scott*, 314 N.C. at 311, 333 S.E.2d at 297. We held this argument improper because it went outside the record and focused on public sentiment against drinking and driving and the accidents caused thereby, suggesting to the jury that it should convict the defendant based on other accidents caused by drunk drivers. *Id.* at 312, 333 S.E.2d at 298.

Here, in contrast, the prosecutor merely stated that the law is in accord with the community's view of the appropriate punishment and that the jury should follow the law in reaching its recommendation. We have held such arguments to be permissible. *See State v. Soyars*, 332 N.C. 47, 59-61, 418 S.E.2d 480, 487-88 (1992) ("You come here and represent the conscious [sic] of the community."); *State v. Artis*, 325 N.C. 278, 329-30, 384 S.E.2d 470, 499 ("When you hear of such acts . . . you think, 'Well, somebody ought to do something about that.' . . . You are the somebody. . . . You speak for Robeson County . . . ."); *State v. Huff*, 325 N.C. 1, 71, 381 S.E.2d 635, 676 (1989) ("Today, you speak for the people of North Carolina. You are the moral conscience of our community."), *sentence vacated*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991). We conclude there was nothing improper in this argument.

[10] Next, defendant argues that the prosecutor's argument that defendant had enjoyed the killing was not based on evidence and was extremely inflammatory. In discussing the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, the prosecutor argued:

> Imagine the fear, the emotions of Katherine Price when you're considering whether this was designed to reflect a high degree of pain, maybe even for the enjoyment of it. The enjoyment of it. The James Campbell [sic] loves to have women in his power and to toy with them. You know why? After he's done, he calls them back. He calls them back.

Defendant cites other examples where the prosecutor referred to defendant's enjoyment of the murder. He contends that because evidence of defendant's remorse was presented, this argument was improper as not based on the evidence. We disagree.

Counsel for both sides may argue to the jury the facts in evidence and all reasonable inferences to be drawn 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). There was evidence to support the prosecutor's argument, such as the evidence of defendant's contact with two of his kidnapping victims, Ada Teal and Linda Shadel, after the crimes. Tina Cline testified that the day after defendant raped her, he called to apologize and to ask if she was all right. The prosecutor was drawing a reasonable inference from this evidence when he argued that defendant enjoyed the power over his victims that he derived from the commission of a crime against them.

Further, there was evidence that there was no animosity between defendant and Price prior to the attack, that defendant spontaneously and without reason decided to kill Price, that he brutally strangled her and then stabbed her multiple times, and that the injuries were much greater than necessary to incapacitate her. Defendant's pretrial statement indicated that Price moaned and was rendered helpless after he initially failed to kill her. *See State v. Laws*, 325 N.C. 81, 106, 381 S.E.2d 609, 624 (1989) (argument that the defendant loved killing was permissible inference based on evidence of brutality of murder, lack of provocation by victim, and lack of animosity between the defendant and the victim), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, 502 U.S. 876, 116 L. Ed. 2d 174, *reh'g denied*, 502 U.S. 1001, 116 L. Ed. 2d 640 (1991); *Zuniga*, 320 N.C. at 256, 357 S.E.2d at 913 (prosecutor's argument that the defendant enjoyed murdering the victim held permissible based on evidence that the defendant stabbed the victim in the neck after raping her). The prosecutor's argument was therefore based on the evidence and was not improper.

[11] Defendant also points to an argument that, according to defendant, emphasized the suffering of the victims of defendant's prior misconduct. The prosecutor argued:

> This is deserving of a tremendous amount of weight, this kind of recidivist history again and again and again. And they're not just labels and convictions. They represent women who were victimized at the time and are still victimized today.

The aggravating circumstance of prior convictions for crimes involving the use or threat of violence against a person was submitted to the jury. The prosecutor may argue that defendant's criminal history deserves great weight in support of that circumstance. *See State v. Green*, 336 N.C. 142, 186-87, 443 S.E.2d 14, 40 (finding no impropriety in similar jury argument directed to weight to be given to "course of conduct" aggravating circumstance), *cert. denied*, —- U.S.—-, 130 L. Ed. 2d 547 (1994). This argument was proper.

[12] Defendant also complains because, he argues, the prosecutor stated that defendant was not a human being. The prosecutor argued:

> Famous man once said, all that walks in the eyes of a man is not necessarily a human. That applies here. James Campbell is a man who has the reaper of death tattooed on his forearm, who has terrorized women in North and South Carolina, put in fear of their lives. And he killed Katherine Price.

Later, the second prosecutor argued:

> Ladies and gentlemen, as I've watched old movies, and as I'm sure some of you have, I can remember where the cowboy movies, the bad guy always wore the black hat. I can remember in the old monster movies where the monster had fangs or he had pointy ears or he changed in some physical way when he went from being a normal person to being the werewolf or whatever—whatever transformation occurred.
>
> We all know because we're adults that there is no physical transformation that people go through. The way we identify a monster is to look at what did he do. What has he done before and what's his reaction to it? And that's what we've tried to present to you in this trial. What he did and what he stands before you convicted of is first-degree murder.

Defendant argues that these statements were grossly improper because this Court has disapproved arguments that likened defend-

ants to animals. *See State v. Hamlet*, 312 N.C. 162, 173, 321 S.E.2d 837, 845 (1984); *State v. Smith*, 279 N.C. 163, 165-66, 181 S.E.2d 458, 459-60 (1971).

We perceive no impropriety in these arguments requiring *ex mero motu* intervention. The prosecutors did not directly call defendant an animal; rather, they characterized defendant's depravity as a void in his character. They pointed out to the jury that defendant's normal appearance did not necessarily indicate a man of compassion and morality. The character of a defendant is an appropriate consideration during sentencing. *See State v. Oliver*, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1983) (emphasis in sentencing is on the circumstances of the crime and the character of the criminal).

[13] Defendant also argues that the following comments by the prosecutor were designed to denigrate the credibility of defendant's attorneys as well as defendant:

> The rules say at this stage of the punishment phase, that the defendant gets the last argument and gets as many arguments and for whatever length that they choose to make them. I fully anticipate that just as Mr. Campbell has been elbowing his lawyers through this entire trial, that after each of them concludes their remarks, he will be elbowing them again, and they will be coming back, and they will be coming back, and they will be coming back.

He interprets this argument as simultaneously punishing him for having consulted with his counsel during the trial and punishing his counsel in advance for making arguments that would attempt to convince the jury that a life sentence was the appropriate punishment.

We do not view this argument as implicating defendant's right to counsel. Immediately prior to this statement by the prosecutor, defendant's attorney had addressed the jury very briefly. The prosecutor told the jury not to get excited about the brevity of defendant's argument. He then made the complained-of statement and immediately stated:

> I don't know how long it will last. But I can tell you this, when I conclude what I'm saying to you right now, this is going to be the last words you're going to hear from the State of North Carolina in the case of the State of North Carolina versus James Adolph Campbell. We're not going to make any third argument or any fourth argument, this is it. I don't know how long they will go on. But I ask you to give us your attention for a little bit longer.

Rather than denigrating defendant and his counsel, the prosecutor was preparing the jurors for the anticipated lengthy closing arguments. He asked them for their attention and patience. We cannot say the prosecutor's comment was so grossly improper as to require *ex mero motu* intervention. This assignment of error is overruled.

[14] In his next assignment of error, defendant argues that the trial court erred by failing to instruct the jury that it could not consider the same evidence as supportive of more than one aggravating circumstance. Defendant failed to request an instruction but contends that the court committed plain error by not giving one *ex mero motu*. Defendant focuses on the prosecutor's closing arguments which pointed to defendant's kidnapping and raping of Price as supportive of both the aggravating circumstance that the murder was committed during the commission of a rape and/or kidnapping and the circumstance that the murder was especially heinous, atrocious, or cruel. The prosecutor also argued evidence of prior convictions for violent felonies in support of the circumstances that the murder was especially heinous, atrocious, or cruel and that it was committed to avoid a lawful arrest. Defendant posits that the probable duplicative use of the evidence allowed the jurors to give more weight to the circumstances than they otherwise would have, thereby influencing their sentencing recommendation.

Defendant further argues that the court's instructions compounded the problem in that they allowed the jury to use the same evidence to support more than one circumstance. The court charged:

> All evidence relevant to your recommendation has been presented. There is no requirement to resubmit during the sentencing proceeding any evidence which was submitted during the guilt phase of the case. *All the evidence which you hear in both phases of the case is competent for your consideration in recommending punishment. It is now your duty to decide from all the evidence presented in both phases what the facts are.*

(Emphasis added.)

The trial court submitted four aggravating circumstances, and the jury found all four. Defendant concedes that "the aggravating circumstances in this case all could have been properly considered under this Court's precedents without double-counting of evidence." We therefore need only to determine whether the trial court should have instructed the jury so as to prevent the possible duplicative use of the evidence.

We stated in *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993), that "the trial court should . . . instruct the jury in such a way as to ensure that jurors will not use the same evidence to find more than one aggravating circumstance." Defendant failed to request an instruction; therefore, our review is for plain error. Defendant must show that the error was so fundamental that it had a probable impact on the result reached by the jury. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983).

We cannot say that this was plain error. This murder was particularly savage. Price was stabbed many times and, according to Dr. Clark, could have lived for a time after the wounds were inflicted. Further, there was separate evidence to support each aggravating circumstance. The court's instruction that defendant contends compounded the problem was likely interpreted by the jurors as permission to consider both guilt and sentencing phase evidence in their deliberations rather than as license to use the same evidence to support more than one circumstance. We think it unlikely that the trial court's failure to instruct *ex mero motu* on the duplicative use of evidence had a probable effect on the sentencing recommendation. This assignment of error is overruled.

[15] In his next assignment of error, defendant argues that the trial court violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to inform the jury that if defendant were sentenced to life and received consecutive life sentences, he would never be paroled given his reasonably expected life span. Defendant notes that the prosecutor argued to the jury about defendant's future dangerousness. He therefore contends that his case is like that of *Simmons v. South Carolina*, — U.S. —, 129 L. Ed. 2d 133 (1994). Defendant failed to request a parole instruction; however, he argues that the failure to so instruct was plain error. We disagree.

Unlike the defendant in *Simmons*, defendant here could not have been sentenced to life without parole. Under the statutes in effect when the murder was committed, had defendant received life he would have been eligible for parole after serving twenty years in prison. N.C.G.S. §§ 14-1.1(a)(1) (1993), 15A-1371(a1) (1988). An instruction that defendant would be ineligible for parole if he received life therefore would have been an incorrect statement of the applicable law. We have interpreted *Simmons* to apply only to cases wherein the alternative to a sentence of death is life imprisonment

without the possibility of parole. *See, e.g., State v. Conaway*, 339 N.C. 487, 520, 453 S.E.2d 824, 845, *reconsideration denied*, 339 N.C. 740, 457 S.E.2d 304 (1995). Further, we have held repeatedly that parole eligibility does not reveal anything about the defendant's character or record or any circumstance of the offense; therefore, it is irrelevant to the sentencing process. *See, e.g., id.* We adhere to our prior rulings on this issue. We conclude that the failure to instruct the jury on parole eligibility was not error, much less plain error. This assignment of error is overruled.

[16-21] Defendant raises seven additional issues that he concedes this Court has decided against his position: (1) the trial court erred in denying defendant the right to examine each juror challenged by the State during death qualification prior to his or her excusal and by excusing jurors whom defendant was not permitted to question; (2) the trial court erred by denying defendant's motions to quash the murder and rape indictments; (3) the trial court erred by instructing the jury that all evidence in both phases of the trial was competent for the jurors' consideration; (4) the trial court erred by submitting to the jury the "especially heinous, atrocious, or cruel" aggravating circumstance with instructions that failed adequately to limit the application of the circumstance; (5) the trial court erred in its instructions on the burden of proof applicable to mitigating circumstances through use of the terms "satisfaction" and "satisfy" as defining the burden of proof; (6) the trial court erred in its instructions on mitigating circumstances because it allowed the jury to reject a mitigating circumstance on the basis that it had no mitigating value; and (7) the trial court erred in its use of the term "may" in sentencing recommendation issues three and four because this gave the jury discretion in considering proven mitigating circumstances. We find no compelling reason to depart from our prior holdings on these issues. These assignments of error are overruled.

We note that defendant made 157 assignments of error and has brought forward thirty-three of these under seventeen "questions presented." We deem the remaining assignments abandoned. N.C. R. App. P. 28(a), (b)(5).

PROPORTIONALITY REVIEW

[22] Having found no error in the guilt and sentencing phases, we must determine: (1) whether the record supports the jury's findings of the aggravating circumstances upon which the sentencing court based its sentence of death; (2) whether the jury imposed the sen-

tence of death under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (Supp. 1994).

The jury found defendant guilty of first-degree murder under the felony murder rule and on the basis of malice, premeditation, and deliberation. The jury also convicted him of robbery with a dangerous weapon, two counts of first-degree rape, burning of personal property, and first-degree kidnapping. At the sentencing proceeding, the trial court submitted the following aggravating circumstances: 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); that the murder was committed for the purpose of avoiding or preventing a lawful arrest, *id.*(e)(4); that the murder was committed while defendant was engaged in the commission of rape and/or kidnapping, *id.*(e)(5); and that the murder was especially heinous, atrocious, or cruel, *id.*(e)(9). The jury found all four aggravating circumstances and found that the felonies of which defendant had been previously convicted were assault with intent to kill, robbery, aggravated assault and battery, housebreaking, and grand larceny. We hold that the evidence fully supports the aggravating circumstances. Our review of the record reveals nothing suggesting that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We therefore begin our final statutory duty of proportionality review.

The trial court submitted two statutory mitigating circumstances: that the murder was committed while defendant was under the influence of mental or emotional disturbance and that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired at the time of the offense. N.C.G.S. § 15A-2000(f)(2); (6). One or more jurors found the former to exist, but none found the latter. The trial court also submitted eleven nonstatutory mitigating circumstances, of which one or more jurors found two to exist: that defendant was and is emotionally neglected and has chronic feelings of deprivation, inadequacy, and anger, and he is uncomfortable and frightened by these feelings; and that defendant has a history of substance abuse which began at a very early age as a consequence of a lack of supervision and a lack of family structure. After weighing the aggravating and mitigating circumstances, the jury recommended a sentence of death.

This crime is distinguished by the brutal attack on the victim, which consisted of attempted strangulation and multiple stab wounds to her face and neck; the rape of the victim, which occurred prior to her death; and the kidnapping of the victim. Defendant was found guilty of murder based on both the felony murder rule and on malice, premeditation, and deliberation. "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. The jury found all submitted aggravating circumstances and found only three of thirteen mitigating circumstances submitted. It is also significant that the jury found that defendant is a recidivist whose prior convictions were for violent felonies.

We decline to engage in a detailed comparison of this case to the seven cases in which this Court has found the death penalty disproportionate. *See 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). This case is sufficiently distinguishable from those cases based on the jury's finding here of four aggravating circumstances, including that of the murder being committed during the commission of a rape and kidnapping. We have never found a death sentence disproportionate where the victim was sexually assaulted. *Lee*, 335 N.C. at 294, 439 S.E.2d at 574.

Our review of the pool reveals no case in which the jury found the four aggravating circumstances found here. However, there are fourteen capitally tried cases wherein the jury found three of these: that the defendant had a prior conviction of a violent felony; that the murder was committed while the defendant was engaged in a homicide, rape, robbery, or kidnapping; and that the murder was especially heinous, atrocious, or cruel. Of those fourteen cases, five defendants are to receive either a new trial or a new sentencing proceeding, which eliminates those cases from the pool. *See State v. Bacon*, 337 N.C. 66, 106-07, 446 S.E.2d 542, 563-64 (1994), *cert. denied*, —- U.S. —-, 130 L. Ed. 2d 1083 (1995). Of the remaining nine, five defendants received life sentences; the other four received death sentences. Based on these statistics, we cannot say that juries consistently have returned life sentences in cases similar to defendant's. Further, in four of those cases wherein the defendant received a life sentence,

the defendant had not raped the victim, unlike here. As we have noted, juries tend to return death sentences in murder cases involving a sexual assault on the victim. *Lee*, 335 N.C. at 294, 439 S.E.2d at 574. In the fifth, *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980), the defendant was not convicted of first-degree kidnapping, unlike here.

We are not limited to matching the aggravating and mitigating circumstances of this case with cases in the pool. We instead must examine "the individual defendant and the nature of the crime or crimes which he has committed," *State v. Pinch*, 306 N.C. 1, 36, 292 S.E.2d 203, 229, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), *overruled in part on other grounds 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 conjunction with comparable cases. Several such comparable cases exist in which the death sentence was affirmed. Among them are: *State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412 (1994), *cert. denied*, — U.S. —-, 131 L. Ed. 2d 738 (1995); *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879, *cert. denied*, — U.S. —-, 130 L. Ed. 2d 429 (1994); and *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518, *cert. denied*, — U.S. —-, 129 L. Ed. 2d 883 (1994).

In *Moseley* the defendant savagely beat the victim with a blunt-force object, cut her with a sharp object, sexually assaulted her with a blunt instrument, raped her, and manually and ligaturally strangled her. *Moseley*, 338 N.C. at 15, 449 S.E.2d at 421. The jury found defendant guilty of first-degree murder based on premeditation and deliberation, first-degree sexual assault, and first-degree rape. It found the following six aggravating circumstances: that the defendant had been previously convicted of a felony involving the use or threat of violence to the person; that the defendant had been previously convicted of the felony of attempted second-degree sexual offense; that the murder was committed while the defendant was engaged in the commission of a first-degree sexual offense; that the murder was committed while the defendant was engaged in the commission of a first-degree rape; that the murder was especially heinous, atrocious, or cruel; and that the murder was part of a course of conduct in which the defendant engaged in the commission of other crimes of violence against another person or persons. *Id.* at 58-59, 449 S.E.2d at 446-47. The jury found two of the eight submitted nonstatutory mitigating circumstances: that the defendant was considerate and loving to his mother, father, and sister; and that the defendant was cooperative

with law enforcement officers in not resisting arrest and in voluntarily assisting in the search of his bedroom at his parents' house. *Id.* at 62, 449 S.E.2d at 447-49.

In *Sexton* the defendant was convicted of first-degree murder based on both the felony murder rule and premeditation and deliberation. The defendant raped the victim and then strangled her. The victim may not have died immediately. Her body was badly bruised. *Sexton*, 336 N.C. at 337-38, 444 S.E.2d at 888. The jury found three aggravating circumstances, all of which also were found in this case: that the murder was committed while defendant was engaged in the commission of a first-degree rape, first-degree sexual offense, first-degree kidnapping, and common-law robbery; that the murder was especially heinous, atrocious, or cruel; and that the murder was committed for the purpose of avoiding or preventing a lawful arrest. The jury found eighteen of the twenty-seven nonstatutory mitigating circumstances submitted. *Id.* at 377-78, 444 S.E.2d at 911.

In *Rose* the victim died from both sharp and blunt-force trauma to the head and from manual strangulation. The defendant inflicted several incised wounds on the victim's body prior to her death. The defendant burned the body after death. *Rose*, 335 N.C. at 315-16, 439 S.E.2d at 525. The jury found two aggravating circumstances: that the defendant had been previously convicted of a felony involving the use or threat of violence to the person and that the murder was especially heinous, atrocious, or cruel. The jury found the nine nonstatutory mitigating circumstances but none of the statutory mitigating circumstances that were submitted. *Id.* at 349, 439 S.E.2d at 544.

As in *Moseley*, *Sexton*, and *Rose*, there was evidence here that Price could have lived for a period of time after the initial attack by defendant. Price, like the victims in those cases, was raped. Unlike the victims in *Moseley* and *Rose*, Price also was kidnapped by defendant. The jury here found the aggravating circumstances found in those cases, including that the murder was especially heinous, atrocious, or cruel and that defendant had prior convictions of violent felonies. We note that the aggravating circumstances that the murder was especially heinous, atrocious, or cruel and that the defendant had been previously convicted of a felony involving the use of violence are present in many death-affirmed cases. *Moseley*, 338 N.C. at 64, 449 S.E.2d at 449. Finally, defendant's jury found fewer mitigating circumstances than did those in *Sexton* and *Rose*.

Based on these cases, as well as our review of the pool, we conclude as a matter of law that the death sentence in this case was not excessive or disproportionate, considering both the crime and the defendant. We hold that defendant received a fair trial and sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. PAUL EUGENE LYONS

No. 379A94

(Filed 28 July 1995)

1. Homicide § 244 (NCI4th)— shooting of police officer—first-degree murder—premeditation and deliberation—intent to kill—sufficiency of evidence

The State's evidence was sufficient to show that defendant acted with a specific intent to kill after premeditation and deliberation so as to support his conviction of first-degree murder of a police officer where it tended to show that it was quiet as the victim and other officers approached defendant's apartment to execute a search warrant; all the officers were in full uniform; an officer announced the presence of the police by yelling "Police search" several times; after several strikes on the door with a battering ram, the victim was able to get the door of the apartment open, and another officer took two full strides inside the apartment before defendant shot at that officer but instead hit the victim; after shooting the victim, defendant ran to his back door, encountered another officer, and said he was tired of the police trying to "bust my house"; there were three misfired rounds in defendant's pistol; and the location of these rounds indicated that defendant had pulled the trigger three times before he was able to fire the shot which killed the victim.

Am Jur 2d, Homicide §§ 45-52, 104, 263-269, 439.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

2. Homicide §§ 476, 489 (NCI4th)— inference of intent to kill, premeditation and deliberation—instructions—no mandatory presumption

The trial court's instructions that an intent to kill and premeditation and deliberation may be inferred from certain relevant circumstances did not establish an unconstitutional mandatory presumption because they failed to include the phrase, "you are not compelled to do so," since there was nothing in the instructions which suggested that the jury *must* infer an intent to kill or premeditation and deliberation.

Am Jur 2d, Homicide §§ 52, 263-269, 439.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

3. Homicide § 609 (NCI4th)— self-defense—absence of reasonable belief—instruction not required

A defendant who shot a police officer executing a search warrant for defendant's apartment when officers used a battering ram to open the door to the apartment and an officer stepped inside was not entitled to an instruction on perfect or imperfect self-defense in his first-degree murder trial because the evidence did not show that he had formed a reasonable belief that it was necessary to kill the person inside his doorway in order to save himself from death or great bodily harm where the evidence tended to show that defendant shot at the officer inside the apartment but instead hit the victim; defendant's evidence tended to show that when he heard the blows on his door, he was scared and thought he was being robbed again; and defendant testified that he intended only to shoot a warning shot, that he didn't intend to shoot anyone, and that his intent was to shoot at the top of the door. Defendant's self-serving statement that he was "scared" is not evidence that defendant formed the belief that it was necessary to kill in order to save himself.

Am Jur 2d, Homicide § 153.

Duty of trial court to instruct on self-defense, in absence of request by accused. 56 ALR2d 1170.

Homicide: modern status of rules as to burden and quantum of proof to show self-defense. 43 ALR3d 221.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary—modern cases. 73 ALR4th 993.

4. Homicide § 566 (NCI4th)— first-degree murder—voluntary manslaughter instruction not required—any error cured by verdict

Defendant was not entitled to an instruction on voluntary manslaughter premised upon imperfect self-defense in this first-degree murder trial where defendant was not entitled to an instruction on imperfect self-defense because the evidence did not indicate that defendant formed a belief that it was necessary to kill the deceased in order to protect himself from death or great bodily harm. Assuming that defendant acted under adequate provocation when he fired his pistol, the trial court's refusal to instruct on voluntary manslaughter was harmless error where the trial court properly instructed on first-degree and second-degree murder, and the jury found defendant guilty of first-degree murder.

Am Jur 2d, Homicide §§ 45-52, 70, 525-534.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

5. Homicide § 709 (NCI4th)— failure to instruct on involuntary manslaughter—error cured by verdict

Even if defendant was entitled to an instruction on involuntary manslaughter based on evidence that he recklessly discharged his .38-caliber revolver, any error in the trial court's failure to instruct on involuntary manslaughter is harmless where the jury was properly instructed on first-degree and second-degree murder and thereafter returned a verdict of guilty of first-degree murder based on premeditation and deliberation.

Am Jur 2d, Homicide § 70.

Inconsistency of criminal verdict as between different counts of indictment or information. 18 ALR3d 259.

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

6. Homicide §§ 643, 647 (NCI4th)— imperfect defense of habitation—theory not recognized—instruction on defense of habitation not required

The theory of imperfect defense of habitation will not be recognized in this State, and the trial court in a capital trial thus did not deny defendant due process when it failed to instruct on voluntary manslaughter based upon imperfect defense of habitation. In any event, defendant, who shot a police officer attempting to execute a search warrant for defendant's apartment, was not entitled to *any* instruction on defense of habitation where defendant contended that, while he could or should have heard the police announce their presence, he did not believe the announcement because of past robberies and unreasonably believed the policemen were would-be robbers, since defendant's belief in the need to prevent a forcible entry was thus not reasonable.

Am Jur 2d, Homicide §§ 174-179, 291, 519.

Homicide: Extent of premises which may be defended without retreat under right of self-defense. 52 ALR2d 1458.

7. Appeal and Error § 504 (NCI4th)— instruction requested by defendant—invited error

Where defendant made a formal, written request for an instruction on transferred intent in this capital trial, defendant cannot complain on appeal that the evidence did not support such an instruction. N.C.G.S. § 15A-1443(c).

Am Jur 2d, Homicide §§ 482-497.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

8. Jury §§ 70, 103 (NCI4th)— capital trial—denial of jury questionnaire and sequestered voir dire—no abuse of discretion

The trial court in a capital trial did not abuse its discretion or violate defendant's due process rights by denying defendant's motions for the use of a jury questionnaire and for individual, sequestered jury *voir dire*, since it is entirely speculative that a

prospective juror would only be honest and candid through sequestered questioning and in response to a questionnaire, and defendant made no showing that he was prohibited from asking prospective jurors, individually, the same questions set out in his questionnaire.

Am Jur 2d, Jury §§ 189-210.

Right of counsel in criminal case personally to conduct the voir dire examination of prospective jurors. 73 ALR2d 1187.

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors. 86 ALR3d 571.

Effect of accused's federal constitutional rights on scope of voir dire examination of prospective jurors—Supreme Court cases. 114 L. Ed. 2d 763.

9. Evidence and Witnesses § 357 (NCI4th)— murder of officer—purchase of marijuana from defendant—admissibility to show motive—balancing test satisfied

In a prosecution of defendant for first-degree murder of a law officer who was executing a search warrant for defendant's apartment, testimony by a witness that he had purchased marijuana from defendant the day before the shooting was properly admitted for the limited purpose of showing that defendant had a motive for the shooting where the State's theory of the case was that defendant, as a known drug dealer, had a motive to kill a law officer; the State's evidence tended to show that officers yelled "Police, search warrant" several times; the officers were in uniform, the front door was open, and one officer had stepped inside the apartment when defendant fired his pistol; and a civilian witness heard defendant tell an officer at the back door that he was tired of officers "trying to bust my house." Further, the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rules 404(b), 403.

Am Jur 2d, Evidence §§ 327-330; Homicide § 108.

10. Constitutional Law § 252 (NCI4th)— State's failure to disclose evidence—evidence not material—no Brady violation

In a prosecution for first-degree murder of a police officer who was executing a search warrant for defendant's apartment

wherein defendant contended that he and others in his apartment did not hear the police yell, "Police, search warrant," because they were listening to a compact disc entitled "Blacktronic Science," the State did not violate *Brady v. Maryland*, 373 U.S. 83, by failing to disclose to defendant that the "Blacktronic Science" compact disc was discovered in defendant's stereo system because this evidence would not have affected the outcome of the trial and was not material where the jury heard testimony from defendant and two others that they were listening to the "Blacktronic Science" compact disc at the time police entered defendant's apartment and that the music was loud, and a visitor in another apartment testified that defendant's music was very loud that night and he did not hear the police announce their identification.

Am Jur 2d, Evidence §§ 304, 307-312.

11. Searches and Seizures § 134 (NCI4th)— forced entry into defendant's apartment—lawfulness—evidence properly seized

The trial court's findings of fact supported its conclusion that an entry by force into defendant's apartment was lawful under N.C.G.S. § 15A-251(2) on the ground that officers had probable cause to believe that the giving of further notice would endanger the lives of the officers or of others where the trial court made findings supported by evidence that officers believed a firearm was inside defendant's apartment and that defendant would not cooperate and was mean; the area outside defendant's door was so small that even though officers felt the situation was dangerous, their weapons were not drawn out of fear of harming other officers and bystanders; officers heard two arguing voices inside the apartment; and officers announced their identity by yelling "Police search" several times. The fact that officers did announce their identity and purpose does not mean that entry by force cannot be justified under N.C.G.S. § 15A-251(2) without a showing that officers reasonably believed their admittance was being denied or unreasonably delayed. Therefore, the trial court did not err by denying defendant's motion to suppress evidence seized from defendant's apartment.

Am Jur 2d, Searches and Seizures §§ 165-170, 204-211.

Search warrant: sufficiency of description of apartment or room to be searched in multiple-occupancy structure. 11 ALR3d 1330.

Propriety of execution of search warrant at nighttime. 26 ALR3d 951.

What constitutes compliance with knock-and-announce rule in search of private premises—state cases. 70 ALR3d 217.

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 Rousseau, J., at the 1 November 1993 Criminal Session of Superior Court, Forsyth County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 13 April 1995.

Michael F. Easley, Attorney General, by John G. Barnwell, Assistant Attorney General, for the State.

Thomas A. Fagerli for defendant-appellant.

LAKE, Justice.

Defendant was tried capitally for the first-degree murder of Police Officer Bobby F. Beane. The jury returned a verdict of guilty of first-degree murder, but was unable to reach a unanimous sentencing recommendation. Accordingly, the trial court imposed a mandatory sentence of life imprisonment pursuant to N.C.G.S. § 15A-2000(b). We find no error and, therefore, uphold defendant's first-degree murder conviction and sentence.

At trial, evidence for the State tended to show that Senior Police Officer Bobby F. Beane of the Winston-Salem Police Department was fatally shot on 23 April 1993 while executing a search warrant for the defendant's apartment. The search warrant was issued for Apartment 540-C, Kennerly Street, based upon information given by Recio Harris to Police Officers S.A. Logan and Rick Moser, both members of the East Side Street Narcotics Intervention Unit. Harris had been arrested and charged with carrying a concealed weapon and possession of marijuana. In exchange for having the charges against him dismissed, Harris told officers he had purchased marijuana from the defendant several times. He agreed to conduct an undercover buy from defendant for the officers on 22 April 1993. Officers Logan and Moser searched Harris just prior to his entering the defendant's apartment to ensure that any illegal substances came from the defendant, and gave him $30 to buy the marijuana. Harris bought the marijuana from defendant and reported back to the officers after the buy was com-

plete. He told the officers that defendant had between three and five pounds of marijuana in his apartment, had a nasty attitude and was a "mean mother f——-." Harris also felt there were firearms in the apartment. A toxicology test confirmed the substance Harris purchased from defendant was marijuana. Based upon this information, the search warrant for defendant's apartment was issued.

Officer Logan testified that at approximately 10:00 p.m. on 23 April 1993, a meeting was held in the roll call room of the Public Safety Center to discuss the execution of the search warrant. In addition to Officer Logan, Sergeant Steve Hairston, Senior Police Officer Bobby Beane, Senior Police Officer Gloria Johnson, Officer P.B. Thomas, Officer Carl McClaney, Officer L.W. Lemert, Officer Rozelle Barnes, Officer Joe Vanhook, and Officer Lela Burke were in attendance. Using a blackboard, a diagram of the layout of defendant's apartment complex was drawn to illustrate each officer's individual duties, and to show the narrow staircase the officers would have to climb to reach defendant's apartment. There was a small walkway just outside defendant's door. Because of the information supplied by Harris and the tight area in which the officers had to work, officer safety was considered to be at risk. All the officers on the team were in uniform that night and, according to Officer Logan, their "badge, name plate, [and] patches were all on our uniform." Officer Beane was selected to carry the battering ram "because Bobby was the most experienced in executing searches, and also the largest officer among our group." After the twenty-minute meeting, the team rode in the police van to Kennerly Street.

Once at the scene, Officers Lemert, Barnes and Thomas took their assigned positions at the rear of the apartment building, while Officers Beane, Johnson, Vanhook, McClaney and Logan entered the front of the building. Officer Logan led the team up the narrow stairwell with Officer Beane directly behind him. Officer Logan remembered that as the team went up the stairwell, he heard no noise and that it was very quiet. Once he reached the top of the stairs, Officer Logan pulled open the screen door to Apartment C, and it made a popping noise. Concerned he had prematurely alerted the defendant to the presence of the officers, Logan pressed his ear to the door. He heard no television or music, but he did distinctly hear two voices.

When the officers were in position, Logan stepped away from the door and yelled, "Police search," and Officer Beane hit the door with the battering ram. The door did not come open, so again Logan yelled,

"Police search," and Beane swung the battering ram. The other officers on the team were also yelling, "Police search." After the battering ram hit the door two more times, the door finally came open, and Logan entered the front room of the apartment ahead of Officer Beane. Officer Logan's service revolver was not drawn, as the area outside the apartment was very small and Logan was afraid he would be hit with the battering ram and accidentally discharge his gun. Officer Beane had both hands on the battering ram so his revolver remained in his holster as well.

Officer Logan testified he took two strides into the apartment. The door was fully open. He saw one of the three males inside move directly in front of him and then he "heard a gunshot. Felt a bullet go so close to this side of my head that the wind of it moved my hair. I smelled the smoke." Officer Logan hit the floor and dropped the search warrant he was carrying in his hand; he backed out of the apartment on his hands and knees. The search warrant was later found two feet and eight inches inside the apartment. Once outside the apartment, Officer Logan realized Officer Beane had been shot once in the head.

Senior Police Officer G.D. Johnson testified she was the supervisor for the search of defendant's apartment that night. According to Officer Johnson, it was very quiet as the search team climbed up the stairwell. Officer Johnson testified further that she heard Officer Logan yell, "Police officers, search warrant," and that each time Officer Beane swung the battering ram and the door did not come open, she also yelled, "Police, search warrant, open up." After the door came open, Officer Johnson remembered hearing a gunshot. She saw Officer Beane fall forward and then back; she was able to see he was bleeding from his left ear and forehead. Officer Johnson testified that at the time she heard the gunshot, Officer Logan was inside the apartment and she could no longer see him. Because the stairwell was so narrow, when Officer Logan backed out of the apartment, it forced the other officers on the stairwell to turn around as well. Once at the bottom of the stairs, Officer Johnson stated she took cover and watched the defendant's apartment door. One person from the apartment came outside and surrendered, and then two more people came out and surrendered.

Officer L.W. Lemert, at his position at the rear of the building, testified it was very quiet. Officer Lemert was able to hear a male voice shout, "Police, search warrant." He heard Officer Johnson sound a

radio alert, "Officer down," and Officer Lemert, confused about what had happened, ran around the side of the building and learned Officer Beane was hurt. Officer Lemert returned to the defendant's back door and a black male opened the back door to the apartment. When Officer Lemert pointed his service revolver at him, the male slammed the door.

Further testimony for the State came from Darryl Myers and Chris White who witnessed the search team pull up in a white van and surround the apartment building. Both Myers and White testified they had no difficulty in recognizing the team as police officers, and each heard officers yelling, "Police officer," several times. White testified he saw a man open the back door to defendant's apartment and heard him say to an officer, "I'm tired of ya'll trying to bust my house. Get the f— away from my door."

Police Identification Technician J.A. Hassell collected evidence from defendant's apartment that night. He recovered a .38-caliber Smith and Wesson revolver from the kitchen counter, and his examination of the revolver revealed that six rounds of ammunition were inside the gun. Of these six rounds, two were live rounds; three were misfired rounds; and one was a spent casing. The misfired rounds were located counter-clockwise from the empty cartridge case of the bullet that had been successfully fired. According to Hassell, a misfired round means that the "firing pin has struck the back of the bullet, but the projectile has not left the shell case." In other words, the trigger was pulled but these three rounds, for some reason, did not fire.

Dr. Gregory Davis, a forensic pathologist, performed an autopsy on Officer Beane. He testified that a medium caliber bullet entered Officer Beane's head, just to the right of the center of the forehead. The bullet traveled almost completely to the rear of Officer Beane's skull before it stopped. Special Agent Eugene Bishop, with the North Carolina State Bureau of Investigation, testified that the bullet recovered from Officer Beane's brain was fired from the .38-caliber revolver seized from defendant's apartment.

Among the twenty-seven items seized from the defendant's apartment that night were marijuana, several items containing crack cocaine, heroin and marijuana residue, rolling papers, a crack pot, a set of measuring spoons, a set of silver envelope scales, a small scalpel-type razor, a 12-gauge shotgun, a .38-caliber Smith and Wesson revolver, and ammunition.

The defendant testified on his own behalf and presented evidence tending to show that he bought the .38-caliber revolver three days before the shooting because six people armed with guns had broken into his apartment and stolen a gun, jewelry, marijuana, and some money. Defendant testified that on the night of the shooting, his brother, James Lyons, and his friend, Arthur Parks, were watching the Chicago Bulls and the Charlotte Hornets basketball game on television with defendant. After the game, defendant put a compact disc in his stereo so Parks could hear a song entitled, "Blacktronic Science." Defendant testified he turned the television down and turned the stereo up "very loud, because I was showing off." Defendant had his .38-caliber revolver in his front left pocket. Defendant testified that suddenly he heard a bang on his front door. He stated he did not hear anyone yelling, "Police, search warrant." Defendant turned the stereo down a little, and at the second bang he got up and stood face to face with the door. Defendant testified he was afraid and that he thought someone was breaking into his apartment again. Defendant decided to fire a warning shot, so he pulled his pistol and after the third bang he pulled the trigger one time. According to the defendant, the door was still closed when he fired, and he did not see Officer Logan. After he shot the pistol, defendant ran to his back door and saw an officer outside so he closed the door. According to defendant, it was only when he surrendered a few minutes later and walked outside the apartment that he realized he had shot a police officer. Defendant testified that as he surrendered to the police, he remarked, "I didn't know you all were policemen."

Defendant testified he had not shot the Smith and Wesson revolver before 23 April 1993. Defendant further testified that he was in Desert Storm, that currently he was unemployed and lived off his savings and by loaning money to people, and that he also made money from selling marijuana.

Arthur Parks also testified for the defense that he went to the defendant's apartment to listen to a compact disc entitled, "Blacktronic Science." As they were listening to the music, turned up very loud, Parks testified he heard what he thought was a knock at the door. He noticed the door "looked like it was breathing." Parks never heard anyone yell, "Police, search warrant." Parks could not tell if the door was open or shut when defendant fired his pistol.

Defendant's brother, James Lyons, testified he was at the defendant's apartment the night of the shooting. He testified that he, defend-

ant, and Parks watched the Hornets-Bulls basketball game and then listened to the "Blacktronic Science" compact disc. About halfway through the song, which he testified was turned up "pretty loud," he heard a kick at the door. James Lyons testified that "[a]t the same time as he [defendant] shot the gun, the door came open" and that he never heard anyone yell, "Police officer" or "Search warrant."

Defendant brings forward eight assignments of error.

I.

[1] In his first assignment of error, defendant contends the trial court erred in denying defendant's motion to dismiss the charge of first-degree murder based on insufficiency of the evidence.

Defendant argues that the evidence was insufficient to support a finding of premeditation, deliberation, and the specific intent to kill. Defendant asserts that because only a matter of seconds passed from the announcement of the police search and the defendant shooting his gun, it is impossible as a matter of law to conclude that defendant had enough time to premeditate. In arguing that the evidence showing deliberation was deficient, defendant contends all the evidence shows that he acted under the strong provocation of fear for himself and his property as a result of the "surprise attack by the people outside his door." Defendant contends that nowhere in the record is there substantial evidence that defendant had formulated the requisite specific intent to kill Officer Logan, but instead shot Officer Beane. Defendant concedes that there was sufficient evidence of malice arising from the use of a deadly weapon.

First-degree murder is the unlawful killing of a human being with malice, premeditation, and deliberation. N.C.G.S. § 14-17 (1993); *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). "Premeditation" means that defendant formed the specific intent to kill for a period of time, however short, before the killing. *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981). "Deliberation means that the defendant formed an intent to kill and carried out that intent in a cool state of blood, in furtherance of a fixed design for revenge or other unlawful purpose and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation." *State v. Solomon*, 340 N.C. 212, 222, 456 S.E.2d 778, 785 (1995); *see State v. Carter*, 335 N.C. 422, 429, 440 S.E.2d 268, 272 (1994).

We have set forth the law governing the review of challenges to the sufficiency of the evidence many times. In conducting such a review, we are bound to view the evidence in the light most favorable to the State and accord the State the benefit of every reasonable inference. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. *Id.* "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). In cases where the evidence presented is circumstantial, the court must determine whether, from the circumstances, a reasonable inference of defendant's guilt may be drawn. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then " 'it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' " *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)). Both competent and incompetent evidence must be considered. Additionally, except in those instances in which it is favorable to the State, defendant's evidence should be disregarded. *State v. Baker*, 338 N.C. 526, 558-59, 451 S.E.2d 574, 593 (1994).

Resolving all discrepancies in the evidence in favor of the State, the evidence in the present case tends to show that it was quiet as the officers approached defendant's apartment. The officers were all in full uniform and easily recognizable. Officer S.A. Logan announced the presence of the police by yelling, "Police search," several times. After several strikes with the battering ram, Officer Beane was able to get the door of the apartment open, and Officer Logan took two full strides inside the apartment before defendant shot at Officer Logan but instead hit Officer Beane. After shooting Officer Beane, defendant ran to his back door, encountered Officer L.W. Lemert, and said, "I'm tired of ya'll trying to bust my house. Get the f— away from my door." In the .38-caliber revolver, from which the fatal round was fired by defendant, there were three "misfired rounds" located counter-clockwise from the empty cartridge case of the bullet that had been successfully fired. Because Smith and Wesson .38-caliber revolvers rotate counter-clockwise, it is reasonable to conclude that defendant persistently and deliberately pulled the trigger four times, experiencing three misfires over that period of time before he was able to fire

the shot which killed Officer Beane. Officer Beane was shot just to the right of the center of his forehead.

Viewing this evidence in the light most favorable to the State, the evidence supports a reasonable inference that defendant could hear the police announcements; that defendant was well aware of what was going on and was tired of the police trying to "bust my house"; that Officer Logan was a few feet inside the apartment when defendant fired the gun; and that defendant aimed at Officer Logan and pulled the trigger a total of four times. Thus, we conclude the evidence is sufficient to show defendant acted with the specific intent to kill after premeditation and deliberation. This assignment of error is overruled.

II.

[2] By his second assignment of error, defendant argues that the trial court instructed the jury regarding the proof required for specific intent to kill, premeditation and deliberation in such a way that a reasonable juror could have thought there existed a mandatory presumption as to these elements of first-degree murder. According to defendant, this operated to relieve the State of its burden to prove each element of first-degree murder beyond a reasonable doubt.

The trial court instructed the jury in pertinent part as follows:

> If the State of North Carolina proves beyond a reasonable doubt that the defendant intended to kill Logan and killed Beane with a deadly weapon, you may infer, first, that the killing was unlawful; and, second, that it was done with malice. But *you're not compelled to do so.* You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.
>
> . . . .
>
> . . . Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proven by circumstances from which it *may be inferred.* An intent to kill *may be inferred* from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.
>
> . . . .

> Now, neither premeditation or deliberation are usually susceptible of direct proof. They *may be proved* from circumstances which *may be inferred* such as the conduct of the defendant before, during, and after the killing; the brutal or vicious circumstances of the killing; the manner in which or means by which the killing was done.

(Emphasis added.)

Defendant notes that with regard to the malice instruction, the trial court correctly included the phrase, "you are not compelled to do so." Defendant labels this a "curative phrase" and argues the phrase saved the malice portion of the jury instructions from amounting to an unconstitutional mandatory presumption. However, defendant argues that the trial court erroneously omitted this same curative phrase, "you are not compelled to do so," although it was requested, from those portions of the instructions regarding intent to kill, premeditation and deliberation. Defendant contends these omissions could have caused a reasonable juror to employ a *de facto* unconstitutional mandatory presumption as to these elements provided the State had proven the necessary predicate facts. This, according to defendant, directly resulted in an unconstitutional shifting of the burden of persuasion to defendant to disprove the elements of intent to kill, premeditation and deliberation.

The trial court instructed the jury that intent to kill, premeditation and deliberation *may* be inferred from certain relevant circumstances. These instructions were in accord with the North Carolina Pattern Jury Instructions. *See* N.C.P.I.—Crim. 206.13 (1989). We fail to find anything in the instructions which remotely suggests that the jury *must* infer intent to kill, premeditation or deliberation, thereby impermissibly establishing an unconstitutional mandatory presumption. Having reviewed the charge in its entirety, we conclude the trial court clearly and correctly instructed the jury that the State bore the burden of proving each of the elements in question. *State v. Skipper*, 337 N.C. 1, 33, 446 S.E.2d 252, 269 (1994) (involving premeditation and deliberation), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995); *State v. Davis*, 321 N.C. 52, 59, 361 S.E.2d 724, 728 (1987). A reasonable juror could not have interpreted the instructions as given to require a mandatory presumption on the first-degree murder elements of intent to kill, premeditation or deliberation. This assignment of error is overruled.

III.

In his third assignment of error, defendant argues that the trial court erred by refusing to instruct the jury on the theories of perfect and imperfect self-defense, voluntary and involuntary manslaughter, and imperfect defense of habitation.

A.

[3] Defendant first contends he stood entitled to instructions on perfect and imperfect self-defense since the evidence warrants such instructions and since self-defense should be given when a situation evolves from one of defense of habitation against an intruder seeking entry to one in which the intruder gains access to the home, thereby converting the case to one of self-defense. Based on the facts of this case, we cannot agree.

The elements which constitute perfect self-defense are:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. McAvoy, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992) (*quoting State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)); *accord State v. Maynor*, 331 N.C. 695, 699, 417 S.E.2d 453, 455 (1992). Perfect self-defense excuses a defendant altogether for a killing if all four elements above exist at the time of the killing. Imperfect self-defense renders a defendant guilty of at least voluntary manslaughter if the first two elements above exist at the time of the killing but the defendant, without murderous intent, either was the aggressor in bringing on the affray or used excessive force. *McAvoy*, 331 N.C. at 596, 417 S.E.2d at 497. This Court has set the following predicate:

> [B]efore the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

State v. Bush, 307 N.C. 152, 160-61, 297 S.E.2d 563, 569 (1982). If there is no evidence from which a jury could reasonably find that defendant, in fact, believed it to be necessary to kill his adversary to protect himself from death or great bodily harm, defendant is not entitled to have the jury instructed on self-defense. *Id.* at 161, 297 S.E.2d at 569.

We hold that the evidence, taken in the light most favorable to the defendant, does not tend to show that the defendant had formed a reasonable belief that it was necessary to kill the person inside his doorway in order to save himself from death or great bodily harm; and therefore, he was not entitled to an instruction on self-defense. The defendant's evidence, considered in the light most favorable to him, tended to show that when he heard the blows on his door, he was scared and thought he was being robbed again. Defendant testified he only pulled the trigger of his .38-caliber revolver "to shoot a warning shot hoping these people would run." Defendant also testified that he "didn't intend to shoot anybody" and that his "intent was to shoot at the top of the door." Thus, from defendant's own testimony regarding his thinking at the critical time, it is clear he meant to scare or warn and did not intend to shoot anyone. There is absolutely no evidence in the record that defendant had formed a belief that it was necessary to kill in order to save himself from death or great bodily harm. *See State v. Reid*, 335 N.C. 647, 671, 440 S.E.2d 776, 789 (1994) (the first requirement of self-defense, that defendant believed it necessary to kill the deceased, is not present where defendant contended he never aimed a gun at anyone and shot only at the floor). Further, defendant's self-serving statement that he was "scared" is not evidence that defendant formed a belief that it was necessary to kill in order to save himself. *See Bush*, 307 N.C. at 159-160, 297 S.E.2d at 568 (defendant's testimony that he was "afraid" and "scared" only indicates a vague and unspecified fear or nervousness and is not evidence that defendant subjectively believed it was necessary to kill in order to protect himself from death or great bodily harm). Because no

evidence demonstrates or indicates defendant believed it necessary to kill to protect himself from death or great bodily harm, defendant was not entitled to an instruction on either perfect or imperfect self-defense. *State v. Norman*, 324 N.C. 253, 260, 378 S.E.2d 8, 12 (1989).

B.

[4] Defendant next contends he was entitled to instructions on the lesser-included offenses of voluntary and involuntary manslaughter. Defendant argues an instruction on voluntary manslaughter was required because imperfect self-defense warrants an instruction on voluntary manslaughter; and, he acted under the adequate provocation that he mistakenly believed he was being robbed again. Defendant further argues he was entitled to an instruction on involuntary manslaughter based on substantial evidence that he recklessly discharged his .38-caliber revolver. We cannot subscribe to any of these arguments.

A trial judge is not required to instruct the jury on lesser-included offenses "when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees." *State v. Shaw*, 305 N.C. 327, 342, 289 S.E.2d 325, 333 (1982). "[V]oluntary manslaughter is an intentional killing without premeditation, deliberation or malice but done in the heat of passion suddenly aroused by adequate provocation or in the exercise of imperfect self-defense where excessive force under the circumstances was used or where the defendant is the aggressor." *State v. Wallace*, 309 N.C. 141, 149, 305 S.E.2d 548, 553 (1983). As pointed out above, the evidence in the present case does not tend to indicate that the defendant in fact formed a belief that it was necessary to kill the deceased, thereby entitling defendant to an instruction on imperfect self-defense. Thus, defendant was not entitled to a jury instruction on voluntary manslaughter premised upon imperfect self-defense.

Assuming without deciding that defendant did act under adequate provocation when he fired his pistol, the trial court's refusal to instruct on voluntary manslaughter was nevertheless harmless error. We held in *State v. Tidwell*, 323 N.C. 668, 374 S.E.2d 577 (1989), that a trial court does not commit prejudicial error in failing to give a voluntary manslaughter instruction when a jury rejects a verdict of guilty of second-degree murder and instead finds defendant guilty of first-degree murder. *Id.* at 674-75, 374 S.E.2d at 581. In *Tidwell*, we reasoned that when a jury does "not find that defendant was in the grip of sufficient passion to reduce the murder from first-degree to

second-degree, then ipso facto it would not have found sufficient passion to find the defendant guilty only of voluntary manslaughter." *Id.* at 675, 374 S.E.2d at 581; *accord State v. Judge*, 308 N.C. 658, 664-65, 303 S.E.2d 817, 821-22 (1983). In the instant case, the trial court properly instructed the jury on first-degree and second-degree murder. After deliberations, the jury returned with a verdict of guilty of first-degree murder. Since the jury rejected second-degree murder, it would also have rejected the lesser offense of voluntary manslaughter.

[5] Defendant's next contention that the trial court denied him due process of law in failing to instruct the jury on involuntary manslaughter is meritless. This Court recently held in *State v. Jones*, 339 N.C. 114, 451 S.E.2d 826 (1994), *reconsideration denied*, 339 N.C. 618, 453 S.E.2d 188, *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 873 (1995), 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. *Id.* at 148-49, 451 S.E.2d at 844; *accord State v. Hardison*, 326 N.C. 646, 392 S.E.2d 364 (1990); *State v. Young*, 324 N.C. 489, 380 S.E.2d 94 (1989). As stated above, the jury in the present case returned a verdict of guilty of first-degree murder based on premeditation and deliberation. In reaching this verdict, the jury found a specific intent to kill, formed after premeditation and deliberation. Such a finding necessarily precludes a finding that the killing was the result of an accident or an act of criminal negligence. Therefore, error, if any, in the trial court's failure to instruct the jury as to involuntary manslaughter was necessarily harmless.

C.

[6] Lastly, as to this third assignment of error, defendant contends the trial court denied him due process of law when it failed to instruct the jury on voluntary manslaughter based upon imperfect defense of habitation.

Defendant acknowledges that this Court has not recognized imperfect defense of habitation as a principle of justification or exculpation but urges that this case is the proper case for such recognition. Defendant argues that the facts of this case lead to the logical conclusion that defendant defended his home, although unreasonably, since the evidence can be interpreted as showing that the police

announced their presence such that defendant could or should have heard, but that defendant, nervous and on edge because of "past robberies," did not believe the announcement and unreasonably believed the police were would-be robbers. Defendant thus argues that the language "voluntary manslaughter is also committed if the defendant . . . unreasonably defended his home" should have been inserted into the pattern jury instruction on voluntary manslaughter and given to the jury.

Defense of habitation is available to a defendant when the defendant has acted "to *prevent* a forcible entry into the habitation under such circumstances . . . that the [defendant] reasonably apprehends death or great bodily harm to himself or other occupants at the hands of the assailant or believes that the assailant intends to commit a felony." *State v. McCombs*, 297 N.C. 151, 156-57, 253 S.E.2d 906, 910 (1979). Under such circumstances, the use of deadly force in defense of habitation is justified. *Id.* at 156, 253 S.E.2d at 910. It is true this Court has not recognized the theory of imperfect defense of habitation, and we decline the invitation to do so now.

The trial court did instruct the jury on the defense of habitation as follows:

> The defendant was justified in using deadly force only to prevent a forcible entry into his home and only if the defendant reasonably believed that such force was necessary to prevent the entry and the circumstances at the time were such that he, that is the defendant, reasonably feared death or great bodily harm to himself or other occupants of the home at the hands of the person seeking entry or he reasonably believed such person intended to commit a felony in the home. It is for you the jury to determine the reasonableness of the defendant's apprehension or belief from the circumstances as they appeared to him there that night on April 23, 1993.

This instruction informed the jury that the defendant was justified in using deadly force if he acted in defense of habitation and was more favorable to defendant than the instruction he requested. Further, while defendant styles his argument as requesting this Court to recognize imperfect defense of habitation, his actual argument does not speak to this proposition. Defendant's argument, premised upon the fact that the evidence could show that his belief in the need to defend his habitation was unreasonable, addresses instead the threshold requirement for defense of habitation. Defendant argues that while he

could or should have heard the police announce their presence, he unreasonably thought he was being fooled. This admission effectively negates defendant's entitlement to *any* instruction on defense of habitation from the outset since his belief in the need to prevent forcible entry was not reasonable.

Even so, we take this opportunity to reject the theory of imperfect defense of habitation. As a unanimous Court said through Justice Branch (later Chief Justice), "[O]ne of the most compelling justifications for the rules governing defense of habitation is the desire to afford protection to the occupants of a home under circumstances which might not allow them an opportunity to see their assailant or ascertain his purpose, other than to speculate from his attempt to gain entry by force that he poses a grave danger to them." *McCombs*, 297 N.C. at 157, 253 S.E.2d at 910. It is this Court's opinion that to subdivide or diffuse the defense of habitation into theories of perfect and imperfect defense of habitation is contrary to and would distract from the clear and basic justifications behind the defense.

This assignment of error is overruled.

IV.

[7] In defendant's fourth assignment of error, he argues that the trial court erred by instructing the jury upon the doctrine of transferred intent. Defendant argues there was no substantial evidence showing that defendant intended to kill Officer Logan but instead killed Officer Beane. Rather, on this point, defendant contends the evidence shows that after Officer Logan gained entry into defendant's apartment, the gun was pointed in Officer Logan's direction, but defendant never pulled the trigger when he had Officer Logan in his sights. Defendant asserts here that it is only logical to "assume" that if defendant had intended to kill Officer Logan, he would have done so. He contends that because he never intended to kill Officer Logan, the instruction concerning transferred intent was erroneous.

We note first that the defendant did not designate this particular argument as an assignment of error in the record. The rule of appellate procedure designating this Court's scope of review is clear. "Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C. R. App. P. 10(a). Thus, this argument is beyond our scope of review. Even if we were to overlook the procedural defect in this appeal pursuant to

Rule 2 of the Rules of Appellate Procedure, defendant would not be entitled to relief as the record reveals defendant himself made a formal, written request for an instruction regarding transferred intent. "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C.G.S. § 15A-1443(c) (1988). This assignment of error is overruled.

V.

[8] In his fifth assignment of error, defendant argues the trial court abused its discretion and violated defendant's right to due process by denying defendant's motions for the use of a jury questionnaire, and for individual, sequestered jury *voir dire*. Defendant points to the example of one juror, who had been passed by both sides as an acceptable juror, to bolster his argument. During a break in jury *voir dire* after her selection, this particular juror approached the bailiff and told him that her children had been molested and that she needed to pick them up after school as she had great fear of an unauthorized person picking the children up after school. She told the bailiff she had not wanted to divulge this in the courtroom earlier. The bailiff promptly brought this information to the attention of the trial court who, in an exercise of discretion, excused this juror from duty. Defendant argues this juror illustrates and makes his argument that the trial court's denial of the motion for a questionnaire, and individual, sequestered *voir dire* "destroyed any chance of the defendant learning about the people who would decide his guilt or innocence and ultimately if he would live or die."

The applicable statute provides: "In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." N.C.G.S. § 15A-1214(j) (1988). A trial court's ruling on whether to grant sequestration and individual *voir dire* of prospective jurors will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987).

In any instance, it is entirely speculative that a prospective juror would only be honest and candid through sequestered questioning and in response to a questionnaire. *See State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979). Defendant points to no question on his questionnaire which would have likely elicited this information, and defendant also makes no showing that he was in any way prohibited from asking prospective jurors, individually, the same questions set

out in his questionnaire. *See State v. Fisher*, 336 N.C. 684, 693-94, 445 S.E.2d 866, 871, *reconsideration denied*, 337 N.C. 697, 448 S.E.2d 535 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 665 (1995). The record reveals that jurors were asked by the trial court to inform the court if they had any undue hardships which would prevent them from serving on this case. The juror defendant sets out as an example correctly informed the bailiff, who correctly relayed the information to the trial court. Defendant's argument that there *may* have been other jurors with undetected biases or difficulties is entirely speculative. Defendant fails to show an abuse of discretion. This assignment of error is without merit.

VI.

[9] Next, defendant assigns error to the admission of testimony from Recio Harris. Harris testified for the State that he had purchased marijuana from the defendant the day before the shooting. This evidence was received for the limited purpose of showing that the defendant had a motive for the shooting. Immediately after Harris' testimony, the trial court gave an appropriate limiting instruction informing the jury it could only consider the testimony as evidence of motive. Defendant argues this testimony was impermissible character evidence under N.C.G.S. § 8C-1, Rule 404(b) and, additionally, that the evidence fails to survive the balancing test in N.C.G.S. § 8C-1, Rule 403.

Rule of Evidence 404(b) sets forth the general rule that evidence of "other crimes, wrongs, or acts" may not be admitted as character evidence in order to prove actions in conformity. Such evidence "may, however, be admissible for other purposes, such as proof of *motive*, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b) (1992) (emphasis added).

Defendant concedes at the outset that Rule 404(b) is a rule of inclusion. Indeed we have stated that Rule 404(b) is "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).

The State's theory of the case was that defendant, as a known drug dealer, had a motive to kill a law enforcement officer. The State's evidence tended to show that the officers yelled, "Police, search war-

rant," and that no officer heard music coming from inside the apartment. The officers were in uniform, the door was fully open, and Officer Logan was inside the apartment when defendant fired his pistol. A civilian witness testified he heard defendant say to Officer Lemert, who was stationed outside defendant's back door, "I'm tired of ya'll trying to bust my house. Get the f—- away from my door." In such a context, it was not an abuse of discretion for the trial court to allow evidence that the defendant was a drug dealer to show motive for the shooting. *See State v. Ligon*, 332 N.C. 224, 235, 420 S.E.2d 136, 142 (1992) (evidence that defendant dealt drugs properly admitted to show motive under Rule 404(b) where State contended the victim was shot when he tried to steal cocaine from defendant). The trial court correctly issued, upon defendant's request, a limiting instruction cautioning the jury that such evidence could only be considered as proof of motive and for no other purpose. The jury was additionally warned by the trial court that it could not "convict the defendant for murder solely on the basis of him having sold marijuana in the past." We conclude it was not error for the trial court to allow evidence that defendant sold drugs as proof of motive pursuant to Rule 404(b).

Further, we cannot say the probative value of the evidence was "substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (1992). Certainly, most evidence tends to prejudice the party against whom it is offered. However, to be excluded under Rule 403, the probative value of the evidence must not only be outweighed by the danger of unfair prejudice, it must be *substantially* outweighed. In light of the trial court's careful and thorough limiting instruction, we conclude that the probative value of Harris' testimony to show motive was not substantially outweighed by the dangers of unfair prejudice. This assignment of error is overruled.

VII.

[10] In his seventh assignment of error, defendant argues that the State withheld evidence exculpatory to the defendant in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), thereby entitling him to a new trial.

At trial, defendant produced evidence that he, Arthur Parks, and James Lyons did not hear the police yell, "Police, search warrant," because they were listening to a compact disc entitled "Blacktronic Science." The defendant's stereo system was seized as evidence by the police department. Pursuant to discovery, the stereo system was

available for inspection by defendant, but the defendant was unable to open the compact disc player. Defendant filed a motion pursuant to *Brady* for production by the State of any exculpatory evidence. After defendant rested his case, he learned that a few days prior to his resting, the stereo system was opened successfully by Detectives Young and Chapple. The "Blacktronic Science" compact disc was found inside. The trial court refused to allow defendant to reopen his case and introduce the "Blacktronic Science" compact disc as an exhibit. Defendant then moved for a mistrial based upon the failure of the State to produce this allegedly exculpatory evidence as required by *Brady*. This motion was also denied.

Brady provides "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218. The United States Supreme Court defined evidence as material only when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985). "In determining whether the suppression of certain information was violative of the defendant's right to due process, the focus should not be on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, but rather should be on the effect of the nondisclosure on the outcome of the trial." *State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983). The defendant has the burden of showing that the evidence not disclosed was material and affected the outcome of the trial. *Id.* In this instance, we find the defendant has failed to carry his burden of showing how the evidence was material, as defined, so as to trigger the State's duty to disclose under *Brady*.

The record reveals that the defendant offered evidence to the jury through the testimony of the defendant himself, Arthur Parks, and James Lyons, that they were listening to the "Blacktronic Science" compact disc just prior to the police entering the apartment. All three testified the music was loud. Defendant was able to present further testimony from Ernest Cameron, Jr. that at the time of the shooting, Cameron was visiting his friend downstairs in Apartment B. Cameron testified that defendant's music was very loud that night and that he did not hear the police yelling, "Police, search warrant." In light of the

evidence presented at trial, we find that the State did not violate *Brady* by not disclosing to the defendant that "Blacktronic Science" was found inside the stereo. The jury heard testimony from no less than four witnesses that defendant was playing music the night of the murder and that the music was very loud. The evidence material to the defendant's case was that loud music was playing which prevented defendant's hearing the police identification. The exact title of the compact disc is not material in and of itself; rather, it is simply corroborative of the material fact that music was playing. In view of the material evidence that was received and heard by the jury, there is no reasonable probability that had this evidence of the compact disc been disclosed, the outcome of the trial would have been different. Therefore, we conclude this evidence was not material and the State was under no duty, pursuant to *Brady*, to reveal to defendant that the "Blacktronic Science" compact disc was discovered in the stereo system. This assignment of error is overruled.

VIII.

[11] In his last assignment of error, defendant argues the trial court erred by denying defendant's motion to suppress evidence seized in the defendant's apartment.

Defendant filed a motion to suppress evidence seized from his apartment arguing that the police failed to announce their presence and purpose as required by N.C.G.S. § 15A-249, and that the entry by force was not justified as the police had no reasonable basis to believe their entry was being denied or unreasonably delayed as required by N.C.G.S. § 15A-251(1). A *voir dire* was conducted at trial, after which the trial court made the following detailed findings of fact: that on 22 April 1993, Officer Logan conducted an undercover buy at the premises of the defendant at 540-C Kennerly Street and that the items purchased were analyzed and found to be marijuana; that the police informant told Officer Logan that the defendant had between three and five pounds of marijuana in his apartment; that defendant had a nasty attitude; that defendant was a mean mother f——, and that the informant would not be surprised if defendant had a firearm in the apartment; that Officer Logan had executed between twenty and twenty-five search warrants; that at the planning session prior to the execution of the search warrant in this case, Officer Logan apprised the team of what he knew of the situation at defendant's apartment; that it was Officer Logan's opinion that defendant would not cooperate; that a firearm was inside the apart-

ment; that the team would have to go up a stairwell of about fifteen steps to reach defendant's apartment; that an adjoining apartment was close by; that it was a small area in which to operate; and that officer safety was at stake. The trial court further found as fact the following: that the officers approached the apartment silently, three to the back door and five to the front; that Officer Logan did not have his weapon drawn, though he thought the situation was dangerous, because he thought the gun might accidently discharge since he was too close to the battering ram and other officers; that Officer Logan pulled open the screen door to the apartment, and it made a popping sound; that Officer Logan was afraid the defendant had been alerted to their presence, so Officer Logan put his ear to the door and heard two arguing voices; that prior to that time, Officer Logan had not heard any radio or television, and the apartment and surrounding area seemed very quiet; that Officer Logan hollered, "Police search," and Officer Beane hit the door with the battering ram; that Officer Logan again hollered, "Police search," and Officer Beane again hit the door with the battering ram; that other officers were also hollering, "Police search"; that after some three or four strikes with the battering ram, the door came open; that once the door opened, Officer Logan took two steps inside the apartment, heard gunfire, began to back out of the apartment on his hands and knees, and then realized Officer Beane had been shot; and that Officer Logan left the search warrant inside the apartment. After making these findings of fact, the trial court then concluded as a matter of law that probable cause existed for Officer Logan to believe that by giving more warning, an officer's or some other person's life would be in danger; and therefore, the officers' entry by force into defendant's apartment at 540-C Kennerly Street was lawful. Accordingly, the trial court denied defendant's motion to suppress.

Defendant contends that the findings of fact are erroneous as they are not supported by the evidence. However, defendant fails entirely to point to a single, specific finding of fact which he alleges is unsupported by the evidence; rather, he makes a broadside attack on the findings of fact in general. Findings of fact are binding on appeal if supported by competent evidence. *State v. Howell*, 335 N.C. 457, 468, 439 S.E.2d 116, 122 (1994). Conclusions of law, however, are fully reviewable. *State v. Barber*, 335 N.C. 120, 436 S.E.2d 106 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 865 (1994). We conclude that the findings of fact were supported by competent evidence in the record. Thus, they are binding on this Court. Accordingly, the issue

facing this Court upon review is whether the trial court's findings of fact support the conclusions of law drawn therefrom.

The trial court concluded as a matter of law that probable cause existed for Officer Logan to believe that by giving more warning, an officer's or some other person's life would be in danger; and therefore, the officers' entry by force into defendant's apartment at 540-C Kennerly Street was lawful. Under N.C.G.S. § 15A-251, a police officer may enter a premises by force in order to execute a warrant only if: (1) the officer complies with N.C.G.S. § 15A-249 by announcing his identity and purpose and reasonably believes his admittance is being denied or unreasonably delayed; or (2) "the officer has probable cause to believe that the giving of notice would endanger the life or safety of any person." N.C.G.S. § 15A-251(1), (2) (1988).

Defendant appears to argue that since a portion of the evidence shows the officers announced their identity and purpose, a forced entry could only be justified in this case if the officers reasonably believed their admittance was being denied or unreasonably delayed under N.C.G.S. § 15A-251(1). Defendant points out that the trial court's conclusion of law was that Officer Logan had probable cause to believe that the giving of more notice would endanger the lives of the officers or of others, thereby justifying forceful entry under N.C.G.S. § 15A-251(2). Under this subsection, no announcement of identity and purpose is required, only exigent circumstances. Thus, defendant contends the findings of fact do not support the trial court's conclusion of law and it follows then, according to defendant, that the fruits of the search should have been suppressed.

We conclude that the trial court's findings of fact do support the conclusion of law that Officer Logan had probable cause to believe that the giving of further notice would endanger the lives of the officers or of others; and therefore, entry by force was lawful. The fact that the officers did announce their identity and purpose does not mean entry by force cannot be justified under N.C.G.S. § 15A-251(2). We find nothing in the statute to forbid an announcement of police presence and purpose when officers also face exigent circumstances.

Furthermore, such an announcement does not, under these facts, lead to the conclusion that exigent circumstances did not exist. The trial court's findings of fact included that the officers believed a firearm was inside defendant's apartment; that defendant would not cooperate and was mean; that the area outside defendant's door was so small that even though officers felt the situation was dangerous,

their weapons were not drawn out of fear of harming other officers and bystanders; and, that Officer Logan heard two arguing voices inside the apartment. These findings of fact support the conclusion of law that entry by force was justified, as officers had probable cause to believe that the giving of further notice would endanger the lives of the officers or others. Under these circumstances, the trial court properly denied the defendant's motion to suppress evidence seized from defendant's apartment. This assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. WILLIAM DILLARD POWELL

No. 190A93

(Filed 28 July 1995)

1. Evidence and Witnesses § 1226 (NCI4th)— inculpatory statements—request to speak off record—admission of subsequent statements as harmless error

Assuming that the trial court erred by admitting in-custody statements in which defendant told an officer what weapon he had used in a murder, why he committed the crime, and how he disposed of the weapon after defendant asked to speak off the record and the officer tore up the *Miranda* waiver form defendant had signed, such error was rendered harmless by defendant's prior confession, before he asked to speak off the record, that he "went off on" the victim because she slapped him as he tried to rob the convenience store where she worked, combined with a witness's positive identification of defendant as the man in the store shortly before the crime and other strong circumstantial evidence.

Am Jur 2d, Evidence §§ 709, 749.

2. Evidence and Witnesses § 1233 (NCI4th)— recording of telephone conversation with defendant—persons not agents of police—admission not Fifth Amendment violation

The trial court properly found that defendant's girlfriend and a male friend were not acting as agents of the police when they tape recorded a telephone conversation with defendant while he was in jail awaiting trial for first-degree murder where the male friend testified that he recorded the conversation for "personal reasons"; the male friend and defendant's girlfriend both testified that no police officer asked them to record any conversation with defendant, although they had been told that any information they had regarding the murder would help; and the officer who told the male friend he would appreciate any information he had testified that he did not ask anyone to record telephone conversations with defendant. Therefore, the conversation did not constitute police-initiated questioning after defendant had requested and conferred with an attorney, and the admission of the recorded conversation and a transcript thereof did not violate defendant's Fifth Amendment rights.

Am Jur 2d, Evidence § 620.

3. Jury § 141 (NCI4th)— capital sentencing—voir dire—parole eligibility beliefs

The trial court did not err by denying defendant's pretrial motion to conduct *voir dire* inquiry regarding prospective jurors' beliefs about parole eligibility.

Am Jur 2d, Criminal Law § 913.

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

4. Jury § 154 (NCI4th)— capital case—jury selection—jurors' views about mitigating and aggravating circumstances—question excluded—no abuse of discretion, prejudice, or statutory violation

The trial court did not abuse its discretion by sustaining the State's objection to defendant's question to four prospective jurors in a capital trial that "if you have a doubt about whether the mitigating circumstances are outweighed by the aggravating circumstances, if the judge instructs you to that effect, do you

understand that you may not vote to execute the defendant?" since the question related to the jurors' understanding of the weighing process used at sentencing hearings, and the trial court properly could have concluded that it confused the jurors because they had not yet been instructed on the sentencing procedure. Furthermore, defendant was not prejudiced by the trial court's ruling where defendant asked the prospective jurors several questions relating to whether they would automatically vote to impose the death penalty, and those questions allowed defendant to ascertain whether the prospective jurors could consider a life sentence. Nor did the court's ruling violate N.C.G.S. § 15A-1214(c) since the court allowed both the prosecutor and defense counsel to "personally question prospective jurors," and the statute does not eliminate the trial court's duty to supervise *voir dire* or its discretion in that regard.

Am Jur 2d, Jury §§ 206, 208, 279.

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

5. Evidence and Witnesses § 351 (NCI4th)— murder during robbery—cocaine use and assistance checks—admissibility to show motive

In a prosecution for first-degree murder committed during the robbery of a convenience store, testimony by defendant's girlfriend about defendant's cocaine use and his receipt of AFDC and Social Security checks for the benefit of his son was properly admitted for the limited purpose of showing motive for the robbery-murder where the girfriend testified that defendant had supported himself and her and their cocaine habit when his only source of income was the AFDC and Social Security checks, and that defendant stopped receiving both checks when his former wife took physical custody of the son two months before the robbery-murder. Further, the trial court did not abuse its discretion in concluding that the probative value of this evidence outweighed its prejudicial effect.

Am Jur 2d, Homicide § 311.

6. Evidence and Witnesses § 179 (NCI4th)— defendant's receipt of government checks—admissibility to show motive

Testimony by a social worker that defendant had received checks from government agencies for his son until two months before a murder committed during the robbery of a convenience store was not improper character evidence and was relevant under Rules 401 and 404(b) to show motive. N.C.G.S. § 8C-1, Rules 401 and 404(b).

Am Jur 2d, Criminal Law § 133; Evidence § 558.

7. Evidence and Witnesses § 263 (NCI4th)— character trait—admissibility for rebuttal—exclusion as harmless error

Where the State had presented evidence that defendant's brother asked him to swear on his mother's grave that he did not commit a robbery-murder but defendant stated only that he had tried to borrow money from the brother right before the crime occurred, the trial court erred by excluding as hearsay testimony by defendant's former wife that defendant loved his mother dearly and, in her opinion, would never swear or profane his mother's grave, since the testimony was not hearsay but was relevant character evidence admissible under Rule 404(a)(1) to rebut the implication in the State's evidence that defendant declined to swear to his innocence because he knew he was guilty. However, the exclusion of this testimony was not prejudicial error because the testimony could not have affected the jury's verdict in light of all of the other evidence, including a partial confession and eyewitness identification of defendant at the scene near the time of the crime. N.C.G.S. § 8C-1, Rule 404(a)(1).

Am Jur 2d, Evidence §§ 358, 363, 369.

Admissibility of evidence of pertinent trait under Rule 404(a) of Uniform Rules of Evidence. 56 ALR4th 402.

8. Criminal Law § 537 (NCI4th)— capital trial—announcement of guilty verdict—spectator outburst—denial of mistrial for sentencing phase

The trial court did not abuse its discretion by denying defendant's motion for a mistrial prior to the sentencing phase of a capital trial because of an outburst from persons in the courtroom when the foreman read the guilty verdict where the court admonished the spectators that it would not allow anyone in the court-

room to engage in conduct in the jury's presence which would disrupt the administration of justice; the court also informed the audience that any further outbursts would be punished as contempt; when the jury reassembled for the sentencing phase, the court instructed that the jury should not allow the outburst to enter into its consideration of the issues of the case; and no juror indicated an inability to serve fairly when the court asked if any juror felt that he or she could no longer deliberate fairly and impartially as a result of the outburst.

Am Jur 2d, Trial §§ 1738, 1739.

Emotional manifestations by victim or familty of victim during criminal trial as ground for reversal, new trial, or mistrial. 31 ALR4th 229.

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

Evidence presented at a capital sentencing hearing did not require the trial court to submit the statutory mitigating circumstance that "defendant had no significant history of prior criminal activity" where the only evidence about defendant's criminal past consisted of testimony about defendant's cocaine use and a passing reference by a witness to the fact that defendant was temporarily released from jail to attend his father's funeral in the 1980s; the witness did not state the offense for which defendant was incarcerated or the length of his sentence; and neither party mentioned defendant's criminal record or introduced it into evidence. N.C.G.S. § 15A-2000(f)(1).

Am Jur 2d, Evidence § 1336.

10. Criminal Law §§ 452, 463 (NCI4th)— capital sentencing—prosecutor's jury argument—mitigating circumstances—lack of remorse—no gross impropriety

The prosecutor did not denigrate the sentencing process during his closing argument in a capital sentencing proceeding but encouraged the jury to focus on facts he believed justified imposition of the death penalty when he told jurors to focus on the crime instead of the mitigating evidence, referred to some of the proffered mitigators as "lawyer talk," and mentioned the nonstatutory mitigating circumstance that "defendant has been a good prisoner while incarcerated in the Cleveland County Jail"

and asked "so what?" Further, the prosecutor did not mislead the jury by his shorthand description of the impaired capacity mitigating circumstance, N.C.G.S. § 15A-2000(f)(6), when he predicted that defense counsel would argue that defendant "didn't know what he was doing, that he didn't know that that was against the law to do something like [the murder]," and the prosecutor argued facts inferable from the evidence when he stated that defendant killed the victim for forty-eight dollars and showed no remorse. Therefore, none of the prosecutor's statements were so grossly improper that the trial court should have intervened *ex mero motu*.

Am Jur 2d, Trial §§ 572, 841.

11. Jury § 113 (NCI4th)— capital trial—denial of individual voir dire—potential domino effect

The trial court's denial of defendant's pretrial motion for individual *voir dire* in a capital trial did not violate defendant's constitutional rights. The Court has specifically rejected defendant's argument that a group *voir dire* creates a "domino effect" whereby a prospective juror learns which answers will enable him or her to avoid jury duty.

Am Jur 2d, Jury §§ 198, 199.

12. Jury § 223 (NCI4th)— capital trial—jury selection—death penalty views—excusal for cause

The trial court did not err by excusing four prospective jurors for cause in a capital trial where three stated that they could not vote for the death penalty under any circumstances and the fourth told defense counsel he could consider only a sentence of life imprisonment.

Am Jur 2d, Jury § 279.

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

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

The North Carolina death penalty statute is not unconstitutional.

Am Jur 2d, Criminal Law §§ 609-612, 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.

14. Criminal Law § 1341 (NCI4th)— felony murder—armed robbery—pecuniary gain aggravating circumstance

The trial court did not err by submitting the aggravating circumstance that a first-degree murder was committed for pecuniary gain where defendant's conviction rested solely on the felony murder rule with armed robbery as the underlying felony.

Am Jur 2d, Criminal Law §§ 598, 599.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstaance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

15. Criminal Law § 680 (NCI4th)— mitigating circumstances—peremptory instructions—necessity of request

The trial court is not required to give peremptory instructions on mitigating circumstances absent a request by the defendant.

Am Jur 2d, Criminal Law § 628.

16. Criminal Law § 1323 (NCI4th)— nonstatutory mitigating circumstances—instructions—finding of mitigating value

The trial court did not err by instructing the jury that it could determine that a nonstatutory mitigating circumstance existed but had no mitigating value.

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

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

17. Criminal Law § 1363 (NCI4th)— nonstatutory mitigating circumstance—good prisoner—no mitigating value per se

The trial court did not err by failing to instruct the jury that the nonstatutory mitigating circumstance that "the defendant has been a good prisoner while incarcerated in the Cleveland County Jail" had mitigating value *per se*.

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

18. Criminal Law § 1327 (NCI4th)— capital sentencing—instructions—duty to recommend death sentence

The trial court did not err by instructing the jury that it had a "duty" to recommend a sentence of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstance and that the aggravating circumstance was sufficient to call for such a penalty.

Am Jur 2d, Trial § 1458.

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

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate to the sentence imposed in similar cases, considering both the crime and the defendant, where defendant killed a convenience store employee during a robbery of the store; the jury found the pecuniary gain aggravating circumstance and no mitigating circumstances; the evidence tended to show that the killing was particularly brutal in that the victim had numerous lacerations on her face with corresponding skull fractures underneath, part of her left ear was torn off, her nose was broken on the left side, her left eye was displaced due to a fracture of the bone behind the eye, she had lacerations on her forearm and hand which indicated that she struggled for her life, she had bone fragments imbedded in her brain from numerous fractures, and her brain was torn in some places and protruded from the skull in others; defendant used a tire iron to inflict these injuries; defendant acted alone and was forty-five years old at the time of the murder; and defendant left the victim to die in a pool of blood and never expressed remorse for his crime.

Am Jur 2d, Criminal Law § 628.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Gaines, J., at the 12 April 1993 Criminal Session of Superior Court, Cleveland County, on a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 15 February 1995.

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

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

WHICHARD, Justice.

Defendant was convicted of the first-degree murder of Mary Gladden, an employee of The Pantry on Charles Road in Shelby, and sentenced to death. He appeals from his conviction and sentence. We conclude that defendant received a fair trial, free of prejudicial error, and that the sentence of death is not disproportionate.

The State's evidence tended to show that the victim was killed on 31 October 1991 while on duty at The Pantry. Scott Truelove testified that he bought five dollars' worth of gasoline there between 3:15 and 3:30 a.m. on 31 October. At the counter he stood near a rough-looking man with unkempt, shoulder-length hair, facial hair, and a tattoo on his left forearm. The next morning Truelove read about the murder and gave a description of the man to Captain Ledbetter of the Shelby Police Department. On 16 November 1991 Truelove identified defendant as the man by picking him out of a photographic lineup.

On 31 October 1991 Clarissa Epps stopped at The Pantry to buy gasoline at approximately 4:15 a.m. She went in to pay for her purchase. After waiting in vain for a clerk to appear, Epps called out but received no answer. Epps then turned and saw the victim lying in blood behind the counter. Epps drove home and called the police.

Officer Mark Lee of the Shelby Police Department arrived at The Pantry at 4:26 a.m. on 31 October in response to a radio dispatch. Lee first ensured that all customers had left the store and then found the victim behind the counter. She was lying on her back in a pool of blood with her head toward the cash register and her hands at her sides. Lee noticed injuries to the victim's left eye and ear as well as other injuries to her head. He also saw a one-dollar bill on the floor near her left foot and another on the counter.

Dr. Stephen Tracey, who performed the autopsy, testified that the victim had numerous lacerations on her head and that her skull was fractured in several places. Additionally, her nose was broken and her left eye had been displaced by a fracture to the bone behind it. The victim's brain had hemorrhaged, was bruised and lacerated in several places, and contained skull fragments. Tracey determined that blunt trauma to the head caused the victim's death and that she died from the trauma before she lost a fatal amount of blood. He also concluded that human hands had not inflicted the wounds; he surmised from their size and shape that the perpetrator used a lug-nut wrench, a tire wrench, or possibly a pipe.

Mark Stewart, an employee of The Pantry, testified that he worked on 27 October and 1 November 1991. On 27 October Stewart saw a tire tool behind the counter to the side of the cash register. The tool had lain there for approximately one year. It was curved on one end with a round hole for a lug nut and was split on the other end for hubcap removal. Stewart noticed that the tool was missing when he worked on 1 November, the day after the murder.

Thomas Tucker, a district manager of The Pantry, testified that he arrived at The Pantry sometime after 6:00 a.m. on 31 October. He examined the cash register tape for that morning; it showed, among other transactions, a gasoline sale of five dollars at 3:29 a.m. and a no-sale at 3:35 a.m. The cash register enters a no-sale when it is opened but no purchase is made. According to the tape, no transaction occurred between the five-dollar purchase and the no-sale. Tucker opened the register at 6:22 a.m. at the direction of Captain Ledbetter to determine whether any money had been taken during the homicide. He concluded that approximately forty-eight dollars were missing.

On 16 November 1991 Lieutenant Mark Cherka and Officer David Lail drove to Anthony's Trailer Park to find defendant and bring him to the police station for questioning. Defendant came out of a trailer and allowed Cherka to take four photographs of him. Defendant agreed to accompany Cherka and Lail to the police station for questioning as a possible suspect in the murder. Defendant was not under arrest at that time; the officers told him he did not have to leave with them.

They arrived at the police station at approximately 4:00 p.m., and Cherka began to question defendant. Defendant refused to allow Cherka to tape record the interview, so Cherka made notes of what transpired shortly after the interview ended. Defendant stated that he had gone to sleep at around 4:00 a.m. on 31 October after drinking with Don Weathers and defendant's girlfriend, Lori Yelton. Later that morning Yelton and defendant took Weathers to the hospital because he had cut himself at some point during the previous night. Cherka left the interview room and related defendant's statement to Ledbetter. While Cherka had been questioning defendant, Truelove had identified defendant from a lineup containing thirty-two photographs as the man he saw in The Pantry on 31 October. Ledbetter informed Cherka of the identification and then accompanied Cherka back into the interview room.

Defendant again indicated he did not want to be tape recorded, and Ledbetter complied. Ledbetter told defendant about Truelove's identification and asked defendant if he wanted an attorney. Defendant stated that he had not killed anyone and did not want an attorney. Ledbetter advised defendant of his *Miranda* rights, and defendant signed a waiver of those rights. Defendant continued to deny involvement in the murder.

Ledbetter then told him he knew he had killed the woman and asked, "Why did you kill her?" Defendant hung his head and answered, "[S]he slapped me and I went off on her." Defendant then asked to speak to Ledbetter alone; Cherka left the room. Ledbetter again asked defendant why he had killed the victim. Defendant stated that she had slapped him, he had panicked, he had not intended to harm her, and he merely wanted the money from the cash register.

Defendant then indicated that he wanted to speak to Ledbetter off the record and asked Ledbetter to tear up the *Miranda* waiver form, which Ledbetter did. Defendant related additional details about the crime, including information about the weapon he had used, after Ledbetter ripped the form into four pieces. At about 6:00 p.m. defendant asked for a lawyer, and one was contacted for him. Defendant was arrested and taken into custody after he conferred with his lawyer.

Defendant testified that he did not read the *Miranda* waiver form, but signed it because he felt "agreeable" from cocaine he had ingested. He further testified that Ledbetter suggested they talk off the record. On cross-examination he admitted he had given *Miranda* warnings during his tenure in law enforcement; he recited the warnings on the witness stand. He also admitted he had not mentioned in his pretrial affidavit that Ledbetter proposed that they talk off the record.

Billy Joe Sparks testified that sometime after the murder he had a conversation with Paul Barnard, who called himself Rambo. During the conversation Rambo sniffed glue and both men drank beer. Rambo told Sparks he had killed a woman at a supermarket by beating her to death. Rambo died before defendant's trial; Sparks did not tell the police about Rambo's statement until after Rambo's death.

Johnny Smith, the operator of a local entertainment center, testified that he had spoken to Truelove about the murder. Smith stated that Truelove told him he had seen a man with red hair in The Pantry on the day of the murder.

In rebuttal the State recalled Truelove. He testified that he knew Rambo and that the lineup from which he identified defendant contained a photograph of Rambo. Truelove never picked Rambo as the person he saw at The Pantry on 31 October. Truelove also testified that he remembered having a conversation with Smith about becoming an uncle, not about the murder. Truelove and his sister both have red hair, and his sister had recently given birth to a baby with red hair.

The State also called Officer James Glover of the Shelby Police Department in rebuttal. Glover testified that Rambo claimed to be a Vietnam veteran and to have a black belt in karate; neither claim was true. Before his death Rambo had telephoned Glover and told him he had lied to Sparks about committing the murder. Rambo told Sparks he had killed a woman only to maintain his street image.

At sentencing the State relied on the evidence it presented at the guilt/innocence phase. Defendant's evidence showed that defendant was raised in a loving family, had worked as a jailer and with the fire department, and was well-liked and not violent. Dr. Terrence Onischenko, an expert in psychology and neuropsychology, testified that he performed comprehensive testing of defendant on 22 November 1992. The results showed that defendant's memory, problem-solving skills, and motor functions are impaired. Defendant scored in the average range on other tests. Dr. Onischenko also testified that defendant has an increased chance of developing Alzheimer's disease as well as other organic diseases. Defendant's abuse of cocaine and alcohol probably caused his brain dysfunctions. Defendant has an average IQ and normal concentration skills, language functions, sensory ability, and visual ability.

Defendant also presented evidence showing that he took good care of his son, who is profoundly mentally retarded and autistic. Defendant implemented the programs devised for his son's development and served on the advisory council of the parent-teacher organization at his son's school. Two jailers at the Cleveland County jail testified that defendant had adjusted well to life as an inmate and had caused no problems.

The jury found defendant guilty of first-degree murder under the felony murder rule, with robbery with a dangerous weapon as the underlying felony. At sentencing the jury found one aggravating circumstance, that the murder was committed for pecuniary gain, and no mitigating circumstances. It unanimously recommended that

defendant be sentenced to death; the trial court sentenced defendant accordingly.

PRETRIAL PHASE

[1] Defendant first assigns as error the trial court's denial of his pretrial motion to suppress the confession he made to Officer Ledbetter on 16 November 1991. He contends that any statements made after the destruction of his *Miranda* waiver form constitute an involuntary confession induced by the deception of a law enforcement officer. Thus, the trial court committed constitutional error by admitting those statements, in which defendant told Ledbetter, *inter alia*, what weapon he used, why he committed the crime, and how he disposed of the weapon.

Assuming *arguendo* that the trial court erred by admitting the statements defendant made after Ledbetter destroyed the waiver form, we hold that the error is harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (1988). Before defendant asked to speak off the record, he twice stated that he "went off on" the victim because she slapped him as he tried to rob the store. That voluntary confession, combined with Truelove's positive identification of defendant as the man in the store shortly before the crime and the other strong circumstantial evidence, makes any error in admitting the remainder of defendant's confession harmless beyond a reasonable doubt.

[2] Defendant next assigns as error the trial court's denial of his pretrial motion to suppress a telephone conversation and transcript thereof between himself, Don Weathers, and Lori Yelton that Weathers and Yelton tape recorded without defendant's knowledge or consent. The relevant facts are as follows: Defendant made several collect telephone calls to Weathers' home while incarcerated and awaiting trial for this murder. Yelton was also in jail at that time for an unrelated probation violation. On the day Yelton was released defendant called Weathers from prison and asked to speak to Yelton. Weathers told him Yelton was not there, even though she was, because Yelton did not wish to speak to defendant. Defendant called again later that day, Yelton agreed to talk to him, and Weathers recorded the conversation with Yelton's knowledge and consent by pushing the "record" button on his answering machine. Yelton gave the tape to the police shortly after the conversation occurred.

Weathers testified at the pretrial hearing that he recorded the conversation "for personal reasons." He and Yelton both testified that no police officer asked them to record any conversations with defendant, although they had been told that any information they had regarding the murder would help the police. Sergeant Mackey Linnens, who told Weathers he would appreciate any information Weathers had, testified that he did not ask anyone to record telephone conversations with defendant.

Defendant contends that Weathers and Yelton were acting as agents of the Shelby Police Department when they recorded the conversation. He further contends that admission of the recorded conversation and the transcript thereof violated his Fifth Amendment rights because the conversation constituted police-initiated questioning after defendant had requested and conferred with an attorney. Under the Fifth Amendment, police officers may not initiate questioning of an accused who has invoked the right to counsel. *State v. Pope*, 333 N.C. 106, 113, 423 S.E.2d 740, 744 (1992). Thus, if Weathers and Yelton recorded the conversation at the behest of the police, admitting the recording or a transcript thereof would be error. Even if no constitutional error occurred, defendant argues, the trial court should have excluded the evidence as unduly prejudicial under N.C.G.S. § 8C-1, Rule 403.

The trial court found that "there is no evidence that the recordation was done while the occupant of [Weathers'] premises was acting as the agent of the Cleveland County Police Department or any other law enforcement agency" and concluded that "the recordation is admissible into evidence." The record fully supports the trial court's findings of fact, which support the court's conclusion of law. The ruling did not violate defendant's rights under the Fifth Amendment. Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Thus, N.C.G.S. § 8C-1, Rule 403 does not preclude admission of the evidence. Accordingly, we overrule this assignment of error.

[3] Defendant next argues that the trial court erred by denying his pretrial motion to conduct *voir dire* inquiry regarding prospective jurors' beliefs about parole eligibility. Defendant concedes that this Court has decided this issue against his position but contends that *Simmons v. South Carolina*, — U.S. —, 129 L. Ed. 2d 133 (1994), requires reconsideration of our position. We rejected defendant's arguments in *State v. Price*, 337 N.C. 756, 762-63, 448 S.E.2d 827, 831

(1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 224, *reh'g denied*, — U.S. —, 131 L. Ed. 2d 879 (1995). Defendant presents no compelling reasons to depart from our precedent on this issue. This assignment of error is overruled.

JURY SELECTION

[4] Defendant argues that the trial court improperly precluded him from inquiring into four jurors' views about mitigating and aggravating circumstances in violation of *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992), and N.C.G.S. § 15A-1214. We disagree.

The trial court sustained the State's objection to the following question, which defendant asked during the group *voir dire* inquiry of four prospective jurors:

> Ladies and gentlemen, the judge is going to instruct you concerning your findings of aggravation and . . . of mitigation and you are to listen to the judge's instructions but if you have a doubt about whether the mitigating circumstances are outweighed by the aggravating circumstances, if the judge instructs you to that effect, do you understand that you may not vote to execute the defendant?

Defendant declined the trial court's invitation to rephrase the question but proceeded to ask four life-qualifying questions. Defendant exercised peremptory challenges to excuse two of the prospective jurors; the other two sat on the jury. Defendant argues that the trial court's ruling precluded him from inquiring into the prospective jurors' "feelings concerning the process by which the jury would impose capital punishment." Defendant also argues that the ruling influenced the jury to find none of the submitted mitigating circumstances.

Defendant has shown neither an abuse of discretion nor prejudice, both of which are required to establish reversible error relating to *voir dire*. *See State v. Miller*, 339 N.C. 663, 678, 455 S.E.2d 137, 145 (1995). A defendant may use *voir dire* as a vehicle for determining whether a prospective juror is "willing to consider a life sentence in the appropriate circumstances or would automatically vote for death upon conviction." *State v. Conner*, 335 N.C. 618, 644-45, 440 S.E.2d 826, 841 (1994). Defendant did not phrase the question at issue here, however, to elicit that information. Rather, the question related to the jurors' understanding of the weighing process used at sentencing hearings. The trial court properly could have concluded that it con-

fused the jurors because they had not yet been instructed on the sentencing procedure. Thus, the court did not abuse its discretion when it sustained the State's objection. Further, defendant asked the four prospective jurors several questions relating to whether they would automatically vote to impose the death penalty. Those questions allowed defendant to ascertain whether the prospective jurors could consider a life sentence. Defendant therefore was not prejudiced by the ruling.

Defendant has also failed to show a violation of N.C.G.S. § 15A-1214(c), which provides:

> The prosecutor and the defense counsel, or the defendant if not represented by counsel, may personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge. The prosecution or defense is not foreclosed from asking a question merely because the court has previously asked the same or similar question.

The trial court allowed both the prosecutor and defense counsel to "personally question prospective jurors." The statute does not eliminate the trial court's duty to supervise *voir dire* or its discretion in that regard. We conclude that the trial court's ruling was not an abuse of discretion, did not prejudice defendant, and did not violate N.C.G.S. § 15A-1214(c).

GUILT/INNOCENCE PHASE

[5] Defendant next argues that the trial court erred by admitting testimony regarding defendant's cocaine use and his receipt of AFDC and Social Security checks for the benefit of his son. He argues that the testimony was inadmissible character evidence and was unduly prejudicial. We disagree.

Lori Yelton testified over defendant's objection that she and defendant used about one gram of cocaine every day, at a daily cost of about one hundred dollars, when they lived together from April to October 1991. She also testified that during that time neither she nor defendant had jobs; monthly AFDC and Social Security checks defendant received for the support of his son represented their sole source of income. Finally, she testified that defendant stopped receiving both checks when his former wife took physical custody of the child in August 1991. The trial court ruled that the evidence was

admissible to show defendant's motive and that its probative value outweighed any prejudicial effect. The court instructed the jury that it could consider the testimony only for the purpose of showing a motive for the crime.

N.C.G.S. § 8C-1, Rule 404(b) allows the admission of evidence of other crimes, wrongs, or acts to show, *inter alia*, the defendant's motive. The trial court properly could have concluded that Yelton's testimony showed a motive for the crime at issue. Yelton stated that defendant had supported himself, Yelton, and their cocaine habit when defendant's only source of income was AFDC and Social Security checks. That evidence permits the inference that defendant needed money once the checks stopped in August 1991 and decided to commit this robbery to obtain that money. Further, defendant has not shown that the trial court abused its discretion when it concluded that the probative value of the evidence outweighed its prejudicial effect. An abuse of discretion occurs only where a trial court's ruling is neither supported by reason nor the result of a reasoned decision. *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986). We conclude that the evidence was properly admitted under both Rule 404(b) and Rule 403.

[6] In a related assignment of error defendant argues that the trial court erred by admitting the testimony of Sue Ross, a social worker, over defendant's objection. Ross testified that defendant had received checks from government agencies for his son until two months before the murder. Defendant argues that this evidence tainted the jury's perception of his character and destroyed the mitigating value of his sentencing phase evidence, much of which focused on his loving care for his son. He thus argues that the testimony should have been excluded under Rule 401 as irrelevant and under Rule 403 as "wildly prejudicial."

We conclude that the trial court properly could find Ross's testimony relevant under Rules 401 and 404(b) to show motive. A defendant's motive is a fact of consequence to be considered, though the State is not required to prove it. *Riddick*, 315 N.C. at 758, 340 S.E.2d at 60. Further, defendant has not shown that the trial court abused its discretion when it determined that the probative value of Ross's testimony outweighed its prejudice to defendant. We will not reverse the trial court's ruling absent such a showing. *State v. Rose*, 335 N.C. 301, 319-20, 439 S.E.2d 518, 528 (1994). Accordingly, this assignment of error is overruled.

[7] Defendant next assigns as error the trial court's exclusion of character evidence offered by the defense through the testimony of defendant's former wife, Marjorie Collier. The State had shown that defendant's brother asked him to swear on their mother's grave that he did not commit the murder with which he was charged; defendant looked at him and, instead of swearing on his mother's grave, said, "I tried to borrow some money from you right before that happened, didn't I?" During the direct examination of Collier, defense counsel asked whether defendant "would ever swear on his mother's grave." The trial court conducted *voir dire* upon the State's objection to the question. Defendant made an offer of proof showing that Collier would testify that defendant loved his mother dearly and would never, in her opinion, swear on or profane his mother's grave. The trial court sustained the State's objection on the ground of hearsay. Defendant argues that the trial court erred because the proffered testimony was not hearsay but relevant character evidence admissible under N.C.G.S. § 8C-1, Rule 404(a)(1).

Rule 404(a)(1) provides that a defendant may offer character evidence as long as he tailors it "to a particular trait that is relevant to an issue in the case." *State v. Squire*, 321 N.C. 541, 546, 364 S.E.2d 354, 357 (1988). In the context of this rule, " 'pertinent' . . . is tantamount to relevant." *Id.* at 547, 364 S.E.2d at 358. Where evidence of a character trait is admissible, it may be introduced through testimony as to reputation or by testimony in the form of an opinion. N.C.G.S. § 8C-1, Rule 405(a) (1992).

Collier's testimony would have taken the form of an opinion; thus, if it illuminated a pertinent trait of defendant's character, it should have been admitted. We conclude that the proffered testimony did not constitute hearsay and would have revealed defendant's reverence and respect for his mother. That character trait was relevant in that the State's evidence raised the implication that defendant declined to swear to his innocence because he knew he was guilty. Evidence of defendant's respect for his mother was admissible under Rule 404(a)(1) to rebut this implication. Therefore, the trial court erred by excluding the testimony.

Defendant is entitled to a new trial, however, only if there is a reasonable possibility "that, had the error . . . not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a). Defendant has the burden of showing prejudice from any error. *See State v. McLaughlin*, 321 N.C. 267, 273, 362 S.E.2d 280,

284 (1987). We conclude that defendant has not met this burden. The evidence defendant sought to rebut through Collier's testimony did not constitute the heart of the State's case. Considering all of the other evidence, including the partial confession and eyewitness identification of defendant at the scene and near the time of the crime, Collier's testimony could not have affected the jury's verdict. This assignment of error is overruled.

[8] Defendant next argues that the trial court erred by denying his motion for a mistrial made at the conclusion of the guilt phase and renewed after the sentencing phase. He contends his sentencing hearing was prejudiced by an outburst from persons in the courtroom when the foreman read the guilty verdict. Defendant argues that the trial court should have granted his motion "so that a different jury, untainted by the outburst, could [have heard] the sentencing [evidence]." We disagree.

A ruling on a motion for a mistrial lies within the discretion of the trial court. *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). We will not overturn such a ruling absent a clear showing that the trial court abused its discretion. *Id.* Defendant has not made such a showing here. After the lunch recess following the close of the guilt phase, the trial court admonished the spectators that it would not "abide or suffer or allow anyone in this courtroom to engage in open conduct in the presence of this jury which would in any way disrupt the normal administration of justice." The court also informed the audience that any further outbursts would be punished as contempt of court. When the jury reassembled for the sentencing phase, the trial court instructed it in part as follows:

> Now, members of the jury, during the taking of the verdicts this morning there was an outburst in the courtroom that interrupted the proceedings for a very short period of time. I instruct you . . . that you should disabuse your mind from that outburst. You should not let it, in any way, enter into your consideration of any issues in this case. . . . [W]ith regards to this phase of the deliberations you should in no way, no way, allow any outbursts or exhibit of emotions . . . interfere with your cool, calm and dispassionate deliberation of the evidence in this case . . . .

The court also asked if any juror felt that he or she could no longer deliberate fairly and impartially as a result of the outburst; no juror indicated an inability to serve fairly.

From the foregoing we conclude that the trial court did not abuse its discretion by denying defendant's motion for a mistrial. The court took all steps necessary to ensure that the outburst would not affect the integrity of the sentencing proceeding.

SENTENCING PHASE

[9] Defendant argues that the trial court erred by refusing to submit the statutory mitigating circumstance that "defendant has no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1) (Supp. 1994). He contends evidence presented at sentencing required the court to submit the circumstance for the jury's consideration.

A trial court is not required to submit a mitigating circumstance to the jury unless substantial evidence exists to support it. *State v. Skipper*, 337 N.C. 1, 44-45, 446 S.E.2d 252, 276 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 895 (1995). The record here does not contain substantial evidence regarding defendant's criminal past. The only such evidence consisted of testimony about defendant's cocaine use and a passing reference by a witness to the fact that defendant was temporarily released from jail to attend his father's funeral in the 1980s. The witness did not state the offense for which defendant was incarcerated or the length of his sentence. Neither party mentioned defendant's criminal record or introduced it into evidence. The trial court thus properly could determine that the evidence was insufficient to support the circumstance, and it did not err by declining to submit it.

[10] Defendant presents numerous assignments of error concerning the prosecutor's closing argument at sentencing. Defendant did not object to any of the allegedly improper statements at trial; he contends, however, that the trial court should have intervened *ex mero motu* and that its failure to do so constitutes prejudicial error. We disagree.

First, defendant argues that the prosecutor denigrated the entire sentencing process by telling jurors to focus on the crime instead of the mitigating evidence. The prosecutor also referred to some of the proffered mitigators as "lawyer talk" and, defendant posits, warned the jury that defendant's evidence at sentencing simply "muddied the waters" and removed the focus from the murder.

Second, defendant contends the prosecutor misstated the law when he discussed the proof in support of the statutory mitigating circumstance that defendant's capacity to appreciate the criminality of

his conduct was impaired at the time of the crime. *See* N.C.G.S. § 15A-2000(f)(6). For example, the prosecutor predicted that defense counsel would argue that defendant "didn't know what he was doing, that he didn't know that that was against the law to do something like [the murder]." Defendant argues that such comments denigrated his expert's testimony and urged an unduly restrictive interpretation of the law concerning the (f)(6) circumstance.

Third, defendant argues that the prosecutor improperly implied that one of defendant's nonstatutory mitigating circumstances had no value. The prosecutor mentioned the circumstance that "defendant has been a good prisoner while incarcerated in the Cleveland County Jail" and then said, "to which I respond, 'so what?' " Defendant submits that such commentary prejudiced him.

Finally, defendant contends the prosecutor argued facts not in evidence when he said that defendant killed the victim for forty-eight dollars and that defendant never said he was sorry in his confession or showed any remorse. Defendant argues that the record supports neither of those propositions.

Prosecutors are allowed "wide latitude in the scope of their argument." *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). A trial court must intervene absent objection only where the prosecutor's argument affects the right of the defendant to a fair trial. *Id.* Defendant did not object to any of the above statements at trial; we must therefore determine whether the arguments complained of were "so prejudicial and grossly improper as to require corrective action by the trial [court] *ex mero motu*." *State v. James*, 322 N.C. 320, 324, 367 S.E.2d 669, 672 (1988). In making that determination, we consider the statements in their context, not in a vacuum. *State v. Gibbs*, 335 N.C. 1, 64, 436 S.E.2d 321, 357 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994).

We conclude that none of the prosecutor's statements contested by defendant were so grossly improper that the trial court should have intervened *ex mero motu*. The prosecutor did not denigrate the sentencing process but encouraged the jury to focus on the facts he believed justified imposition of the death penalty. Such encouragement is the job of a prosecutor in a criminal case. *Id.* at 64, 436 S.E.2d at 358. Additionally, the shorthand description of the (f)(6) mitigating circumstance did not unfairly mislead the jury, and the prosecutor argued facts fairly inferable from the State's evidence. In short, we

see nothing grossly improper in the prosecutor's closing argument. These assignments of error are overruled.

PRESERVATION ISSUES

[11] Defendant contends the trial court's denial of his pretrial motion for individual *voir dire* violated his constitutional rights. He submits that group *voir dire* creates a "domino effect" whereby a prospective juror learns which answers will enable him or her to avoid jury duty. "This Court has specifically rejected defendant's argument that a potential 'domino effect' requires individual *voir dire* . . . ." *State v. Reese*, 319 N.C. 110, 119, 353 S.E.2d 352, 357 (1987); *see also Skipper*, 337 N.C. at 57, 446 S.E.2d at 284. Defendant presents no compelling reason to revisit this issue.

[12] Defendant next argues that the trial court should not have excused for cause four prospective jurors. Three stated they could not vote for the death penalty under any circumstances. The fourth told defense counsel he could consider only a sentence of life imprisonment. The record reveals that none of the four could have fulfilled the duty of jurors to set aside their personal beliefs and follow the law. The trial court thus properly excused them for cause. *See State v. Brogden*, 334 N.C. 39, 41-42, 430 S.E.2d 905, 907-08 (1993).

[13] Defendant next contends North Carolina's death penalty statute is unconstitutional, relying on Justice Blackmun's dissenting opinion in *Callins v. Collins*, — U.S. —, —, 127 L. Ed. 2d 435, 436 (1994). We have consistently rejected defendant's contention. *See, e.g., Skipper*, 337 N.C. at 58, 446 S.E.2d at 284; *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).

[14] Defendant next argues that the trial court should have excluded the aggravating circumstance that the murder was committed for pecuniary gain and should have set aside the verdict when the jury found it. He contends the use of that circumstance violated the Eighth Amendment to the United States Constitution because his conviction rested solely on the felony murder rule, with robbery with a dangerous weapon as the underlying felony. We have rejected defendant's argument. *See, e.g., State v. Taylor*, 304 N.C. 249, 288-89, 283 S.E.2d 761, 785 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983). Defendant has presented no compelling reason to reconsider our position.

[15] Defendant next contends he is entitled to a new sentencing hearing because the trial court failed to give peremptory instructions on all the mitigating circumstances submitted. Defendant concedes he did not request such instructions. We have held that a trial court is not required to give peremptory instructions absent a request by the defendant. *State v. Gay*, 334 N.C. 467, 493, 434 S.E.2d 840, 855 (1993); *State v. Johnson*, 298 N.C. 47, 77, 257 S.E.2d 597, 619 (1979). We perceive no reason to reconsider that holding. This assignment of error is overruled.

[16] In his next assignment of error defendant argues that the trial court erred by instructing the jury that it could determine that a nonstatutory mitigating circumstance existed but had no mitigating value. He contends jurors must give weight to all mitigating circumstances found to exist, statutory and nonstatutory alike. We have rejected defendant's position on this issue. *See Miller*, 339 N.C. at 691, 455 S.E.2d at 152-53; *State v. Payne*, 337 N.C. 505, 533, 448 S.E.2d 93, 109-10 (1994), *cert. denied*, —- U.S. —-, 131 L. Ed. 2d 292 (1995). Defendant's argument does not warrant overruling our precedent.

[17] Defendant next argues that the trial court should have instructed the jury *ex mero motu* that the nonstatutory mitigating circumstance, "the defendant has been a good prisoner while incarcerated in the Cleveland County Jail," had mitigating value *per se*. We have held that "nonstatutory 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 (1995). This assignment of error is overruled.

[18] Defendant also argues that the trial court erred by instructing the jury that it had a "duty" to recommend a sentence of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstance and that the aggravating circumstance was sufficient to call for such a penalty. Defendant contends the instruction impaired the fair consideration of mitigating evidence in violation of *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and its progeny. We have consistently rejected defendant's argument. *See, e.g., Skipper*, 337 N.C. at 57, 446 S.E.2d at 283-84; *State v. McDougall*, 308 N.C. 1, 26, 301 S.E.2d 308, 323-24, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). Defendant presents no new reason for us to reconsider our position.

[19] Having found no error in the guilt/innocence or sentencing phases, we must now fulfill our statutory duty to determine whether the record supports the aggravating circumstance found by the jury; whether the death sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor"; and whether the 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). After a thorough review of the record, transcripts, and briefs, we conclude that the evidence supports the aggravating circumstance found, namely, that "[t]he capital felony was committed for pecuniary gain." N.C.G.S. § 15A-2000(e)(6). We further conclude that the sentence of death was not imposed "under the influence of passion, prejudice, or any other arbitrary factor." We thus turn to proportionality review, in which we compare this case with others "in the pool 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).

This case has two distinguishing characteristics: the severe brutality of the crime and the "complete lack of mitigating circumstances found by the jury." *Payne*, 337 N.C. at 537, 448 S.E.2d at 112. While the State did not submit the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, the evidence tended to show that this killing was particularly brutal. The victim had numerous lacerations on her face, with corresponding skull fractures underneath. Part of her left ear was torn off. Her nose was broken on the left side, and her left eye was displaced due to a fracture of the bone behind the eye. The victim also had lacerations on her forearm and hand, indicating that she struggled for her life. Further, she had internal injuries. For example, she had bone fragments embedded in her brain from the numerous fractures. Her brain was torn in some places and protruded from the skull in others. Finally, she had several bruises on her brain and a subdural hemorrhage. Defendant used a tire iron to inflict these injuries. The trial court submitted two statutory and sixteen nonstatutory mitigating circumstances. None of the jurors found any of these to exist, despite the uncontroverted evidence supporting some of the nonstatutory circumstances.

Further, this case is distinguishable from those in which this Court has found the death penalty disproportionate. In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), the jury found several

mitigating circumstances, including that the defendant operated under a mental or emotional disturbance at the time of the crime. The jury here specifically rejected that circumstance. Further, the brutality of this crime substantially overshadows that of the crime in *Benson*. The defendant there shot the victim in the legs; defendant here beat out the victim's brains.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), the defendant was only seventeen years old at the time of the crime and acted with an older co-felon. Additionally, the evidence did not clearly establish whether defendant or his partner, who received a life sentence, acted as the ringleader. Here, by contrast, defendant killed alone and was forty-five years old at the time of the murder.

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 tried to shoot a person with whom he had argued; he accidentally shot the victim instead. Defendant here brutally beat the defenseless victim to death without provocation.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the defendant acted with accomplices and was only nineteen years old at the time of the crime. The jury "found evidence of one or more mitigating circumstances," *id.* at 674, 325 S.E.2d at 185, without specifying which circumstance(s) it found, *id.* at 690, 325 S.E.2d at 194. Again, defendant here acted alone and was forty-five years old. The jury found no mitigating circumstances.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the defendant killed a law enforcement officer. The evidence did not clearly establish the circumstances of the crime, and the victim died shortly after the shooting. Here the facts surrounding the crime are much clearer, and the victim suffered a terrifying, torturous death.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the defendant shot his victim but immediately obtained medical treatment for him. Defendant here left the victim to die in a pool of blood and never expressed remorse for his crime.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant shot the victim twice in the head. There was no evidence comparable to that of the brutal callousness with which defendant here beat the victim.

As we noted in *State v. Miller*, "[p]roportionality review is designed to 'eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.' " 339 N.C. at 692, 445 S.E.2d at 153 (quoting *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 imposition of the death penalty in an arbitrary or capricious manner. *Id.* Further,

> the issue of whether the death penalty [is] disproportionate in a particular case ultimately rest[s] upon the "experienced judgments" of the members of this Court. . . . [T]he fact that one, two or several juries have returned recommendations of life imprisonment in cases similar to the one under review does not automatically establish that juries have "consistently" returned life sentences in factually similar cases.

State v. Green, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, — U.S. —, 130 L. Ed. 2d 547 (1994). A jury is likely to recommend a sentence of death for a defendant who commits a murder "in a particularly egregious manner." *State v. Harris*, 338 N.C. 129, 162, 449 S.E.2d 371, 387 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 752 (1995). The murder here was so committed. We thus cannot conclude that the death sentence was aberrant, capricious, or disproportionate.

NO ERROR.

JANA L. CAMALIER ADMINISTRATRIX C.T.A. OF THE ESTATE OF CALEB WILLARD CAMALIER, CORRIE R. CAMALIER BY AND THROUGH HER DULY APPOINTED GUARDIAN AD LITEM, G. BRYAN COLLINS, JR., LOUISE H. CAMALIER, BY AND THROUGH HER DULY APPOINTED GUARDIAN AD LITEM, G. BRYAN COLLINS, JR., AND JANA L. CAMALIER, INDIVIDUALLY v. CHARLES J. JEFFRIES, FRANK A. DANIELS, JR., AND THE NEWS AND OBSERVER PUBLISHING CO.

No. 93PA94

(Filed 28 July 1995)

1. Death § 49 (NCI4th)— retirement party—evidence of defendant's intoxication—summary judgment

The Court of Appeals correctly affirmed the trial court's order for partial summary judgment for plaintiffs as to defendant Jeffries' liability in an action arising from an automobile accident

involving Jeffries following a retirement party at the house of his employer, the publisher of the *News and Observer*, at which Jeffries drank three or four gin and tonics. Although defendant Jeffries correctly contended that the Court of Appeals opinion does not clearly reflect a consideration of all the evidence Jeffries presented, plaintiffs established that Jeffries breached a duty to plaintiffs by driving while impaired and running a red light, and Jeffries did not forecast sufficient evidence to create a genuine issue of material fact as to breach of a duty.

Am Jur 2d, Automobiles and Highway Traffic §§ 361, 646; Damages § 750; Negligence § 1175; Premises Liability §§ 396, 407, 411, 439.

Liability of employer for injury resulting from games or other recreational or social activities. 18 ALR2d 1372.

Liability, under dramshop acts, of one who sells or furnishes liquor otherwise than in operation of regularly established liquor business. 8 ALR3d 1412.

Workmen's compensation: injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment. 47 ALR3d 566.

Intoxicating liquors: employer's liability for furnishing or permitting liquor on social occasion. 51 ALR4th 1048.

2. Intoxicating Liquor § 59 (NCI4th)— retirement party—automobile accident—social host liability—summary judgment

The Court of Appeals properly affirmed the trial court's granting of summary judgment for defendants Daniels and the Publishing Company in an action arising from an automobile accident involving a Company employee which followed a retirement party hosted by the Company at Daniels's home and at which the employee consumed three or four gin and tonics. While plaintiffs' evidence tends to show that the employee, Jeffries, was intoxicated at the party, or shortly thereafter, it does not meet the standard espoused in *Hart v. Ivey*, 332 N.C. 299, for social host liability in that plaintiffs failed to forecast any evidence that anyone at the party saw any indications of Jeffries' intoxication or believed that he was intoxicated at the time he was served alcohol at the party. Nor is there a forecast of evidence that Daniels, the Publishing Company, or the bartenders working for them

knew that Jeffries had consumed enough alcohol to become intoxicated. In contrast, defendants presented substantial evidence that Jeffries did not display any manifestation of impairment or intoxication at the party.

Am Jur 2d, Damages § 750; Incompetent Persons § 76; Intoxicating Liquors §§ 35, 36; Negligence § 1175; Premises Liability §§ 407, 411, 439.

Liability, under dramshop acts, of one who sells or furnishes liquor otherwise than in operation of regularly established liquor business. 8 ALR3d 1412.

Civil Damages Act: liability of one who furnishes liquor to another for consumption by third parties, for injury to or damage caused by consumer. 64 ALR3d 922.

Liability to adult social guest injured otherwise than by condition of premises. 38 ALR4th 200.

Intoxicating liquors: employer's liability for furnishing or permitting liquor on social occasion. 51 ALR4th 1048.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence. 62 ALR4th 16.

3. Evidence and Witnesses § 217 (NCI4th)— automobile accident—social host liability—evidence of condition after leaving party—not admissible as to hosts' knowledge

The Court of Appeals did not err in considering the granting of a summary judgment motion for defendant social hosts in declining to consider any evidence of the driver's condition or appearance after he left the party. While admissible to prove intoxication, the evidence was not probative on the question of whether defendants knew or should have known that he was intoxicated at the time alcohol was served to him at the party.

Am Jur 2d, Evidence §§ 273, 297, 397; Expert and Opinion Evidence § 209; Incompetent Persons § 76; Intoxicating Liquors §§ 4, 453.

Liability, under dramshop acts, of one who sells or furnishes liquor otherwise than in operation of regularly established liquor business. 8 ALR3d 1412.

Common-law right of action for damage sustained by plaintiff in consequence of sale or gift of intoxicating liquor or habit-forming drug to another. 97 ALR3d 528.

Intoxicating liquors: employer's liability for furnishing or permitting liquor on social occasion. 51 ALR4th 1048.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence. 62 ALR4th 16.

4. Labor and Employment § 223 (NCI4th)— retirement party—accident following party—respondeat superior liability of employer-host

The Court of Appeals correctly affirmed the trial court's grant of summary judgment for defendant Publishing Company on the issue of vicarious liability for an automobile accident following a retirement party at which the driver had consumed three or four gin and tonics. Plaintiff's evidence was insufficient to forecast a genuine issue of material fact as to whether the attendance of the driver, Jeffries, at the party and his negligent consumption of alcohol there were within the scope of his employment. Defendant presented substantial evidence that Jeffries and other Publishing Company employees were not required to attend the party; no record of attendance was taken; there was no evidence that an employee's failure to attend would have resulted in adverse consequences; the party was held on a weekend, a day that Jeffries did not usually work and at a time that was after his usual working hours; Jeffries was not compensated for the time spent attending the party and was not required to work if he did not attend the party; the party was held at the private home of the newspaper's publisher rather than at the Publishing Company's business facilities; and Jeffries was employed as a reporter but did no reporting while in attendance at the party.

Am Jur 2d, Master and Servant §§ 404-417; Negligence § 1175; Premises Liability §§ 396, 407, 411, 439.

Liability, under dramshop acts, of one who sells or furnishes liquor otherwise than in operation of regularly established liquor business. 8 ALR3d 1412.

Common-law right of action for damage sustained by plaintiff in consequence of sale or gift of intoxicating liquor or habit-forming drug to another. 97 ALR3d 528.

Intoxicating liquors: employer's liability for furnishing or permitting liquor on social occasion. 51 ALR4th 1048.

Justice ORR concurring.

Justice WEBB joins in this concurring opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 113 N.C. App. 303, 438 S.E.2d 427 (1994), affirming the 22 July 1992 summary judgment orders for defendants Frank A. Daniels, Jr., and The News and Observer Publishing Company and affirming partial summary judgment for plaintiffs as to defendant Charles J. Jeffries' liability, entered on 22 July 1992 and amended on 29 July 1992. These orders were entered by Stephens (Donald W.), J., in Superior Court, Wake County. Heard in the Supreme Court 11 January 1995.

Young Moore Henderson & Alvis P.A., by Jerry S. Alvis, R. Michael Strickland, and David M. Duke, for plaintiff-appellants and -appellees.

Bailey & Dixon, L.L.P., by Gary S. Parsons, Patricia P. Kerner, and Kenyann G. Brown, for defendant-appellant Jeffries.

Yates, McLamb & Weyher, L.L.P., by Dan J. McLamb and Suzanne S. Lever, for defendant-appellee Daniels.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson, John D. Madden, and James Y. Kerr, II, for defendant-appellee The News and Observer Publishing Company.

Carruthers & Roth, P.A., by Richard L. Vanore and Michael J. Allen, for unnamed defendant-appellee Michigan Mutual Insurance Company.

Harold M. White, Jr., on behalf of Mothers Against Drunk Driving North Carolina State Organization, amicus curiae.

Glenn, Mills and Fisher, P.A., by Robert B. Glenn, Jr., on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

FRYE, Justice.

The pleadings and the forecast of evidence tended to show that on 27 October 1990, Caleb Willard Camalier was operating his 1982

Toyota automobile on Highway 70 near Raleigh when his automobile collided with a Volvo automobile operated by defendant Charles J. Jeffries. Camalier was seriously injured in the accident and remained hospitalized in a comatose state for nine months until his death on 27 July 1991.

At the time of the accident, Jeffries was employed by The News and Observer Publishing Company (the Publishing Company) as a newspaper reporter. Prior to the collision, Jeffries attended a retirement party (the party) in the backyard of Frank A. Daniels' home in Raleigh. The party was given in honor of Claude Sitton, the outgoing editor of *The News and Observer*, a newspaper published by the Publishing Company. At the time of the party, Daniels was the publisher of *The News and Observer* and served as an officer and director of the Publishing Company.

The Publishing Company hired Paul D. Broughton d/b/a Broughton Special Events Catering (Broughton) to organize and handle the details of the party. Broughton hired Savory Fare, Inc., to assist in the preparation and service of the food and drinks at the party. Employees of Broughton and Savory Fare were the exclusive bartenders for the party.

The Publishing Company hired McLaurin Parking Company (McLaurin) to handle parking arrangements. McLaurin was responsible for coordinating remote parking and the shuttling of guests between the parking areas and the party. Steve McLaurin, vice president of McLaurin, was present to oversee and supervise the parking arrangements. In addition, vehicles were available to provide guests with rides to their homes, if needed.

Jeffries arrived at the party at approximately 7:30 p.m. and stayed until approximately 10:15 p.m. While at the party, Jeffries engaged in conversations with several party guests, ate some food, and drank three or four gin and tonics which he obtained from the bars at Daniels' home. Several dozen guests who knew Jeffries saw or spoke with him at the party and stated he did not appear to be impaired or intoxicated at any time during the evening.

When Jeffries left the party, he, along with other guests, was transported by van to his automobile. Steve McLaurin sat in the front seat and observed Jeffries negotiate his way over and past two women to exit the van. Additionally, McLaurin observed Jeffries walk to his automobile. Jeffries did not appear intoxicated; instead, he

appeared to be perfectly normal to McLaurin. At approximately 10:40 p.m., defendant Jeffries was driving west on Highway 70 when his automobile collided with the automobile being driven by Caleb Camalier, leading to serious injuries and the subsequent death of Camalier.

There were no independent witnesses to the accident; however, witnesses who observed Jeffries after the accident stated that he appeared visibly impaired at the scene. Approximately thirty-five minutes had elapsed between the time Jeffries left the party and the time witnesses observed him at the scene following the accident. Jeffries was transported to Durham County General Hospital where a blood sample was drawn from him at 12:04 a.m., approximately one hour and forty-five minutes after he left the party. The blood sample was analyzed and determined to contain an alcohol concentration of 0.191. Jeffries was charged with driving while impaired and failing to stop for a red light. On 15 February 1991, pursuant to a plea bargain with the State, Jeffries entered pleas of guilty to the charges.

Plaintiffs filed their complaint against defendants on 18 March 1991. Plaintiffs alleged that Jeffries' negligent operation of his vehicle caused the accident leading to their injuries and damages. Additionally, plaintiffs alleged that defendants Daniels and the Publishing Company negligently served or caused to be served unlimited and highly intoxicating alcoholic beverages to Jeffries when they knew or should have known that Jeffries would become intoxicated. Plaintiffs further alleged that Jeffries' attendance at the party and consumption of alcohol while there were within the course and scope of his employment and that the Publishing Company was liable to plaintiffs under the doctrine of *respondeat superior*. After Camalier's death, the complaint was amended to include a wrongful death claim against each defendant.

On 22 July 1992, the trial court granted defendants Daniels' and the Publishing Company's motions for summary judgment and granted plaintiffs' motion for partial summary judgment as to Jeffries' liability. In an order dated 29 July 1992, the trial court certified the order granting plaintiffs' partial summary judgment for immediate appeal. In a unanimous decision, the Court of Appeals affirmed. *Camalier v. Jeffries*, 113 N.C. App. 303, 438 S.E.2d 427 (1994). On 7 April 1994, this Court allowed plaintiffs' and defendant Jeffries' petitions for discretionary review. For the reasons stated herein, we affirm the decision of the Court of Appeals.

[1] First, we address the two arguments raised by defendant Jeffries. Jeffries contends that the Court of Appeals erred in affirming partial summary judgment for plaintiffs as to Jeffries' liability to Camalier's estate because there is a genuine issue of material fact remaining to be resolved. Jeffries argues that the Court of Appeals failed to consider all of the following evidence which was submitted in response to plaintiffs' motion for partial summary judgment: (1) Jeffries' affidavit in which he fully explained his reasons for entering guilty pleas to the charges of running a red light and driving while impaired; (2) testimony by plaintiffs' expert witness that versions of the events given by Jeffries and other party guests were inconsistent with SBI test results; (3) affidavits and depositions of other party guests who indicated that defendant was not intoxicated when he left the party; and (4) the investigating officer's report, indicating that Jeffries stated that he thought he had the green light at the time of the accident. We agree with Jeffries' contention that the Court of Appeals' opinion does not clearly reflect a consideration of all the evidence Jeffries presented in opposition to plaintiffs' summary judgment motion. However, after reviewing all the evidence, we agree with the Court of Appeals that partial summary judgment in favor of plaintiffs was appropriate in this case.

In accordance with Civil Procedure Rule 56(c), we have stated that summary judgment should be " 'granted when, viewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' " *Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co.*, 326 N.C. 771, 774, 392 S.E.2d 377, 379 (1990) (quoting *Beckwith v. Llewellyn*, 326 N.C. 569, 573, 391 S.E.2d 189, 191, *reh'g denied*, 327 N.C. 146, 394 S.E.2d 168 (1990)). In order to be entitled to summary judgment, the moving party must bear the burden and show that no questions of material fact remain to be resolved. *Id.*

In their complaint, plaintiffs allege that Jeffries' negligent operation of his automobile caused the collision with Camalier's automobile and ultimately Camalier's death. It is well established that in order to prevail in a negligence action, plaintiffs must offer evidence of the essential elements of negligence: duty, breach of duty, proximate cause, and damages. *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 395 S.E.2d 112 (1990).

N.C.G.S. §§ 20-138.1 and 20-158(b)(2) impose public safety duties on automobile drivers. N.C.G.S. § 20-138.1 imposes a duty on individuals to not operate vehicles upon public streets and highways while impaired, while N.C.G.S. § 20-158(b)(2) requires individuals to come to a complete stop when approaching a red light. In this case, as to defendant Jeffries, there is a clear forecast of evidence tending to show duty, proximate cause, and damages. The essential controversy relates to breach of duty. However, even as to this element, defendant Jeffries does not argue that plaintiffs have failed to forecast substantial evidence that Jeffries breached a duty owed to plaintiffs. Rather, Jeffries contends that his forecast of evidence, when considered in light of plaintiffs' forecast, created a genuine issue of material fact as to whether he breached a duty to plaintiffs by driving while impaired and running the red light. If Jeffries is correct in this assertion, then partial summary judgment against him was inappropriate. Thus, we must decide whether Jeffries' evidence was sufficient to create a genuine issue of material fact as to whether he breached a duty to plaintiffs by running the red light and driving while impaired.

Jeffries pled guilty to the charges of running a red light and driving while impaired. However, while evidence of a plea of guilty to a criminal charge is generally admissible in a civil case, it is not conclusive evidence of defendant's culpable negligence and may be explained. *Grant v. Shadrick*, 260 N.C. 674, 133 S.E.2d 457 (1963). Accordingly, we have reviewed all the evidence in support of and in opposition to plaintiffs' motion for partial summary judgment in order to determine whether Jeffries' explanation is sufficient to create a genuine issue of material fact as to whether he breached a duty to plaintiffs by running the red light and driving while impaired.

Jeffries argues that partial summary judgment in favor of plaintiffs was improper because he presented a forecast of evidence sufficient to show that he could make a *prima facie* case at trial that he did not breach a duty owed to plaintiffs and, therefore, he was not liable to Camalier's estate. Jeffries' forecast included his affidavit in which he stated that he believed that the light was green in his direction when he entered the intersection. In his affidavit, Jeffries explained that he pled guilty to the charge of driving while impaired because he could not risk being convicted and spending additional time in jail since he had family responsibilities. Jeffries' plea arrangement required him to spend only one night in jail. Additionally, Jeffries' affidavit indicated that he pled guilty to the charge of running a red light because plaintiffs' attorney indicated that he would insist

that the district attorney prosecute Jeffries on the driving while impaired charge if Jeffries did not plead guilty to running the red light.

In addition, Jeffries' forecast of evidence included depositions and affidavits of other party guests, which reveal that Jeffries did not appear intoxicated or impaired at the party. It also included his pre-plea statement to the investigating officer that the light was green at the time he approached it. The police report indicates that Jeffries told the investigating officer, "I don't know what color the lights were. I think they were green. I'm not sure."

Furthermore, Jeffries argues that the deposition testimony of plaintiffs' own expert witness, a toxicologist, supports his contention that summary judgment was inappropriate. The toxicologist indicated that Jeffries' alcohol concentration of 0.191 was inconsistent with Jeffries' and other party guests' account of Jeffries' appearance and behavior at the party. A review of the transcript reveals that the toxicologist indicated that there were at least three possibilities for the inconsistencies; however, Jeffries makes no specific allegations which pertain to the three possibilities.

On the other hand, plaintiffs' forecast of evidence included a transcript of Jeffries' guilty pleas to running a red light and driving while impaired, an SBI report indicating that Jeffries' alcohol concentration was 0.191 less than two hours after he left the party, and the testimony of witnesses who observed Jeffries shortly after the accident and who stated that Jeffries appeared intoxicated.

Any doubt as to the color of the light and whether Jeffries was intoxicated at the time of the accident was removed at Jeffries' 15 February 1991 appearance in District Court, Wake County, when judgment was entered upon his pleas of guilty to driving while impaired, in violation of N.C.G.S. § 20-138.1, and to running a red light, in violation of N.C.G.S. § 20-158(b)(2). The following colloquy occurred in the District Court between the trial judge and Jeffries:

> Q. Have you discussed your case fully with your lawyer and are you satisfied with his legal services?
>
> A. Yes.
>
> Q. Do you understand that you are pleading guilty to the misdemeanors of, Number 1, driving while subject to an impairing substance; that is, alcoholic beverages, in violation of G.S. 20-138.1;

and, 2, by entering an intersection while a stop light was emitting a steady red light for traffic in your direction of travel in violation of G.S. 20-158(b)(2)?

A. Yes.

Q. Have the charges been explained to you by your lawyer and do you understand the nature of the charges, and do you understand every element of each charge?

A. Yes.

Q. Do you understand that upon your plea you could be imprisoned for a possible maximum sentence of one year and two months and a minimum mandatory sentence of one day in jail?

A. Yes.

Q. Do you understand that you have the right to plead not guilty and to be tried by a jury and at such trial to be confronted with and to cross-examine the witnesses against you, and by this plea you give up those and your other constitutional rights relating to trial by jury or judge?

A. Yes.

Q. And actually the earlier part of that last question, these particular cases being misdemeanor traffic offenses, that you'd also have the right to be tried by a judge in district court?

A. Yes.

Q. Do you now personally plead guilty to these charges?

A. Yes, sir.

Q. Are you in fact guilty of these charges?

A. Yes.

Q. Have you agreed to plead as a part of a plea arrangement?

Before you answer, I advise you that the Courts have approved plea negotiating, and if there is such, you may advise me truthfully without fear of incurring my disapproval.

A. Yes.

Q. So you're entering pleas of guilty to both of these charges; is that right?

A. Yes.

During the course of the proceedings, Jeffries signed a transcript of his plea under oath. Additionally, Jeffries' attorney, in asking the court to accept the plea arrangement, stated to the court in the presence of Jeffries: "By virtue of this plea he subjects himself to very serious civil liability." Thereafter, the trial judge made appropriate findings and conclusions and entered judgment in accordance with the pleas of guilty.

After reviewing all of plaintiffs' and defendant Jeffries' forecasts of evidence, we conclude that plaintiffs have established that Jeffries breached a duty to plaintiffs by driving while impaired and running the red light. We further conclude that Jeffries has not forecast sufficient evidence to create a genuine issue of material fact as to this breach of duty. Accordingly, we affirm the Court of Appeals' decision which affirmed the trial court's order for partial summary judgment for plaintiffs as to Jeffries' liability.

For his final assignment of error, defendant Jeffries argues that the trial court erred in granting plaintiffs' motion for partial summary judgment on the basis of estoppel. We find it unnecessary to address this assignment of error since we have held that partial summary judgment against Jeffries was proper on another basis.

[2] Next, we address the four arguments made by plaintiffs regarding defendants Daniels and the Publishing Company. In their first and fourth arguments, plaintiffs contend that the Court of Appeals erroneously affirmed the trial court's grant of summary judgment for these defendants because plaintiffs presented competent evidence that defendants Daniels and the Publishing Company negligently served alcohol to Jeffries when they knew or should have known Jeffries was intoxicated and, thus, were liable as social hosts under this Court's decision in *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174 (1992). Plaintiffs note that summary judgment is rarely appropriate in a negligence case. *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972). However, like the trial court and the Court of Appeals, we conclude that this is one of those rare negligence cases where summary judgment is appropriate.

We have held that a defendant, as the moving party, may meet its burden on summary judgment " 'by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to sup-

port an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.' " *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 26 (1992) (quoting *Boudreau v. Baughman*, 322 N.C. 331, 342-43, 368 S.E.2d 849, 858 (1988)) (emphasis omitted). To survive a motion for summary judgment, the non-moving parties must have "forecast sufficient evidence of all essential elements of their claim[]" to make a *prima facie* case at trial. *Id.* All inferences must be drawn in favor of the non-moving party. *Id.*

In *Hart*, this Court addressed the issue of social-host liability, concluding that an individual may be held liable on a theory of common-law negligence if he (1) served alcohol to a person (2) when he knew or should have known the person was intoxicated and (3) when he knew the person would be driving afterwards. *Hart*, 332 N.C. at 305, 420 S.E.2d at 178. Defendants Daniels and the Publishing Company contend, and we agree, that the trial court properly entered summary judgment in their favor because plaintiffs' forecast of evidence was insufficient to establish one of the essential elements of the claim. There is no question that defendants Daniels and the Publishing Company caused alcohol to be served to Jeffries and knew or should have known Jeffries would be driving an automobile after the party. Thus, the first and third factors mentioned in *Hart* are not in serious dispute. The essential factor in dispute is the second: whether these defendants knew or should have known that Jeffries was intoxicated at the time he was served alcohol at the party. We conclude that plaintiffs' forecast of evidence was insufficient to establish that either Daniels or the Publishing Company knew or should have known that Jeffries was intoxicated at the time alcohol was served to him.

Plaintiffs' forecast of evidence was as follows: While at the party, Jeffries consumed three to four alcoholic beverages between the hours of 7:30 p.m. and 10:15 p.m. and did not consume any alcohol after he left the party. Approximately an hour and forty-five minutes after he left the party, Jeffries' alcohol concentration was 0.191. Expert testimony was offered to show that, in order for Jeffries' alcohol concentration to reach 0.191, he would have had to consume ten to thirteen ounces of alcohol during the hours he was at the party. Jeffries appeared visibly intoxicated after the accident and later pled guilty to driving while impaired and running a red light.

While plaintiffs' evidence tends to show that Jeffries was intoxicated at the party, or shortly thereafter, it does not meet the standard

espoused by this Court in *Hart* for social-host liability. The standard in *Hart* is whether the social hosts, Daniels or the Publishing Company, served alcohol to Jeffries when they *knew or should have known* Jeffries was intoxicated. While there were more than three hundred people at the party, plaintiffs failed to forecast any evidence that anyone at the party saw any indications of Jeffries' intoxication or believed that he was intoxicated at the time he was served alcohol at the party. Nor is there a forecast of evidence showing that Daniels, the Publishing Company, or the bartenders working for them, knew that Jeffries had consumed enough alcohol to become intoxicated. Plaintiffs' evidence is insufficient to forecast an essential element of their claim: that defendants Daniels and the Publishing Company knew or should have known Jeffries was intoxicated at the time alcohol was served to him.

In contrast, defendants Daniels and the Publishing Company have shown that an essential element of plaintiffs' claim is nonexistent. Defendants presented substantial evidence that Jeffries did not display any manifestation of impairment or intoxication at the party. Thirty-one people executed affidavits, and another twenty-one were deposed; each stated that they saw Jeffries at the party and that he did not appear impaired or intoxicated. Specifically, Steve McLaurin, one of the last people to see Jeffries when he left the party, stated in his deposition that he observed Jeffries in the parking lot after the party and did not observe that Jeffries was intoxicated or impaired. Similarly, Melanie Sill stated that she walked out of the party with Jeffries and then again observed him in the parking lot. Sill's observation indicated that Jeffries was not in any way intoxicated or impaired. None of the more than three hundred persons at the party indicated that Jeffries had too much to drink or appeared intoxicated. Thus, defendant's forecast of evidence is that defendants Daniels and the Publishing Company did not know or have reason to know that Jeffries was intoxicated or impaired while at the party. In viewing defendants' and plaintiffs' evidence in the light most favorable to plaintiffs, the non-moving parties, we conclude that defendants met their burden of showing that plaintiffs could not produce evidence to support their contention that these defendants served alcohol to Jeffries at a time when they knew or should have known that Jeffries was intoxicated. Accordingly, the Court of Appeals correctly affirmed the trial court's grant of summary judgment in favor of defendants Daniels and the Publishing Company on the issue of social-host liability.

[3] In their second argument, plaintiffs contend that the Court of Appeals erred in declining to consider "any evidence regarding Jeffries' condition or appearance after he got into his car and drove out of the parking lot [as being] immaterial and irrelevant." *Camalier*, 113 N.C. App. at 310, 438 S.E.2d at 432. Plaintiffs contend that evidence of Jeffries' visible intoxication shortly after he left the party is relevant and probative on the issue of whether defendants knew or should have known that Jeffries was intoxicated at the party. Under the circumstances of this case, we conclude that the Court of Appeals did not err in declining to consider this evidence.

Rejecting plaintiffs' argument, the Court of Appeals stated:

> [W]e must look to the evidence relevant to the time Jeffries was served the alcoholic beverages and any outward manifestations which would reasonably lead defendants to know that Jeffries was under the influence.

Camalier, 113 N.C. App. at 309, 438 S.E.2d at 431. The Court of Appeals concluded that the record in this case was "devoid of any evidence showing actual or constructive knowledge by defendants of Jeffries' alleged intoxication when alcoholic beverages were served to him at the party." *Id.* We agree. The evidence of Jeffries' state of intoxication at the time of the accident, while admissible to prove that Jeffries was intoxicated, is not probative of the question of whether defendants Daniels and the Publishing Company knew or should have known Jeffries was intoxicated at the time alcohol was served to him at the party. Accordingly, we reject plaintiffs' second argument.

[4] For their third argument, plaintiffs contend that summary judgment for defendant Publishing Company was inappropriate because plaintiffs presented sufficient evidence that the party was an employment-related function of the Publishing Company and that the Publishing Company was vicariously liable under the doctrine of *respondeat superior* for Jeffries' negligent consumption of alcohol. We disagree.

Plaintiffs, noting that this Court has not yet addressed the issue of whether an employer may be held vicariously liable for the negligence of its employee who becomes intoxicated at an employer-sponsored function, cite *Chastain v. Litton Systems, Inc.*, 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 462 U.S. 1106, 77 L. Ed. 2d 1334 (1983). There, the Fourth Circuit Court of Appeals, applying North Carolina law, stated:

> "If an employee is negligent while acting in the course of employment and such negligence is the proximate cause of injury to another, the employer is liable in damages under the doctrine of respondeat superior, notwithstanding the fact that the employer, himself, exercised due care in the supervision and direction of the employee."

Chastain, 694 F.2d at 962 (quoting *Johnson v. Lamb*, 273 N.C. 701, 707, 161 S.E.2d 131, 137 (1968)). The *Chastain* court concluded that summary judgment for the defendant-employer was inappropriate since evidence that the employer sponsored a Christmas party for its 861 employees, that the party was held on the business premises, that the party began at 8:00 a.m. and continued during working hours, and that the employer required employees to check in by 8:00 a.m., in order to be paid for that day's work, raised a genuine issue of material fact as to whether the employee's attendance at the party and his consumption of alcohol could reasonably be considered to be within the scope of his employment. *Id.* Assuming, without deciding, that *Chastain* is a proper application of North Carolina law, we find this case factually distinguishable from *Chastain* and conclude that plaintiffs' forecast of evidence here does not raise a genuine issue of material fact as to whether Jeffries' attendance and consumption of alcohol at the party was within the scope of his employment.

In support of their contention that Jeffries' negligence occurred during the scope of his employment, plaintiffs rely on the deposition testimony of a business expert who opined that the party enhanced the business interests of the Publishing Company by encouraging employees to work hard to achieve similar recognition, by developing good morale and camaraderie among employees, and by generally increasing the productivity and profitability of the business. Further, plaintiffs rely on Jeffries' statements that he felt his attendance at the party "would help" and that he was concerned his failure to attend "might be noticed." However, plaintiffs concede that Jeffries did not state that he felt compelled to attend the party. This evidence is insufficient to forecast a genuine issue of material fact as to whether Jeffries' attendance at the party and negligent consumption of alcohol there were within the scope of his employment.

In contrast, defendants Daniels and the Publishing Company have shown that plaintiffs cannot prove that Jeffries' conduct was within the scope of his employment. Defendants presented substantial evidence that Jeffries and other Publishing Company employees were

not required to attend the party. No record of attendance was taken, and there was no evidence that an employee's failure to attend would have resulted in adverse consequences. Furthermore, the party was held on the weekend, on a day that Jeffries did not usually work and at a time that was after his usual working hours. Jeffries was not compensated for the time spent attending the party and was not required to work if he did not attend the party. In addition, the party was held at the private home of the newspaper's publisher, defendant Daniels, rather than at the Publishing Company's business facilities. Jeffries was employed by The News and Observer as a reporter, and he did no "reporting" while in attendance at the party. From the foregoing, we conclude that defendants have met their burden of showing that plaintiffs could not produce evidence to support their contention that Jeffries' attendance at the party and consumption of alcohol there were within the scope of his employment. Accordingly, we conclude that the Court of Appeals was correct in affirming the trial court's grant of summary judgment for defendant Publishing Company on the issue of vicarious liability.

Plaintiffs next contend that they presented sufficient evidence to support claims for negligent infliction of emotional distress and punitive damages against defendants Daniels and the Publishing Company and that summary judgment in favor of these defendants on these claims was inappropriate. Having determined that summary judgment for defendants Daniels and the Publishing Company was appropriate on plaintiffs' negligence claims because there was no evidence of negligence, we find it unnecessary to address this contention.

In summary, we affirm the Court of Appeals' decision which affirmed the trial court's order granting summary judgment in favor of defendants Daniels and the Publishing Company. Additionally, we affirm the Court of Appeals' decision which affirmed the trial court's order granting plaintiffs' motion for partial summary judgment as to defendant Jeffries' liability.

AFFIRMED.

Justice ORR concurring.

Although I concur with the factual analysis and conclusions reached by the majority, I feel it is necessary to write separately as to the underlying legal basis for "social host liability" in North Carolina.

In the leading case from our jurisdiction, *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174 (1992), this Court stated:

> We have not been able to find a case in this state dealing with the liability of a social host who serves an alcoholic beverage to a person who then injures someone while operating an automobile while under the influence of an intoxicating beverage. We believe, however, that the principles of negligence established by our decisions require that we hold that the plaintiffs in this case have stated a claim.

Id. at 304-05, 420 S.E.2d at 177.

The thrust of the *Hart* decision centered on the question of duty. The Court further stated:

> There remains the question of whether the defendants were under a duty to the plaintiffs not to serve the alcoholic beverage as they did. We said in *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E.2d 551 (1951), "[t]he law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence." *Id.* at 474, 64 S.E.2d at 553. The defendants were under a duty to the people who travel on the public highways not to serve alcohol to an intoxicated individual who was known to be driving.

Hart, 332 N.C. at 305, 420 S.E.2d at 178.

In responding to the argument that no cause of action existed for "social host liability," the Court simply applied established negligence principles and noted, "we are not recognizing a new claim." *Id.* at 305-06, 420 S.E.2d at 178.

In light of *Hart*, the arguments in this case focused on the question of duty. As a result, the majority opinion deals with duty but fails to address what I perceive to be the primary area of focus in a "social host liability" case, and that is proximate cause and foreseeability.

> Under the common law rule it was not a tort to either sell or give intoxicating liquor to ordinary able-bodied men, and no cause of action existed against one furnishing liquor in favor of those injured by the intoxication of the person so furnished. The reason usually given for this rule being that the drinking of the liquor, not the remote furnishing of it, was the proximate cause of the injury. *See* 48 C.J.S., Intoxicating Liquors, § 430 (1947); 45 Am.

Jur. 2d, Intoxicating Liquor, § 553 (1969); 97 A.L.R. 3d 528, § 2 (1980).

Hutchens v. Hankins, 63 N.C. App. 1, 5, 303 S.E.2d 584, 587, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983).

> In recent years only a handful of courts have continued to follow the old rule of nonliability and refused to allow the injured person to recover from the liquor supplier. Two rationales are commonly advanced to support this rule. First, the proximate cause of both the patron's intoxication and the subsequent injury to the third party was held to be the consumption of liquor, not its sale or furnishing. Second, even if the sale or furnishing were found to have caused the patron's intoxication, the subsequent injury to a third party was held to be an unforeseeable result of the furnishing of the intoxicating beverage. The common law rule was succinctly stated in the oft-quoted passage from *State for Use of Joyce v. Hatfield*, 197 Md. 249, 254, 78 A.2d 754, 756 (Md. App. 1951):
>
> > Apart from statute, the common law knows no right of action against a seller of intoxicating liquors, as such, for "causing" intoxication of the person whose negligent or willful wrong has caused injury. Human beings, drunk or sober, are responsible for their own torts. The law (apart from statute) recognizes no relation of proximate cause between the sale of liquor and a tort committed by a buyer who has drunk the liquor.
>
> The rules rests [sic] in part on the further assumption that it is not a tort to sell liquor to an able-bodied man, since the liquor vending business is legitimate and the purchaser is deemed to be responsible. The other common justification for adherence to the old rule is that, in the final analysis, the controlling consideration is one of public policy, and the decision as to liability should be left to the legislature.

Hutchens, 63 N.C. App. at 7-8, 303 S.E.2d at 588-89 (footnotes omitted).

The Court of Appeals in *Hutchens* concluded:

> We agree with the reasoning of the Supreme Court of California in *Vesely v. Sager, supra*, 5 Cal. 3d [153,] 163-64, 95 Cal. Rptr. [623,] 630-31, 486 P.2d [151,] 158-59 [(1971)], as it held:

> To the extent that the common law rule of nonliability is based on concepts of proximate cause, we are persuaded by the reasoning of the cases that have abandoned that rule . . . [A]n actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct . . .
>
> . . . Moreover, "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." . . .
>
> . . . Insofar as proximate cause is concerned, we find no basis for a distinction founded solely on the fact that the consumption of an alcoholic beverage is a voluntary act of the consumer and is a link in the chain of causation from the furnishing of the beverage to the injury resulting from intoxication. Under the above principles of proximate cause, it is clear that the *furnishing* of an alcoholic beverage to an intoxicated person *may be a proximate cause* of injuries inflicted by that individual upon a third person. *If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes, or at least the injury-producing conduct is one of the hazards which makes such furnishing negligent.* (Citations omitted.) (Emphasis supplied.)

Hutchens, 63 N.C. App. at 11-12, 303 S.E.2d at 591.

The thrust of the *Hutchens* opinion was to eliminate under certain circumstances the inflexible barrier to suits against vendors of alcoholic beverages by persons injured by the negligence of consumers of the alcoholic beverages. Thus, after *Hutchens*, the common law proximate cause/foreseeability bar to such suits had been partially overcome. However, the bar still remained as to social host situations.

In the Court of Appeals decision in *Hart v. Ivey*, 102 N.C. App. 583, 403 S.E.2d 914 (1991), *aff'd*, 332 N.C. 299, 420 S.E.2d 174 (1992), the majority extended the rule enunciated in *Hutchens* to social host

cases but only in the context of the negligence *per se* claim based on a public safety statute and not to a common law claim. This Court, however, in the *Hart* decision did find a common law cause of action but made no comment on the proximate cause/foreseeability issue except to say that the jury could find from the evidence that the negligent conduct was the proximate cause of the injury to plaintiffs.

It should be noted that the California legislature subsequently enacted legislation to abrogate the ruling in *Vesely* and subsequent decisions that followed or expanded the ruling.

> As we previously indicated, the stated purpose of section 25602 is to abrogate the rulings in *Coulter v. Superior Court* (1978) 21 Cal. 3d 144, 145 Cal. Rptr. 534, 577 P.2d 669, *Bernhard v. Harrah's Club* (1976) 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P.2d 719[, *cert. denied*, 429 U.S. 859, 50 L. Ed. 2d 136 (1976),] and *Vesely v. Sager* (1971) 5 Cal. 3d 153, 95 Cal. Rptr. 623, 486 P.2d 151, and reaffirm "prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person." (§ 25602, subd. (c).) *Coulter*, *Bernhard* and *Vesely* were cases where the plaintiffs were injured by intoxicated operators of motor vehicles, and were suing the persons or entities who served the alcoholic beverages to the defendant drivers. Obviously, section 25602 now immunizes the person furnishing the alcohol from such liability.

Cantwell v. Peppermill, Inc., 25 Cal. App. 4th 1797, 1802-03, 31 Cal. Rptr. 2d 246, 249 (1994).

The time has now come, in my opinion, for this Court to squarely address "social host liability" on the grounds of proximate cause and foreseeability rather than duty. Based upon the facts of this case, I conclude that the uncontroverted facts show that the defendants/social hosts took every reasonable step to safely serve alcoholic beverages to the guests. Therefore, on the grounds of foreseeability and proximate cause, I would agree with the result reached that summary judgment was properly granted for defendants Daniels and the News and Observer Publishing Company. To hold otherwise would impose liability simply for the act of serving alcoholic beverages. As *Hutchens* and *Hart* both imply, the act of serving alcohol to a person whom you knew or should have known to be intoxicated and plan-

ning to drive would present a set of facts which would arguably survive a motion for summary judgment—at least as to the issues of proximate cause and foreseeability. Such was not the case here.

Justice WEBB joins in this concurring opinion.

STATE OF NORTH CAROLINA v. WANDA COLEEN WILSON

No. 2A94

(Filed 28 July 1995)

1. Criminal Law § 1599 (NCI4th)— restitution of funeral expenses—insufficiency of evidence to support

The procedure for recommending restitution as a condition of work release or parole is: (1) the trial court must determine if it is going to recommend restitution; (2) the amount of restitution must be supported by the evidence adduced at trial or sentencing; and (3) the determination of defendant's ability to pay will be made either by the Department of Correction or by the Parole Commission at the time restitution is actually ordered. In this case, the trial court did not err in failing to find defendant's ability to pay, but did err in ordering restitution of funeral expenses of $4,000 based only on the prosecutor's unsworn testimony that these expenses were $4,000. N.C.G.S. § 15A-1343(d).

Am Jur 2d, Pardon and Parole § 80.

2. Evidence and Witnesses § 1275 (NCI4th)— inculpatory statement made to police—defendant's capacity unaffected by alcohol

The trial court did not err in denying defendant's motion to suppress an inculpatory statement defendant gave to police while she was in custody on the ground she lacked the capacity to knowingly and voluntarily waive her rights, since defendant gave appropriate and responsive answers to officers' questions about defendant's age, date of birth, and place of residence, among other things; defendant could walk and climb stairs unassisted; defendant stated to the officer that she had consumed alcohol but was unimpaired by it; and, in the officer's opinion, defendant was

not impaired to the extent that she did not understand what she was saying and what he was asking her.

Am Jur 2d, Evidence § 747.

3. Homicide § 245 (NCI4th)— first-degree murder—sufficiency of evidence

The evidence of specific intent to kill after premeditation and deliberation was sufficient to be submitted to the jury in a first-degree murder prosecution where it tended to show that the victim did not provoke defendant but instead remained in his car during the entire events leading up to his murder and did not have any contact with defendant until she came over to his car with a knife; when defendant approached the car, the victim did not attempt to get out of the car or confront defendant; prior to the killing, defendant threatened to kill the victim's companion and then to kill the victim; after the murder defendant made statements to the effect that she intended to kill the victim; after defendant stabbed the victim, she touched the wound and stated that she had done it; defendant did not attempt to help the victim but instead threw away the murder weapon and went inside her apartment; and as defendant was escorted out of her apartment by police officers, she admitted to surrounding witnesses that she was the one who had stabbed the victim.

Am Jur 2d, Homicide § 439.

4. Appeal and Error § 155 (NCI4th)— absence of instruction—failure to preserve for appellate review

Defendant failed to preserve for appellate review under N.C. R. App. P. 10(b)(2) an assignment of error to the trial court's failure to instruct on the lack of mental capacity as it related to defendant's ability to form a specific intent to commit murder where defendant failed to timely object to the trial court's instructions. Defendant also waived appellate review under N.C. R. App. P. 10(c)(4) by failing specifically and distinctly to contend that the error amounts to plain error.

Am Jur 2d, Trial § 395.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Stanback, J., at the 26 July 1993 Mixed Session of Superior Court, Alamance County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 13 January 1995.

Michael F. Easley, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

ORR, Justice.

Defendant was tried noncapitally at the 26 July 1993 Mixed Session of Superior Court, Alamance County, for first-degree murder and assault with a deadly weapon with intent to kill. On 30 July 1993, a jury returned a verdict finding defendant guilty of first-degree murder and not guilty of assault with a deadly weapon with intent to kill. The trial court imposed a mandatory sentence of life imprisonment for the first-degree murder conviction and dismissed the charge of assault with a deadly weapon with intent to kill.

On appeal, defendant brings forward five assignments of error. After a thorough review of the transcript of the proceedings, the record on appeal, the briefs, and oral arguments, we conclude that as to the conviction for first-degree murder, defendant received a fair trial, free from prejudicial error. As to the amount of restitution for funeral expenses recommended by the trial court, however, we conclude that the amount was not supported by the evidence. Therefore, for the reasons stated below, we affirm defendant's conviction for first-degree murder and sentence of life imprisonment and vacate that portion of the judgment recommending restitution for funeral expenses in the amount of $4,000.

This case arises out of the murder of Aaron Rudd, who was stabbed while sitting in his car outside of defendant's apartment waiting for his friends. The following is a summary of the events leading up to the murder and the circumstances surrounding the murder as presented by the State: The night of 29 August 1992, Aaron Rudd drove Charles King ("Ciggie"), Dontae Jackson, and John Mark Baker to defendant's apartment to talk with defendant's sister, Lovely, and her friends. Ciggie got out of the car and went into the apartment while Aaron, Dontae, and John remained in the car.

In defendant's apartment, a fight took place between defendant's boyfriend, Tracey Teague, and Ciggie. Ciggie testified that while he was fighting with Tracey, he heard a noise from the kitchen that sounded like silver objects "clinging together." Dontae testified that

he ran into defendant's apartment to get Ciggie and heard "rustling" of silverware from the kitchen. Dontae testified that he saw defendant come out of the kitchen with two knives, one in each hand, and that defendant started swinging these knives at Ciggie. Dontae and Ciggie left defendant's apartment immediately.

Aaron, Dontae, John, Ciggie, and an individual named Mikey later returned to defendant's apartment in two cars to talk with one of Lovely's friends. While Aaron remained in his parked car, Dontae and Ciggie got out of the cars and met Tracey walking down the sidewalk. A fight ensued between Dontae and Tracey. Ciggie and Dontae both testified that while Tracey and Dontae were fighting, defendant came out of her apartment with a knife and began swinging the knife at Dontae. Dontae jumped back, and defendant missed him, whereupon Dontae ran to Aaron's car.

Dontae testified that as he was running to Aaron's car, defendant was chasing him, swinging the knife and saying, "I'm gonna kill you, mother f——, I'm gonna kill you." Dontae testified that he jumped into Aaron's car on the passenger side, closed his door, and rolled up his window. At this time, Aaron was still sitting in the driver's seat of his car, and his door was open. Dontae testified that Aaron closed his door but that his window was still down. After Dontae rolled up his window, defendant went over to Aaron's side of the car, cursing and yelling at Dontae. Defendant looked at Aaron, and Aaron stated that he had nothing "to do with it" and asked defendant why she was yelling at him. Dontae testified that defendant looked at him and then looked at Aaron and stated, "If I can't get you, I'm gonna get him" and stabbed Aaron. Dontae heard Aaron say, "I'm stabbed," and then Aaron turned the car into the driveway, honking the horn. Defendant walked back inside of her apartment. Aaron was taken to the hospital by ambulance, where he died shortly thereafter.

Officer Stanford of the Burlington Police Department took defendant into custody and transported her to the Burlington Police Department where Detective Greg Seel interviewed her. Detective Seel testified that he asked defendant what happened that night and she stated, "I stabbed him. I stabbed him to keep him from coming back." After changing rooms, Detective Seel explained to defendant that the matter he was investigating was serious. Detective Seel testified that he again asked defendant to relate to him the events of the night and that defendant stated

that Dontae, Ciggie, and someone else had come over to the apartment and that she and Tracey were in bed. She stated that she had asked Lovely not to have these people over there anymore and that Lovely had asked them in, and [defendant] stated that she came downstairs and asked them to leave. She stated that they all left and went outside and then [defendant] and Tracey went back upstairs to the bedroom. She said that they stayed upstairs for about fifteen minutes and then [defendant] could hear them outside arguing, so she went back downstairs and they were in the front yard. [Defendant] went outside with Tracey, and Tracey and Ciggie got into an argument and Ciggie smacked Tracey. She said that Ciggie beat Tracey up. She stated that when she came outside she had a steak knife with her that she got out of the kitchen drawer by the stove in her apartment. She stated that she was fighting with someone and that she wanted them to leave her alone and then she stated, "I meant to do it, but I didn't mean to do it." She then stated that she was fighting and that she took the knife out of the waistband of her shorts and she stabbed him in the chest. She stated that she thought he was trying to run away from me or her at the time that she stabbed him. She stated that she heard [Aaron] Rudd say, "They started it, and call the ambulance." After she stabbed Rudd, she went into her house. She stated that the knife still had blood on it and that she . . . thought that she threw the knife in the pasture behind her apartment. She stated after she threw the knife away she went upstairs and smacked Lovely. She told Lovely, "I knew that I'd done something wrong," and then she told Lovely, "See what you made me do," and then Lovely replied that she didn't [mean] to do it. She stated shortly after that her mother, Linda Bigelow, had come over to the apartment. She stated that she came downstairs and that the police and her mother were downstairs in her apartment. She stated, "Okay, I'm coming."

Officer Somers of the Burlington Police Department testified that he recovered the knife from behind defendant's apartment near a pasture, behind a tree. Officer Somers identified the knife at trial as being a Rogers steak knife with a dark wooden handle, nine inches long, with a bent tip and dark-colored stains on the blade. The knife was admitted into evidence.

Dr. Clark, a forensic pathologist, testified that on 30 August 1992, he performed an autopsy on Aaron Rudd. Dr. Clark testified that

Aaron had a stab wound on the front part of his chest and that Aaron died as a result of this stab wound.

Defendant also testified at trial. Defendant testified that on 29 August 1992, she celebrated her twenty-sixth birthday by drinking alcohol all day. Defendant began drinking malt liquor beer at 10:00 a.m. and continued throughout the day to drink beer and gin and to smoke crack cocaine. Defendant testified that around 12:30 or 1:00 a.m., after she had taken some sleeping pills and some other pills that she had stolen from her mother, she and Tracey went upstairs in her apartment, leaving her sister and her friends downstairs. Defendant testified that she went upstairs because she was "tired drunk."

Thereafter, defendant heard "a lot of noise" downstairs and told Tracey to go downstairs and tell her sister and her company that they had to leave. Defendant testified that she heard an argument and that she went downstairs and told everyone to leave her apartment. Defendant testified that at this time, Ciggie and Tracey got into a fight, that she was knocked down, and that she hit her head on the bar. Defendant testified that she did not remember anything about the rest of the night after she hit her head and that she did not remember seeing or speaking to the police. Defendant testified that the next thing she remembered after the fight between Tracey and Ciggie was being in a strange place and her mother telling her that she had killed somebody.

I.

[1] Defendant first contends that the trial court erred in ordering that defendant pay restitution for funeral expenses in the amount of $4,000 to the victim's parents as a condition of work release or parole. In support of her contention, defendant argues that the trial court failed to give any consideration "to defendant's ability to pay and no evidence was presented to support the amount ordered" in violation of N.C.G.S. § 15A-1343(d). We disagree with defendant's assertion that the trial court was required to consider defendant's ability to pay $4,000 in restitution at the time of sentencing. We agree with defendant's assertion, however, that the $4,000 amount must be supported by evidence at trial or sentencing.

Pursuant to N.C.G.S. §§ 148-33.2(c), -57.1(c) (1994), and as stated on the written judgment and commitment, the trial court's order of restitution as a condition of work release or parole constitutes a *recommendation* to the Secretary of the Department of Correction and

the Parole Commission, not an order binding defendant to pay restitution in this amount upon entry of the judgment in this action.

> Neither the Parole Commission nor the Department of Correction is bound by the judge's recommendation of restitution as a condition of parole or work release. When the time comes that restitution may be imposed as a condition of parole, the Parole Commission must give defendant notice that restitution is being considered as a condition of parole and an opportunity to be heard. G.S. 148-57.1(d). The Department of Correction must follow this same procedure before restitution may be imposed as a condition of work release. G.S. 148-33.2(d). Such a hearing is the proper forum for determination of defendant's ability to pay restitution.

State v. Arnette, 67 N.C. App. 194, 196, 312 S.E.2d 547, 548 (1984) (citation omitted). Thus, "[t]here is no statutory requirement for a sentencing judge to inquire into a defendant's ability to pay restitution when the judge merely recommends restitution as a condition of parole or work release." *Id.* at 196, 312 S.E.2d at 548-49. We conclude, therefore, that the trial court did not err in failing to consider defendant's ability to pay restitution, as the potentially binding determination at a later date requiring defendant to pay restitution as a condition of work release or parole by either the Department of Correction or the Parole Commission will by necessity require sufficient evidence of defendant's ability to pay at that time.

However, the amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing. *State v. Daye*, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560, *disc. rev. allowed*, 316 N.C. 554, 344 S.E.2d 11, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986). "Even though recommendations of restitution are not binding, we see no reason to interpret the statutes of this State to allow judges to make specific recommendations that cannot be supported by the evidence before them." *Id.* at 757, 338 S.E.2d at 560. Therefore, "[r]egardless of whether restitution is ordered or recommended by the trial court, the amount must be supported by the evidence." *Id.*

Thus, the procedure for recommending restitution as a condition of work release or parole is as follows: First, the trial court must determine if it is going to recommend restitution. Second, if the trial court decides to recommend restitution in a specific amount, then this amount must be supported by the evidence adduced at trial or

sentencing. Finally, the determination of defendant's ability to pay restitution will be made by either the Department of Correction or the Parole Commission at the time restitution is actually ordered as a condition of work release or parole.

In the present case, the only evidence presented to support the amount of funeral expenses recommended by the trial court is the prosecutor's unsworn statement that these expenses were in the amount of $4,000. This evidence is insufficient to support the amount of restitution recommended. *See State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992) (unsworn statements of prosecutor insufficient to support recommended amount of restitution). Thus, because the $4,000 amount of recommended restitution is not supported by the evidence adduced at trial or sentencing, we vacate that portion of the judgment recommending restitution in the amount of $4,000.

II.

[2] Next, defendant contends that the trial court erred in denying her motion to suppress an inculpatory statement she gave to police while she was in custody on the grounds that she lacked the capacity to "knowingly and voluntarily" waive her rights. We disagree.

When a person is in the custody of law enforcement officers,

> "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."

State v. Ingle, 336 N.C. 617, 634, 445 S.E.2d 880, 888 (1994) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706-07 (1966)), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 222 (1995). Consequently,

> "the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly given. The fact that the technical procedural requirements of *Miranda* are demonstrated by the prosecution is not, standing alone, controlling on the question of whether a confession was voluntarily and understandingly made.

> The answer to this question can be found only from a consideration of all circumstances surrounding the statement."

State v. Mlo, 335 N.C. 353, 363, 440 S.E.2d 98, 102 (quoting *State v. Rook*, 304 N.C. 201, 216, 283 S.E.2d 732, 742 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982)), *cert. denied*, —— U.S.——, 129 L. Ed. 2d 841 (1994).

In the present case, defendant contends that she did not voluntarily and knowingly give her statement because at the time of the questioning, her mental ability to reason was impaired by depression, shock, alcohol, sleeping pills, and cocaine. We disagree.

The trial court held a *voir dire* and made extensive findings of fact concerning the interview in question. The trial court found that on 30 August 1992, at approximately 4:30 a.m., Detective Seel interviewed defendant at the Burlington Police Department. At the time of this interview, defendant was under arrest and charged with murder. The trial court found that before beginning the interview, Detective Seel advised defendant of her *Miranda* rights, that after each right was read to her, defendant was asked if she understood the right, and that defendant responded that she understood all of her rights.

The trial court further found that in the presence of Detective Seel, defendant signed a statement saying that she voluntarily waived her rights. The trial court found that Detective Seel observed defendant for an hour to an hour and a half and that during this time, he observed defendant walking, talking, and climbing steps. The trial court found that defendant was able to walk alone and climb steps without aid and that Detective Seel indicated that in his opinion, "she was not so impaired as to not understand what she was saying or hearing what was going on."

The court also found

> that the statements given by the defendant to the detective were reasonable, that there were no promises, offers of reward, or inducement made by the law enforcement officer to the defendant to make a statement, that there were no threats or suggested violence or show of violence by the law enforcement officer to persuade or induce the defendant to make a statement, that there was no indication by the defendant that she wished to stop talking, there was no request by the defendant for a lawyer, and the defendant indicated that she understood her rights and voluntarily waived her rights orally and in writing.

Based on these findings, the trial court concluded that the statement made by defendant was made "freely, voluntarily, and understandingly while the defendant was in full understanding of her constitutional rights, that she was not so impaired by the consumption of alcohol as not to understand her rights and understand that she was freely, voluntarily, and understandingly waiv[ing] those rights."

"The trial court's findings of fact following a *voir dire* hearing are binding on this [C]ourt when supported by competent evidence." *State v. Lane*, 334 N.C. 148, 154, 431 S.E.2d 7, 10 (1993) (citing *State v. Mahaley*, 332 N.C. 583, 592, 423 S.E.2d 58, 64 (1992), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 649 (1995)). The trial court's conclusions of law based upon its findings are, however, fully reviewable on appeal. *Id.*

In the present case, the trial court's findings were supported by the following evidence presented at *voir dire*: Prior to advising defendant of her *Miranda* rights, Detective Seel asked her if she were under the influence of any alcohol or drugs. Defendant responded that she had drunk three beers and a "plate of kiwi," a type of wine. Detective Seel then asked defendant if she felt impaired by the alcohol, and she stated "no, that she was not." Thereafter, Detective Seel read defendant her *Miranda* rights.

Detective Seel went through each right with defendant, checking them off on a form when defendant indicated that she understood them. Then Detective Seel asked defendant if she understood each of these rights, and defendant indicated that she did understand these rights by writing "yes" and her name beside the question. Detective Seel then asked defendant if, with these rights in mind, she wished to talk with him, and defendant wrote "yes" and her initials beside this question. Defendant also signed a written form that indicated that she understood her rights, that she was willing to make a statement and answer questions without a lawyer present, and that no promises or threats had been made to her and no pressure or coercion had been used against her.

Defendant accurately wrote her name and date of birth on the waiver form and accurately answered Detective Seel's questions regarding her name, age, date of birth, place of residence, lack of employment, marital status, and the number of children she had. Defendant walked down the stairs and hallway unassisted, and she appeared to Detective Seel to know where she was. Defendant's answers were appropriate and responsive, and in Detective Seel's

opinion, defendant was not impaired to the extent that she did not understand what he was saying and what he was asking her.

We find the foregoing evidence substantial evidence in support of the trial court's findings. Further, the trial court's conclusion that under these facts defendant gave her statement "freely, voluntarily, and understandingly" and that defendant was "not so impaired by the consumption of alcohol as not to understand her rights and understand that she was freely, voluntarily, and understandingly waiv[ing] those rights" was correct. *See State v. Eason*, 328 N.C. 409, 423-24, 402 S.E.2d 809, 816 (1991) (trial court properly concluded defendant was not so "hung over" as to render his statement involuntary based on the evidence that at the time he was advised of his rights, defendant did not appear to be under the influence of drugs or alcoholic beverages, defendant appeared to understand where he was, what was going on, and what was being asked, defendant was not threatened or offered inducements to respond, and defendant asked the officers what evidence they had against him before answering questions); *see also State v. McCollum*, 334 N.C. 208, 236-37, 433 S.E.2d 144, 160 (1993) (where defendant contended his mental retardation and emotional disabilities prohibited him from making a knowing and intelligent waiver of his constitutional rights, the trial court properly concluded that defendant knowingly and intelligently waived his constitutional rights and voluntarily made his statements to officers where the evidence showed defendant chose to go with the officers and appeared to have no problem understanding what the officers talked about or any of their instructions, officers read defendant each of his rights and defendant indicated he understood these rights and signed a waiver of his rights form, and defendant's answers were reasonable in relation to the questions asked by the officers), *cert. denied*, — U.S. —, 129 L. Ed. 2d 895, *reh'g denied*, — U.S. —, 129 L. Ed. 2d 924 (1994). Defendant's assignment of error is overruled.

III.

[3] Defendant also contends that the trial court erred in denying her motion to dismiss the charge of first-degree murder based on the insufficiency of the evidence. We disagree.

"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 and of the defendant's perpetration of such crime." *State v. Bates*, 309 N.C. 528, 533, 308 S.E.2d 258, 262 (1983).

> "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The term 'substantial evidence' simply means 'that the evidence must be existing and real, not just seeming or imaginary.' *State v. Powell*, 299 N.C. 95, 99 261 S.E.2d 114, 117 (1980)."

State v. Watson, 338 N.C. 168, 175-76, 449 S.E.2d 694, 699 (1994) (quoting *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992)), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 569 (1995). "The trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994).

Upon a motion to dismiss in a trial for first-degree murder, " 'the trial court must determine whether the evidence, viewed in the light most favorable to the State, is sufficient to permit a jury to make a reasonable inference and finding that the defendant, after premeditation and deliberation, formed and executed a fixed purpose to kill.' " *Id.* (quoting *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61-62 (1991)). In the present case, defendant contends that although there was evidence of an intentional unlawful act by defendant sufficient to support an inference of malice, there was insufficient evidence to show that prior to committing the unlawful act, defendant formed the specific intent to kill the victim and committed the unlawful act in execution of that intent.

"Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992) (citations omitted). " 'Premeditation is defined as thought beforehand for some length of time; deliberation means an intention to kill, executed by defendant in a "cool state of blood" in furtherance of a fixed design or to accomplish some unlawful purpose.' " *State v. Bell*, 338 N.C. 363, 388, 450 S.E.2d 710, 724 (1994) (quoting *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838 (1981)), *petition for cert. filed*, —— U.S. ——, —— L. Ed. 2d —— (No. 94-9093-CSY, 13 April 1995). "A *specific intent to kill* is a necessary constituent of the elements of premeditation and deliberation." *State v. Young*, 324 N.C. 489, 493, 380 S.E.2d 94, 96 (1989) (citing *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560 (1968)). "Proof of premeditation and deliberation is proof of that intent." *Id.*

" 'Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence.' " *Bell*, 338 N.C. at 388, 450 S.E.2d at 724 (quoting *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 822-23 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *rev'd on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988)). Circumstances and actions used to prove premeditation and deliberation include:

> "(1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds."

Mlo, 335 N.C. at 369, 440 S.E.2d at 106 (quoting *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992)).

In the present case, the evidence, viewed in the light most favorable to the State, showed that the victim, Aaron Rudd, did not provoke defendant. In fact, the evidence tended to show that Aaron remained in his car during the entire events leading up to his murder and did not have any contact with defendant until she came over to his car with a knife. Aaron did not go into defendant's apartment, nor was he physically involved in the fights between defendant's boyfriend and Ciggie, and defendant's boyfriend and Dontae. When defendant approached Aaron in the car, Aaron did not attempt to get out of the car or confront defendant. Instead, Aaron told defendant that he did not have anything to do with the fight between her boyfriend and Dontae and asked her why she was yelling at him.

The evidence further tended to show that prior to the killing, defendant threatened to kill Dontae and then to kill Aaron and that prior to the killing and after the killing, defendant made statements to the effect that she intended to kill Aaron. Defendant came out of her apartment with two knives, one in her hand and another in the waistband of her pants. Defendant swung one of the knives at Dontae but missed. Defendant then chased Dontae up a hill and over to Aaron's car, swinging a knife and threatening, "I'm gonna kill you, mother f——-, I'm gonna kill you." When defendant got to the car, she approached Aaron's side of the car, cursing and yelling, saying,

"Mother f——, I told ya'll not to come back . . . . I don't know what ya'll came back for." Defendant looked at Aaron, and Aaron stated, "I have nothing to do with it. Why are you yelling at me?" Defendant stated that if she could not get Dontae, she would get Aaron. Defendant then reached through Aaron's window and stabbed Aaron in the chest with such force that the knife went through Aaron's sternum, through the right ventricle of his heart, through his diaphragm, and into his liver.

After she stabbed Aaron, defendant touched the wound and stated, "Yeah, that's right, I did it, I did it. I told you, mother f——-, to leave Tracey alone." Defendant did not attempt to help Aaron; instead, she walked over to her apartment, discarded the knife in a wooded area, and went inside. As defendant was escorted out of her apartment by police officers, she admitted to the surrounding witnesses that she was the one who stabbed Aaron. When she arrived at the police station, defendant stated to police officers, "I stabbed him. I stabbed him to keep him from coming back."

From the foregoing, we conclude that substantial evidence existed to show defendant acted with the specific intent to kill Aaron Rudd after premeditation and deliberation. Accordingly, the trial court properly denied defendant's motion to dismiss the charge of first-degree murder based on the insufficiency of the evidence. Defendant's assignment of error is without merit.

IV.

[4] Next, defendant contends that the trial court erred in denying her request to instruct the jury on the lack of mental capacity as it related to defendant's ability to form the specific intent to commit murder. We disagree.

During the charge conference, defense counsel stated, "There is a specific instruction for voluntary intoxication or lack of capacity for premeditation and deliberation in first degree murder" and referenced N.C.P.I.—Crim. 305.11. Defense counsel then stated, "We would ask for the voluntary intoxication as to premeditation and deliberation in the first degree murder." The trial court agreed to give an instruction on voluntary intoxication. Following the presentation of additional evidence and prior to the jury instruction being given, defense counsel stated:

> [I]n asking the [c]ourt for the instruction on voluntary intoxication, that instruction as a pattern instruction would cover volun-

> tary intoxication by drugs or alcohol as well as a diminished capacity or lack of mental capacity. Based upon the testimony about depression and some other things, being out of touch with reality after the situation, we're asking the [c]ourt to include the language about lack of mental capacity, and what's clear to me is we didn't specifically address that, if the [c]ourt was going to include that language in that instruction or not.

Other than statements by the prosecutor that he did not think there was evidence of lack of mental capacity and that he was unsure of the language in the instruction to which defense counsel was referring, there was no further discussion on the record regarding the charge. Thereafter, the trial court instructed the jury on voluntary intoxication but did not instruct on the lack of mental capacity. After the jury retired to the jury room, the trial court asked whether the State or defendant had any corrections or additions to the jury charge. Defense counsel responded, "No sir."

On appeal, defendant contends that the trial court erred in failing to instruct the jury on lack of mental capacity. Because defendant failed to timely object to the trial court's instruction, however, defendant did not preserve this assignment of error for appellate review under Rule 10(b)(2) of the Rules of Appellate Procedure. N.C. R. App. P. 10(b)(2) states:

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

Further, defendant does not allege plain error. N.C. R. App. P. 10(c)(4) provides:

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

In the present case, because defendant has failed to specifically and distinctly allege that the trial court's instruction amounted to plain

error, defendant has waived any appellate review. *State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994).

V.

Finally, defendant contends that the trial court erred by allowing the prosecutor on cross-examination to improperly question and impeach defendant. Again, however, defendant failed to object to the specific questions which she now argues were in error, and she does not allege plain error. Thus, defendant has failed to preserve this assignment of error for appellate review. *State v. Johnson*, 340 N.C. 32, 455 S.E.2d 644 (1995); N.C. R. App. P. 10(b)(1), (c)(4).

As to the first-degree murder conviction and sentence of life imprisonment—NO ERROR.

As to the recommended amount for restitution for funeral expenses—VACATED.

STATE OF NORTH CAROLINA v. BOBBY RAY HIGHTOWER

No. 375A94

(Filed 28 July 1995)

1. Evidence and Witnesses § 190 (NCI4th)— first-degree murder—mental condition of victim—testimony excluded

The trial court did not err in a first-degree murder prosecution in excluding expert testimony concerning the victim's mental condition. Although defendant contended that the excluded evidence consisted of expert testimony that the victim suffered from a manic-depressive illness which caused various problems, including irritability and hostility, that this was admissible to corroborate defendant's claim that he killed the victim after she resisted his effort to end their relationship and became assaultive, and that the excluded testimony was thus relevant to disprove premeditation and deliberation, the undisputed evidence, including evidence that the victim was attempting to withdraw from a confrontation with defendant at the time of the murder, shows premeditation and deliberation on the part of defendant regardless of the victim's mental condition. The victim's actions in this case, regardless of mental condition, did not

constitute sufficient provocation to negate premeditation and deliberation on the part of defendant.

Am Jur 2d, Evidence § 559.

2. Evidence and Witnesses § 761 (NCI4th)— first-degree murder—defendant's relationship with victim—testimony excluded—no prejudice

There was no prejudicial error in a first-degree murder prosecution in the exclusion of testimony by defendant's neighbor that defendant had told her that he tried to break off his relationship with the victim but that she would not let him, that he was reconciling with his wife, and that the victim had threatened to tell defendant's wife that she was pregnant. Assuming that this evidence was relevant, similar undisputed testimony was before the jury.

Am Jur 2d, Appellate Review § 759.

3. Evidence and Witnesses § 649 (NCI4th)— first-degree murder—testimony of prior assaults by defendant—motion to prohibit cross-examination concerning—ruling refused

There was no error in a first-degree murder prosecution where defendant questioned his former wife on *voir dire* concerning the victim's harassing conduct toward her and defendant, the State cross-examined her about defendant's previous assaults against her, defendant argued that questions concerning the assaults were not admissible, the court ruled that the testimony elicited by defendant on direct was admissible but declined to rule on the cross-examination by the State, defendant requested a ruling on the question later in the trial, and the court indicated that he would listen to the cross-examination and make rulings as the trial proceeded. Defendant's motion, although not made as a pretrial motion, appears to be in the nature of a *motion in limine*, which is in the discretion of the trial judge. It cannot be said that the State would have offered evidence so highly prejudicial that a curative instruction would not have prevented prejudice. Defendant was free to call the witness and retained the right to object to any questions asked by the State on cross-examination. Not calling the witness was a purely tactical decision; defendant's right to testify on his own behalf was not implicated and the statements by the State were not necessarily inadmissible.

Am Jur 2d, Trial § 112.

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. Criminal Law § 490 (NCI4th)— first-degree murder—publicity during trial—no inquiry of jury

There was no error in a first-degree murder prosecution where the trial court declined to ask sitting jurors if they had read a newspaper article which appeared during the trial over a weekend and which stated that defendant had previously been convicted and sentenced to death. The judge stated that he had told each member of the jury numerous times not to read anything about the case and to decide the case on the evidence, expressed concern about provoking the jury's curiosity, and found that this jury panel was responsible and would follow his instructions. The trial judge is in the best position to observe the jury; additionally, the judge's finding here was supported by the fact that at least one member of the jury had openly indicated that he had followed the court's instructions by refusing to talk about the case.

Am Jur 2d, Trial § 1641.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Mills, J., at the 11 October 1993 Criminal Session of Superior Court, Guilford County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 11 April 1995.

Michael F. Easley, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

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

ORR, Justice.

On 4 January 1988, defendant was indicted for first-degree murder in the death of Naomi Donnell. At defendant's first trial, a jury found defendant guilty of first-degree murder and recommended that the death penalty be imposed. On appeal, this Court found error in the jury selection phase of defendant's trial and ordered a new trial. *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992). Defendant was

retried, and on 19 October 1993, a jury returned a verdict finding defendant guilty of first-degree murder. Following a capital sentencing proceeding, the same jury failed to find the sole aggravating circumstance submitted, and the trial court entered judgment sentencing defendant to a term of life imprisonment.

On appeal, defendant brings forward three 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 from prejudicial error, and we therefore affirm his conviction and sentence.

The evidence presented at trial tended to show the following: In November 1987, Naomi Donnell lived with her mother and stepfather in High Point, North Carolina. Naomi was eighteen years old at this time. Naomi's mother, Harriet Donnell Stamps, testified that her daughter dated defendant, beginning in January 1987. In March or April of that year, Ms. Stamps "had gotten the news" that defendant was married and confronted defendant with this information. Ms. Stamps testified that defendant admitted to her that he was married but that he also stated that he was legally separated from his wife.

Ms. Stamps also testified that in October 1987, defendant came over to her house to visit. During this visit, defendant asked Ms. Stamps, "has Naomi told you the news about us and what we're looking for?" Ms. Stamps testified that she responded by asking if they were looking for an apartment and that defendant laughed and stated, "No," they were "looking for" a baby.

On 11 November 1987, defendant called Ms. Stamps' house and asked to speak with Naomi about their "problem." Ms. Stamps called Naomi to the phone, and Naomi picked up the other phone in the living room. Ms. Stamps testified that she listened to their conversation and that she heard defendant ask Naomi if she had any plans for that night or the next day because he wanted to talk to her. Naomi told defendant that she was not free that night and that she would be at the grocery store with her mother the next day. Ms. Stamps testified that defendant told Naomi that he wanted to meet her and that when Naomi asked him what he wanted to meet with her about, defendant stated, "I've finally got a solution to our problem, and we need to talk." Ms. Stamps testified that Naomi and defendant made plans to meet.

The following night, 12 November 1987, at approximately 10:00, Naomi went to the grocery store with her parents. After they had been in the store about five minutes, Naomi went outside, came back, and told her mother that defendant was there and that she was "getting ready to ride out." Ms. Stamps testified that she told Naomi not to be late and that Naomi told her that she would be home between 11:30 and 12:00. Ms. Stamps further testified that this was the last time she saw her daughter alive.

Deputy James Church of the Guilford County Sheriff's Department testified that on 13 November 1987, he responded to a call at a bridge on Troxler Mill Road concerning a body that had been spotted floating in the Haw River. Deputy Church testified that he arrived on the scene at approximately 4:00 p.m. and that he and some volunteer firemen pulled the body out of the water. Deputy Church observed that the body was that of a black female with "slash" or "gash" wounds about her neck area and chin. The body was later identified as Naomi Donnell's.

Captain R.T. Forrest of the Guilford County Sheriff's Department testified that he arrived on the scene at approximately 5:29 p.m. the day the body was found and that in response to information he received from another officer, he searched the area of a nearby mill. Captain Forrest testified that in the mill area, he observed a clearly defined path that went around the back of the mill through a grassy area between the mill and the riverbank. Captain Forrest further testified that on the riverbank in this area, he observed bloodstains on the rocks and leaves and vertical marks that "looked like someone had slid down, or fallen down, the bank." Captain Forrest testified that there was an eight- to nine-foot drop from the bank of the river to the rocky water's edge.

Dr. Robert L. Thompson, a forensic pathologist, supervised the autopsy of Naomi Donnell. Dr. Thompson testified that he observed a series of wounds on the body, including thirteen stab wounds, three cut or incised wounds, and numerous abrasions, lacerations, and bruises. Dr. Thompson testified that in his opinion, the two stab wounds in the upper left and right side of the back were the cause of the victim's death. Dr. Thompson also testified that the autopsy revealed that at the time of her death, Naomi Donnell was fifteen weeks pregnant.

On 16 November 1987, Captain Forrest and Detective Jackson questioned defendant at the Guilford County Sheriff's Department

about his relationship with Naomi. Captain Forrest testified that defendant told him that he knew Naomi because he went to school with her older sister and brother and that he had been seeing her "for a few months prior." Defendant told Captain Forrest that at the time he was seeing Naomi, he was separated from his wife. Captain Forrest testified that defendant was in fact living with his wife at the time of this interview.

Captain Forrest further testified that defendant told him that he agreed to meet with Naomi the night of 12 November 1987 at a Kroger's grocery store. Defendant told Captain Forrest three different versions of the events that occurred on the night of 12 November 1987, and, following the third version, Detective Jackson stated, "Bobby, you killed her, didn't you?" Captain Forrest testified that in response to this question, defendant "began to tear up, and he dropped his head and just nodded, 'Yes,' up and down." Captain Forrest then asked defendant to tell them what had happened.

Defendant's statement was reduced to writing and signed by defendant. Captain Forrest read the following narrative portion of defendant's written statement into evidence:

> "On Thursday, November 12, 1987, I got a phone call from Naomi Donnell. I was home when I got the call. She said she needed to see me. She asked me if I could meet her. I asked, 'When?' She told me her father would be getting off of work at 9:30 p.m. She asked if I could meet her at Kroger's on High Point Road about 30 minutes after that. I went to Kroger's on High Point Road. I got there about 10:00 p.m. Naomi arrived about the same time. She was with her parents. She went inside with them. A few minutes later, I went into the store to see her. She was sitting in the cafe part. She went and talked to her mother and told her mother that she was going to the movies. I went back out to my car. She came out about 15 minutes later. When she got out to the car, we argued because she wanted to go to the movies and I said, 'No.' She threatened to tell everyone she was pregnant if I didn't take her to the movies. We left Kroger's and went to Cedrow Park in High Point. We sat there for about five minutes. I started to take her home, but she would not get out of the car when we got to her street. I told her I wanted to end our relationship. She asked me if I would take her up to Caswell County to a dirt road off Highway 86 where we had once made love. I took her to that road. We sat there for a while. We talked about how things used to be,

and she told me it could be that way again. I told her I didn't want it to be that way. I told her that I had felt guilty about cheating on my wife, and what we had done was a mistake. She started crying. She got upset with me when I left from there. As I started towards Greensboro, she started grabbing the steering wheel, trying to make me run off the road. She slapped me a couple of times. I was on Troxler Mill Road then. I had just got [sic] back inside Guilford County. I stopped the car after I crossed the bridge at Haw River. I tried to calm her down and reason with her, but she kept fussing. She also kept trying to hit me. She got out of the car and started to walk up the hill. I tried to stop her, and she kicked me in the groin. I went back to the car and got a boner knife I had in the trunk. I was going to make her get back in the car. When I got the knife, she was walking fast up the road. When I caught up with her, she was on the dirt road down by the mill. She started hitting me, and tried to kick me again. I stepped back. She turned around, and that's when I stepped up behind her and stabbed her in the back with the knife. Before I realized it, I had stabbed her twice in the back. She fell down on the ground and called my name out once. I stabbed her one more time in the left side. I don't remember if I stabbed her anymore. I drug [sic] the body off behind the mill and rolled it down into the river. The body fell on some rocks. I climbed down the hill and pushed her into the water. I got back into the car and put the knife in the glove box. I drove back to Greensboro. I went to Bingham Street Park. I stayed there for a couple of hours. Then, I went home. I washed the knife and put it with the set . . . it came from in the cupboard that sets [sic] between the stove and the bar."

After defendant gave his statement, he consented to a search of his residence. Captain Forrest testified that he went with defendant to his residence and that defendant retrieved a knife from a box in the kitchen and indicated to Captain Forrest that it was the knife he had used to kill Naomi. Thereafter, Captain Forrest accompanied defendant to the murder scene, and defendant showed him where the events in his statement concerning the murder had occurred.

I.

[1] First, defendant contends that the trial court erred in excluding expert testimony concerning Naomi Donnell's mental condition. Because the excluded evidence was irrelevant to any fact in issue, we disagree.

"Evidence which is not relevant is not admissible." N.C.G.S. § 8C-1, Rule 402 (1992). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992).

In the present case, the excluded evidence consisted of expert testimony that Naomi suffered from a manic-depressive illness which caused her to have poor self-monitoring skills, a decreased capacity to appreciate the impact of her behavior on others, heightened sexual needs, increased irritability, paranoia, possessive behavior, jealousy, and hostility. The excluded evidence also consisted of testimony that she had physically assaulted a previous boyfriend and that she had discontinued taking her medication and refused treatment, as well as expert opinion testimony that on the night of her murder, "she was clearly out of control."

Defendant argues that this testimony was admissible to corroborate his claim that he killed the victim after she resisted his effort to end their relationship and became assaultive. Based on this argument, defendant contends the excluded testimony was relevant to disprove premeditation and deliberation and by establishing "a reasonable inference of some provocation and the lack of a killing in a cool state of mind" from which the jury could have found defendant guilty of second-degree murder instead of first-degree murder. Because we conclude that regardless of the victim's mental condition, the undisputed evidence shows premeditation and deliberation on the part of defendant, we disagree.

"Murder in the first degree is the unlawful killing of another human being with malice and with premeditation and deliberation." *State v. Watson*, 338 N.C. 168, 176, 449 S.E.2d 694, 699, *reconsideration denied*, 338 N.C. 523, 457 S.E.2d 302 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 569 (1995); *accord* N.C.G.S. § 14-17 (1993). "Murder in the second degree is the unlawful killing of another human being with malice but without premeditation and deliberation." *Watson*, 338 N.C. at 176, 449 S.E.2d at 699 (citing *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983)).

" 'Premeditation is defined as thought beforehand for some length of time; deliberation means an intention to kill, executed by defendant in a "cool state of blood" in furtherance of a fixed design or to accomplish some unlawful purpose.' " *State v. Bell*, 338 N.C. 363,

388, 450 S.E.2d 710, 724 (1994) (quoting *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838 (1981)), *cert. denied*, — U.S. —, — L. Ed. 2d —, 63 U.S.L.W. 3906 (1995). "In this context, the term 'cool state of blood' does not mean the perpetrator was devoid of passion or emotion." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595-96 (1992) (citing *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991)).

"The fact that defendant was angry or emotional at the time of the killing will not negate the element of deliberation unless such anger or emotion was strong enough to disturb the defendant's ability to reason." *State v. Solomon*, 340 N.C. 212, 222, 456 S.E.2d 778, 785 (1995) (citing *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 338 (1986)). "What is required to negate deliberation . . . is a sudden arousal of passion, brought on by sufficient provocation during which the killing immediately takes place." *Watson*, 338 N.C. at 178, 449 S.E.2d at 700.

In the present case, defendant's version of events tends to show the following: The night of the murder, Naomi argued with defendant as a result of defendant's attempt to break off his relationship with her. Naomi was angry with defendant, slapped him a couple of times, and attempted to run his car off the road by grabbing the steering wheel. However, after defendant stopped the car, she withdrew from the argument by getting out of the car and walking away from defendant, toward the road. Defendant did not drive away. Instead, defendant got out of the car and actively pursued her.

When defendant overtook Naomi, she kicked him in the groin. Defendant then walked back to his car, opened the trunk, and retrieved a ten-inch boner knife. Defendant walked back toward the victim with the knife. Naomi did not confront defendant; instead, in defendant's own words, she was "walking fast up the road" away from defendant at this time. Defendant again actively pursued her and caught up with her on the dirt road by the mill. Defendant grabbed Naomi, and she attempted to kick him. She then turned her back to defendant and again began walking away from him toward the car. Although defendant stated that he had gotten the knife "to make her get back in the car," it was at this point, when Naomi had her back to defendant and was walking back toward the car, that defendant stabbed her twice in the back. Naomi called defendant's name and fell to the ground, and defendant stabbed her a third time in her left side. She did not move or make any additional sounds after that. Defendant

then dragged her body around the mill, rolled it down the riverbank, climbed down the riverbank, and pushed her body into the water.

Defendant argues that this evidence shows that he acted under the provocation arising from his quarrel with the victim which negated his premeditation and deliberation. The foregoing evidence clearly shows, however, that at the time of the murder, the victim was attempting to withdraw from a confrontation with defendant and that any attempts by Naomi at hitting or kicking defendant on or near the dirt road prior to his stabbing her were the direct result of defendant's pursuit of her. Further, there was evidence tending to show preparedness on the part of defendant to kill the victim before the argument between them ensued. Before their argument, defendant picked the victim up in his car with the murder weapon in the trunk, a knife which defendant kept with a set of knives in his cupboard. Defendant had made plans to meet with the victim that night in order to discuss a "solution" to their "problem." Defendant had just reconciled with his wife; he knew that the victim was pregnant with his child, and the victim had threatened to reveal her pregnancy. Thus, the evidence tended to show a possible motive defendant had for killing the victim.

Further, the evidence shows that the victim withdrew from defendant before defendant stabbed her. Once defendant followed the victim down the road, defendant had to return to his car and retrieve the knife from the trunk before he pursued the victim down the road again and stabbed her in the back. This evidence shows that any provocation resulting from the argument between Naomi and defendant had had time to dissipate before defendant stabbed and killed her. We found similar evidence in *Watson* insufficient provocation to negate deliberation as a matter of law. 338 N.C. at 177-78, 449 S.E.2d at 700. Thus, under the specific facts of this case, the victim's actions, regardless of her mental condition, did not constitute sufficient provocation to negate premeditation and deliberation on the part of defendant.

Further, the State presented substantial evidence to support the inference that defendant committed the murder with premeditation and deliberation. Defendant's conduct before and after the killing showed that defendant met the victim at the grocery store with the murder weapon in the trunk of his car; that defendant then drove the victim to an area near the Haw River where he stabbed her in the back and disposed of her body; and that after disposing of the body, defendant returned home, cleaned off the murder weapon, and placed

the murder weapon back in his cupboard with the set of knives "it came from." We found similar facts to be evidence of premeditation and deliberation in *State v. Sierra*, 335 N.C. 753, 759, 440 S.E.2d 791, 795 (1994).

The nature and number of the victim's wounds and evidence that the killing was done in a brutal manner also tended to prove premeditation and deliberation. The State's evidence tended to show that after defendant stabbed the victim in the back, she fell to the ground and called defendant's name. Defendant continued to stab the victim while she lay helpless on the ground. The autopsy revealed defendant stabbed the victim a total of thirteen times. Defendant stabbed the victim at least twice in both the chest and abdominal areas. This evidence also supports a finding that defendant killed the victim with premeditation and deliberation. *See State v. Ginyard*, 334 N.C. 155, 159, 431 S.E.2d 11, 13 (1993) (evidence deceased suffered four stab wounds, including wounds to his upper and lower abdomen which pierced his heart and severed his rib, was evidence tending to prove premeditation and deliberation); *accord Fisher*, 318 N.C. at 518, 350 S.E.2d at 338 (evidence of multiple stab wounds, including two wounds to the chest, was evidence that the killing was done in a brutal manner to support a finding of premeditation and deliberation).

Thus, because we have concluded that defendant's version of the events surrounding the murder and the murder itself failed to establish provocation sufficient to negate defendant's premeditation and deliberation, regardless of the victim's mental condition at this time, testimony concerning the victim's mental condition would have been irrelevant to any fact in issue. Accordingly, we conclude that the trial court properly excluded such evidence.

[2] Defendant also argues, however, that the trial court erred in excluding testimony by defendant's neighbor, Rose Marie Gregory, that he told her that he tried to break off his relationship with Naomi but she would not let him, that he was reconciling with his wife, and that Naomi had threatened to tell defendant's wife she was pregnant. Assuming *arguendo* that this evidence was relevant to any theory of defendant's case, any error in not admitting this evidence was harmless. Similar testimony concerning these facts was before the jury, and these facts were undisputed. Thus, the tendered testimony would have been merely cumulative, and any error in failing to admit it was harmless. *See State v. Lovin*, 339 N.C. 695, 712, 454 S.E.2d 229, 239 (1995). Defendant's first assignment of error is overruled.

II.

[3] Next, defendant contends that the trial court erred in refusing to rule on defendant's motion to prohibit the State from cross-examining his former wife, Vanessa Poteat, about defendant's prior assaultive conduct toward her. We disagree.

Following a *voir dire* hearing on the admissibility of Rose Marie Gregory's testimony held during defendant's presentation of his evidence, defendant suggested that a *voir dire* be held for Vanessa Poteat's testimony. During this *voir dire*, defendant asked Poteat about Naomi's harassing conduct toward her and defendant. The State then cross-examined Poteat on *voir dire* about defendant's previous assaults against her, including an assault when she was eight months pregnant. At the end of this *voir dire*, defendant argued that Poteat's testimony regarding Naomi was admissible but that any questions concerning the assaults by defendant on Poteat were "clearly not admissible."

The trial court stated:

> Well, from what I heard on y'all's direct examination of this witness, I didn't—it's all admissible, based on what I've already heard about the case, I think, but I'm not going to rule on it. I'm not here to rule on the cross[-]examination by the State. I'm not going to make a ruling right now on that.

The trial court then ruled that the testimony elicited by defendant on direct was admissible.

Later in the trial, defendant asked the court to "give a ruling on whether or not [the State] is going to be allowed to ask these questions." The trial judge informed defendant that he had "already ruled on what [they] put [Poteat] up there about" and stated that he would listen to the cross-examination and make rulings as the trial proceeded. Thereafter, in response to the trial court's statement to defendant that the admissibility of the cross-examination was not properly before it, counsel for the defense stated, "I've made the motion that you consider it, and I guess you've denied my motion." Defendant did not call Poteat to testify.

Although defendant's motion was not made as a pretrial motion, his motion appears to be in the nature of a motion *in limine*, to exclude anticipated prejudicial evidence before such evidence is actually offered in the hearing of the jury. The decision of whether to

grant such a motion rests in the sound discretion of the trial judge. *See State v. Ruof*, 296 N.C. 623, 252 S.E.2d 720 (1979). "These motions can be made in order to prevent the jury from ever hearing the potentially prejudicial evidence thus obviating the necessity for an instruction during trial to disregard that evidence if it comes in and is prejudicial." *State v. Tate*, 300 N.C. 180, 182, 265 S.E.2d 223, 225 (1980). Such a motion is used "to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to [the] moving party that curative instructions cannot prevent predispositional effect on [the] jury." *Black's Law Dictionary* 1013 (6th ed. 1990).

In the present case, because we cannot say that the State would have offered evidence "so highly prejudicial" that a curative instruction would not have prevented prejudice from any improper questions, we conclude that the trial court did not abuse its discretion in failing to grant defendant's motion, thereby requiring defendant to object to Poteat's testimony had she testified. Defendant was free to call Poteat as a witness and retained the right to object to any questions asked by the State on cross-examination. Defendant's decision not to call Poteat as a witness was purely a tactical decision which did not implicate any of defendant's constitutional rights.

Defendant argues, however, that based on the holding in *State v. Lamb*, 321 N.C. 633, 365 S.E.2d 600 (1988), the trial court's failure to rule on his motion to prohibit the State's cross-examination of Poteat impermissibly chilled his right to present evidence and denied him his constitutional rights to a fair trial and due process of law. Defendant's reliance on *Lamb* is misplaced.

Unlike the present case, *Lamb* involved the defendant's right to testify on her own behalf. In *Lamb*, we held that the "bald denial" of defendant's motion *in limine* to exclude statements that "appeared inadmissible under Rule 608(b)" could "impermissibly chill" defendant's constitutional right to testify if it were "abundantly clear from the record . . . that defendant intended to testify unless her motion *in limine* was denied." *Id.* at 648-49, 365 S.E.2d at 608-09. The present case does not implicate defendant's right to testify on his own behalf, and the statements by the State were not necessarily inadmissible. *See State v. White*, 340 N.C. 264, 288, 457 S.E.2d 841, 855 (1995) (Although "other crimes" evidence did not appear to be admissible under N.C.G.S. § 8C-1, Rule 608(b), "the trial court could not know if defendant would 'open the door' to cross-examination about [this evi-

dence] until defendant testified."). Defendant's second assignment of error is overruled.

III.

[4] Finally, defendant contends that the trial court erred in failing to ask sitting jurors if they saw or read an article containing allegedly prejudicial matters not in evidence that appeared in a local newspaper during the trial. We disagree.

Prior to the State resting its case, the court took a weekend recess. Before dismissing the jury for this recess, the trial court instructed the jurors not to discuss the case among themselves, or with anybody, or to allow anybody to approach them and discuss the case. Further, the trial court instructed the jurors not to "read anything that might be printed in the newspaper or listen to anything on the radio or [television] that might be disseminated about [the case]."

Over this weekend break, an article appeared in the Saturday edition of the local newspaper stating that defendant had previously been convicted of the first-degree murder of Naomi and sentenced to the death penalty. When the trial resumed on Monday, out of the presence of the jury, counsel for the defense presented this article to the court and asked the judge to "instruct the [jurors] that, as [he] told them, they weren't suppose [sic] to read the paper, consider anything about it, and did anybody read anything about it, and is that going to affect their ability to be impartial in the case."

In response to defense counsel's request, the judge stated that he had told each member of the jury numerous times not to read anything about the case and to decide the case on what he or she saw and heard admitted into evidence in open court. The court stated:

> THE COURT: I told it to each one at the time they were selected, [not to read anything about the case and to decide the case on what he or she saw and heard admitted into evidence in open court,] and I told it to them in detail at the time we took our break after they were—before they were impaneled, and I reminded them of it . . . Friday evening before they left, and I have to take it that they'll agree with it, and, as I said, I don't know how else to do it. I don't have the authority to shut that newspaper down, or tell them not to print stuff, and I have to take it that the jury is adhering to my instructions. So, I just don't think I need to go into it.

. . . .

THE COURT: I've seen too much reference to it, and they get curious and start looking and saying, "What's he so worried about? Let's go find it," you know. I've seen it back fire [sic] on you.

. . . .

THE COURT: . . . I'm not going to ask them about it. I believe they've been warned enough, and I believe they're a responsible jury. In fact, we heard one that came in here, somebody said they tried to talk to him and he said, "No, the judge told me not to talk about it," and wouldn't talk about it.

Thereafter, the trial resumed.

On appeal, defendant contends that the trial court's failure to question the jury regarding this newspaper article amounted to prejudicial error entitling him to a new trial. We disagree.

"When there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial." *State v. Barts*, 316 N.C. 666, 683, 343 S.E.2d 828, 839 (1986). No inquiry was conducted by the trial court in the present case. Based on the specific facts of this case, however, we conclude that the mere presentation of this particular newspaper article did not give rise to a "substantial reason to fear" that the jury had become aware of improper and prejudicial matters and disobeyed the judge's instructions.

Jurors are presumed to follow the instructions given by the trial court. *See State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *reconsideration denied*, 339 N.C. 619, 453 S.E.2d 188 (1995), *petition for cert. filed*, — U.S.L.W. — (No. 94-9360, 19 May 1995). In the present case, the judge found that this jury panel was responsible and would follow his instructions. Based on the court's myriad experience with conducting inquiries into potentially prejudicial matters concerning the jury and the fact that the trial judge is in the best position to observe the jury, we give great weight to this finding by the trial judge. In addition, the judge's finding was supported by the fact that at least one member of the jury openly indicated that he had followed the court's instructions by refusing to talk about the case.

Accordingly, we find that defendant received a fair trial free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. SEAN LOUIS LITTLEJOHN & RICHARD GERARD DAYSON

No. 125A93

(Filed 28 July 1995)

1. Evidence and Witnesses § 1214 (NCI4th)— codefendant's confession—defendant implicated—confession corroborated by other evidence

Even if defendant Littlejohn's confession implicated defendant Dayson in the crime charged, Dayson was not prejudiced since the confession was largely corroborated by other evidence, including eyewitness testimony and Dayson's own testimony that he went armed to the crime scene and participated in an armed robbery in which the victim was killed.

Am Jur 2d, Evidence § 751.

Supreme Court's application of rule of *Bruton v. United States* (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S.Ct. 1620, holding the accused's rights under confrontation clause of Federal Constitution's Sixth Amendment are violated where codefendant's statement inculpating accused is admitted at joint trial. 95 L. Ed. 2d 892.

2. Assault and Battery § 13 (NCI4th)— assault with deadly weapon with intent to kill inflicting serious injury—acting in concert—sufficiency of evidence

The trial court did not err in denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury, since evidence that an accused went with an accomplice to a person's abode, helped the accomplice bind the occupants of the house, and then stood by while the person was stabbed is evidence from which a jury could conclude

that the two people were acting in concert and that they both intended that the person be killed.

Am Jur 2d, Assault and Battery § 11.

3. Evidence and Witnesses § 1224 (NCI4th)— confession prior to being taken before magistrate—constitutional rights not violated

There was no merit to defendant's contention that his confession should have been suppressed since he was interrogated for ten hours and confessed prior to being taken before a magistrate in violation of N.C.G.S. § 15A-501(2), since the officers fully advised defendant of his constitutional rights before the interrogation began; if defendant had been taken before a magistrate, he would have been advised of those same rights; and the Court cannot hold that defendant would have exercised his right to remain silent if he had been warned of this right by a magistrate rather than the officer.

Am Jur 2d, Evidence §§ 749, 750.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment—modern state cases. 28 ALR4th 1121.

4. Evidence and Witnesses § 1215 (NCI4th)— redacted confession—defendant not prejudiced by excluded evidence

There was no merit to defendant's contention that his rights were violated by the introduction of a redacted confession and that, based on N.C.G.S. § 8C-1, Rule 106, when a part of his confession was introduced, he had a right to have the other part introduced, since defendant was in no way prejudiced by the redaction.

Am Jur 2d, Evidence § 759.

5. Criminal Law § 438 (NCI4th)— prosecutor's argument—credibility of defendant—redaction in confession—no gross impropriety

Though the prosecutor's argument about the credibility of defendant's testimony based on a redaction in defendant's confession which changed the number of people who first entered

the victims' residence from three to two was unfair, the argument was not so grossly improper that the trial court should have intervened on its own motion.

Am Jur 2d, Trial §§ 611, 699.

6. Evidence and Witnesses § 944 (NCI4th)— excited utterances—admissibility of hearsay evidence

Statements made by a homicide victim and a rescue squad member were admissible under the excited utterances exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(2)

Am Jur 2d, Evidence § 865.

7. Criminal Law § 427 (NCI4th)— comment on defendant's failure to testify—defendant not prejudiced

The prosecutor's argument that defendant's "statement came in but he didn't testify" and that the law says that the jury can't hold that against him was not so egregious as to require the trial court to intervene on its own motion. Also, any error in the prosecutor's argument that defendant wasn't under oath or subject to cross-examination was cured by the trial court's instruction that the jury should not consider defendant's failure to testify in any way and its admonishment of the prosecutor not to mention it further.

Am Jur 2d, Trial §§ 577-579, 586.

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.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error—modern cases. 32 ALR4th 774.

8. Criminal Law § 465 (NCI4th)— reasonable doubt—prosecutor's argument allegedly incorrect—defendant not prejudiced

Even if the prosecutor misstated the definition of reasonable doubt in his jury argument, defendant was not prejudiced where

he did not object to the argument at the time it was made, and the court correctly charged on reasonable doubt.

Am Jur 2d, Trial §§ 643-645.

9. Criminal Law § 794 (NCI4th)— acting in concert—defendant's withdrawal from activity—instruction not required

The trial court did not err in refusing to give defendant's requested instruction that the jurors should find defendant was not guilty if they found he withdrew from the concerted activity after the culprits were inside the victims' home, since all the evidence showed that defendant was active in the event until the end.

Am Jur 2d, Trial § 1362.

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 judgments imposing sentences of life imprisonment entered by Lamm, J., at the 21 September 1992 Mixed Session of Superior Court, Mecklenburg County, upon jury verdicts of guilty of first-degree murder. Defendants' motions to bypass the Court of Appeals as to additional sentences imposed were allowed 21 December 1993. Heard in the Supreme Court 10 October 1994.

Each of the defendants was indicted for first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, two counts of robbery with a dangerous weapon, and one count of attempted robbery with a dangerous weapon. The cases were consolidated for trial over the objection of the defendants.

The State's evidence showed that on 16 September 1991, Jimmy White had sold some bad cocaine to defendant Sean Littlejohn, who was determined to have Jimmy White make it right. Littlejohn, defendant Richard Dayson (a/k/a "Cato"), Kareem Locke, a person named Terry, and a person named Miami drove to an apartment occupied by Jimmy White and his brother Rodney White. Darrian Perry was in the apartment with the Whites. Littlejohn, Dayson, and Miami went to the door of the apartment and Perry let them in at the direction of Jimmy White.

Littlejohn took a "street sweeper" shotgun from a duffle bag and indicated he wanted to sell it. At that time, Dayson and Miami drew weapons. Dayson pointed a semiautomatic handgun at Jimmy and said, "[w]here's it at?" Miami pointed an "Uzi" type gun at Perry's head. Dayson ordered the three occupants of the apartment to lie on the floor. Miami took Perry's watch and his gold bracelet. Littlejohn took a .37- caliber handgun from Perry. Dayson took Jimmy's rings as well as some cash. Jimmy told the intruders they could have anything they wanted in the apartment and asked them not to kill them. In the meantime, Locke and Terry entered the apartment.

Perry then told Dayson that he knew Jimmy kept his money in his car and that he would get it for the intruders. Dayson told Littlejohn to accompany Perry to the car, which he did. Perry opened the trunk of the car, and when Littlejohn looked in the trunk, Perry escaped. In the meantime, Jimmy and Rodney were bound with duct tape and stabbed several times. Jimmy died as a result of the stabbing.

At the end of the State's evidence, the court dismissed the attempted robbery with a dangerous weapon charges against both defendants. The jury found Dayson guilty of first-degree murder on the bases of premeditation and deliberation and felony murder. It also found him guilty of assault with a deadly weapon with intent to kill inflicting serious injury and two counts of robbery with a dangerous weapon. The jury found Littlejohn guilty of the same charges except it did not find him guilty of first-degree murder on the basis of premeditation and deliberation.

After a capital sentencing hearing, the jury recommended that each defendant be sentenced to life in prison, which sentences were imposed. Littlejohn was also sentenced to six years for the assault conviction and fourteen years for one of the robbery convictions; the court arrested judgment in the other robbery conviction because it was the underlying felony in the first-degree murder conviction. Dayson was additionally sentenced to six years for the assault conviction and fourteen years for the robbery convictions. All sentences in both cases are to be served consecutively.

The defendants appealed.

Michael F. Easley, Attorney General, by Michael S. Fox, Associate Attorney General, for the State.

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

Jean B. Lawson for defendant-appellant Richard Gerard Dayson.

WEBB, JUSTICE.

[1] Defendant Dayson assigns error to the consolidation for trial of his cases and the cases of defendant Littlejohn. He bases this assignment of error on another assignment of error in which he contends the introduction of Littlejohn's confession implicated him.

In *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968), the United States Supreme Court overruled previous cases and held it violates a defendant's Sixth Amendment right to confront witnesses against him if a codefendant's confession implicating defendant is admitted into evidence, and the codefendant does not testify. In *State v. Fox*, 274 N.C. 277, 163 S.E.2d 492 (1968), we held that before a confession of a nontestifying defendant is admitted into evidence, all portions of the confession which implicate a codefendant must be deleted. *See also* N.C.G.S. § 15A-927(c) (1988).

In *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985) and *State v. Gonzalez*, 311 N.C. 80, 316 S.E.2d 229 (1984), we held that the introduction of a nontestifying defendant's confession that does not mention a codefendant could implicate the codefendant and violate the *Bruton* rule if it is clear that the confession is referring to the codefendant.

In order to make Littlejohn's confession admissible, the State redacted any reference in it to Dayson. Dayson apparently concedes that all references to him were deleted from the redacted confession, but argues strenuously that he was prejudiced by its introduction. He says this is so because it could be inferred from parts of the redacted confession that Littlejohn was referring to Dayson. He says that in numerous places Littlejohn says "we" took certain action. The use of the word "we," says Dayson, shows that more than one person was involved and implies that the other person was Dayson.

Dayson also contends that he was prejudiced at one point in the redacted confession when Littlejohn said Kareem Locke said not to "stick" Jimmy White because he already had a murder charge on him. Dayson says the jury could have inferred from this that he had a murder charge pending against him.

Dayson further contends that he was unconstitutionally prejudiced by a statement in the redacted confession in which Littlejohn said that as he was in the automobile and leaving the scene, "Kareem asked Miami what took so long. Someone said I stabbed them. I asked him why did he do that." Dayson says that this redacted statement was that someone had stabbed the Whites and that it was not Littlejohn. The jury could infer from this that it was Dayson.

At one place in the redacted confession, Littlejohn said that after the criminal events, the culprits went to a motel room. He said Terry and Locke left the room to get Littlejohn's girlfriend. Littlejohn then said the three remaining divided the money they had obtained from the robbery, then left the motel room. Dayson says that because the evidence showed there were five persons who participated in the crimes and two of them had left the room, if there were three left, this had to include Dayson. We agree with Dayson that this reference to three persons should not have been submitted to the jury.

Assuming the introduction of Littlejohn's confession was error as to Dayson, we are satisfied this error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 89 L. Ed. 2d 674 (1986). The evidence against Dayson was strong. Two eyewitnesses, Darrian Perry and Rodney White, testified they knew Dayson and saw him when he entered the Whites' apartment. Dayson testified that he went armed with a pistol with four other people to the Whites' home and participated in an armed robbery. There is no dispute that Jimmy White was killed. Dayson testified that no one had been hurt when he left the apartment, which would mean one of his accomplices killed Jimmy White. Under this state of facts, Dayson is guilty of felony murder by his own statement. *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563, *cert. denied*, 434 U.S. 998, 54 L. Ed. 2d 493 (1977). The parts of Littlejohn's confession about which Dayson complains were of little importance to the case against Dayson. The confession was largely corroborated by other evidence. Dayson was not prejudiced by its admission.

This assignment of error is overruled.

[2] Defendant Littlejohn first assigns error to the denial of his motion to dismiss the charge against him of assault with a deadly weapon with intent to kill inflicting serious injury. He says there is no evidence of an intent to kill on his part and no evidence that he was acting in concert with Dayson in stabbing Rodney White.

The evidence in this case does not show that Littlejohn inflicted the wounds on Rodney White. The evidence does show that Littlejohn was a part of the plan to rob the Whites. He expressed a fear of the Whites because they knew where he lived. On the way to the Whites' apartment, the culprits bought duct tape with which to bind the Whites. Littlejohn entered the apartment with Dayson and held his gun on the Whites as they were bound. Evidence that an accused went with an accomplice to a person's abode, helped the accomplice bind the occupants of the house, and then stood by while the person was stabbed is evidence from which a jury could conclude that the two people were acting in concert and that they both intended that the person be killed. *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994); *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987).

This assignment of error is overruled.

[3] Defendant Littlejohn next assigns error to the denial of his motion to suppress his statement to officers of the Charlotte Police Department, which he says was taken in violation of N.C.G.S. § 15A-501(2). The defendant made a motion to suppress this statement, and a *voir dire* hearing was held outside the presence of the jury.

The superior court found facts which were supported by the evidence that the defendant voluntarily surrendered to officers in Gaffney, South Carolina, and was returned to Charlotte by officers of the Charlotte Police Department. The court found that the officers fully advised the defendant of his constitutional rights and that he waived them. The officers then interrogated the defendant for approximately ten hours, at the end of which time the defendant confessed. The court concluded that the defendant made the statement freely, knowingly, intelligently, and voluntarily. The court also found that the statement was not obtained as a result of any violation of N.C.G.S. § 15A-501(2). The court ordered that the confession be admitted into evidence.

N.C.G.S. § 15A-501(2) provides that upon the arrest of a person he must be taken before a judicial official without unnecessary delay.

N.C.G.S. § 15A-974 provides that evidence must be suppressed if it has been obtained by a substantial violation of the provisions of chapter 15A of the General Statutes. Defendant Littlejohn says the evidence shows there was a thirteen-hour delay between the time he was taken into custody and the time he was taken before a magistrate. He says this was an unnecessary delay. During this delay, the officers interrogated the defendant for ten hours before he confessed. The defendant says that if there had not been this unnecessary delay, he would not have confessed. He argues that if he had been taken before the magistrate and advised of his rights, he would not have made the statement.

We have held that a confession by a defendant as a result of an interrogation before he was taken before a magistrate was not obtained as a result of a substantial violation of chapter 15A. *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 331 N.C. 746, 417 S.E.2d 227 (1992), *cert. denied*, —— U.S. ——, 122 L. Ed. 2d 775, *reh'g denied*, —— U.S. ——, 123 L. Ed. 2d 503 (1993); *State v. Martin*, 315 N.C. 667, 340 S.E.2d 326 (1986); *State v. Reynolds*, 298 N.C. 380, 259 S.E.2d 843 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 795 (1980). The defendant says the difference between those cases and this case is that he was questioned for a much longer period than were the defendants in those cases. We cannot hold that the defendant's statement was obtained by a violation of chapter 15A. The officers fully advised him of his constitutional rights before the interrogation began. If he had been taken before a magistrate, he would have been advised of those same rights. We cannot hold that the defendant would have exercised his right to remain silent if he had been warned of this right by a magistrate rather than the officer.

This assignment of error is overruled.

[4] Defendant Littlejohn also assigns error to the joinder of the cases for trial based on his contention that his rights were violated by the introduction of the redacted confession. He relies on N.C.G.S. § 8C-1, Rule 106 to argue that when a part of his confession was introduced, he had a right to have the other part introduced.

Littlejohn argues that the redacted confession should not have been introduced because (1) it distorted the evidence that he was not acting in concert, which was his principal defense; (2) it destroyed his credibility and the exculpatory evidence in the confession; (3) it

enlarged the overall inculpatory effect as to him; and (4) it made the statement misleading and incoherent.

The first redaction of the confession about which the defendant complains deleted all references to Dayson and Dayson's apartment, which was across the hall from Littlejohn's apartment. In this portion of the confession, Littlejohn described the discussion between the parties as to whether to go to the Whites' apartment. Littlejohn contends the redacted statement makes it appear that the discussion occurred in his apartment rather than in Dayson's apartment, where it actually occurred. We do not see how Littlejohn was prejudiced by the jury's believing that the discussion occurred in his apartment rather than in Dayson's apartment.

Before the confession was redacted, it contained a part which described how the five men discussed the plan to rob the Whites. Dayson said, "well let's go rob him" and Littlejohn said "no." Later in the conversation, Dayson said, "we could get enough dope and money from him to move so [White] can't find us." Littlejohn then said they all agreed to rob the Whites. All references to Dayson were deleted. Littlejohn says the deletions eliminated evidence that he was not acting in concert and made the statement more inculpatory to him. Although Dayson may have persuaded Littlejohn to commit the crimes, Littlejohn was acting in concert with him if he agreed to participate. He said this was so in his confession before and after it was redacted. He was not prejudiced by this deletion as to who was the leader.

The third redaction dealt with a part of the confession which described the manner in which the Whites' apartment was entered. In the original statement, Littlejohn said that he, Dayson, and Miami entered the apartment at which time Perry said, "what's up Cato." Littlejohn then said, "ain't no happening," which meant he would not go through with it. He then described how Dayson drew a gun, forced the Whites to lie down, bound them with duct tape, and robbed them. All references to Dayson were deleted. Littlejohn says this redaction changed the meaning of the statement. However the meaning of the statement was changed, we do not believe it prejudiced Littlejohn. He has not shown us how this redaction made him appear more culpable and we cannot see how it did so.

The fourth redaction about which Littlejohn complains deals with a part of the confession in which Littlejohn said he had an argument with Dayson as they were leaving to go to the Whites' apartment. In

the confession before it was redacted, Littlejohn said he urged Dayson not to "stick" Jimmy White. This part of the confession was redacted. Littlejohn says this eliminated a part of his statement which showed he was not acting in concert in the murder. We do not believe this redaction was harmful to Littlejohn. He was convicted of felony murder. If he went with his accomplices to commit an armed robbery, and all the evidence shows that he did so, he would be guilty of felony murder although he opposed the killing. *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563. His opposition to the killing was irrelevant to the felony murder charge.

The last redaction about which Littlejohn complains deals with a part of the confession in which he described how the killing was concluded. In the original statement, he said that he, Locke, and Terry were in the automobile waiting for Dayson and Miami to join them; that he went into the apartment three times in an effort to get them to leave; and that he saw Dayson standing over the victims on one occasion. He also said that after Dayson and Miami entered the automobile he asked Dayson what took so long and Dayson said, "I stabbed them." He said they then went to a motel and divided the money and jewelry. The redacted statement contained no reference to Dayson. It substituted "I said" for "I told Cato"; the word "we" for "Cato, Miami and myself"; and "someone" for "Cato." Littlejohn argues that this redaction deleted evidence that he was not acting in concert. The deleted evidence that Dayson did the stabbing and that Littlejohn left the apartment before the stabbing was concluded is very little proof that Littlejohn was not acting in concert. He did not have to be in the room when the stabbing occurred to be acting in concert. He was not prejudiced by this redaction.

This assignment of error is overruled.

[5] Defendant Littlejohn next assigns error to the denial of his motion for a mistrial based on what he contends was an improper jury argument by the prosecuting attorney. He argues that redacting the confession created some inconsistencies which could be drawn from it and that the prosecuting attorney argued these inconsistencies to attack his credibility.

In his argument on this point, Littlejohn cites one portion of the prosecuting attorney's argument in which he said that Littlejohn had said in his confession that there were two people outside the door of the Whites' apartment, while the evidence showed three people went inside when the door opened. At another point, the prosecutor argued

that there was a conflict between the testimony of Dayson and the confession of Littlejohn. At another point, the prosecutor argued that Littlejohn had not told the truth when he told the officer that he thought they were only going to rob the Whites. Finally, the prosecuting attorney argued that if the jury looked at all the evidence, it would see that Littlejohn's confession was "full of holes."

The defendant did not object to this argument when it was made and unless there was a gross impropriety in the argument, we cannot hold the court should have intervened on its own motion. *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976). Littlejohn is correct in saying that the prosecutor's argument urging the jury not to believe defendant's other testimony because all the evidence showed three people first entered the Whites' home, which was contrary to the redacted confession, was based on a redaction in the confession which changed the number of people from three to two. This was an unfair argument. The prosecutor argued at some length inconsistencies between Littlejohn's confession and what some of the other evidence showed. Littlejohn does not indicate any other specific instances in which the prosecutor referred to a redacted part of the confession. The prosecuting attorney argued vigorously that the defendant's confession, when compared to the other evidence, showed he was lying. Except for the reference to the two men who first entered the Whites' apartment, we can find no prejudicial reference to a redacted part of the confession. We cannot hold the prosecutor's argument was such a gross impropriety that the court should have intervened on its own motion.

This assignment of error is overruled.

[6] Defendant Littlejohn next assigns error to the admission, over his objection, of certain testimony which he contends was hearsay evidence. Darrian Perry testified that Jimmy White said to the men who had entered the apartment, "he didn't keep anything at his house"; "Sean, man, why are you doing this to me? I have never done anything to harm you"; and "they could have anything they wanted in the apartment; not to kill us." These statements were arguably not introduced to prove the truth of the matters asserted and are not hearsay. N.C.G.S. § 8C-1, Rule 801(c) (1992); *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990). Assuming the statements were hearsay, they were admissible as excited utterances. N.C.G.S. § 8C-1, Rule 803(2) provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused

by the event or condition" is admissible as an exception to the hearsay rule. These statements were certainly made while the declarant was under stress caused by a startling event. They were admissible as an exception to the hearsay rule. *State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994).

Littlejohn also assigns error to the alleged hearsay testimony of Ronald Kennerly, a member of the rescue squad who rode with Jimmy White to the hospital. Mr. Kennerly testified that Jimmy made the following statements on the way to the hospital: (1) "[t]hey[] held us more than an hour"; (2) "[t]hey hurt me"; and (3) "I knew I was in trouble when I saw them put on those dishwashing gloves." The traumatic event which Jimmy White had experienced a short time previously should have certainly suspended reflective thought and made his statements spontaneous. They were excited utterance exceptions to the hearsay rule. *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985).

This assignment of error is overruled.

[7] Littlejohn next argues that he is entitled to a new trial because the prosecuting attorney made several improper comments in his argument to the jury. The prosecuting attorney at one point said, "Mr. Littlejohn's statement came in but he didn't testify. You can't hold that against him. And I would ask that you not hold that against him. That's what the law says." No objection was made to this argument. Later in the prosecutor's argument the following occurred:

> [PROSECUTOR]: And, I would ask that you remember that Littlejohn's statement, he said it was the truth. Okay. But, you determine the truth. He wasn't under oath. He wasn't subject to cross examination. We couldn't ask him any questions.
>
> [DEFENSE COUNSEL]: OBJECTION, Your Honor, on his failure to testify.
>
> THE COURT: SUSTAINED. Members of the jury, I'll instruct you in more detail. But, you can not hold a defendant's failure to testify against him or consider it [in] any way.
>
> Do not mention that further, Mr. Butler.
>
> [PROSECUTOR]: Thank you, Your Honor.

The first statement to which Littlejohn assigns error is very similar to an argument which we held was erroneous in *State v. Reid*, 334

N.C. 551, 434 S.E.2d 193 (1993). There was no objection and unless the argument rose to the level of a gross impropriety, there was not a duty on the court to intervene. *State v. Miller*, 288 N.C. 582, 220 S.E.2d 326 (1975). The prosecuting attorney clearly did not mean to denigrate Littlejohn. He stated how the law applied to the failure of Littlejohn to testify and asked the jury to follow the law. This was not an argument so egregious as to require the court to intervene on its own motion.

As to the second comment about which Littlejohn complains, the court instructed the jury not to consider this defendant's failure to testify in any way and admonished the prosecuting attorney not to mention it further. In *Reid*, we dealt with a curative instruction in this situation. We said:

> [T]his Court has held the error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness.
>
> *[State v.] McCall*, 286 N.C. [472,] 487, 212 S.E.2d [132,] 141 [1975]. *Accord State v. Monk*, 286 N.C. [509,] 516, 212 S.E.2d [125,] 131 [1975]; *State v. Lindsay*, 278 N.C. 293, 295, 179 S.E.2d 364, 365 (1971); *State v. Clayton*, 272 N.C. 377, 385, 158 S.E.2d 557, 562-63 (1968).

334 N.C. at 556, 434 S.E.2d at 197. The court in this case instructed substantially in accordance with *Reid*. There was no prejudicial error.

[8] Defendant Littlejohn next argues under this assignment of error that the prosecutor in his argument to the jury misstated the definition of reasonable doubt. The prosecutor argued as follows:

> [T]he Supreme Court of North Carolina in *State Vs. Pierce* said, [Reading.]
>
> "Now, the state has the duty of satisfying you, beyond a reasonable doubt[,] of the guilt of the defendant. A reasonable doubt is an honest, substantial misgiving, generated by insufficient proof; insufficiency which fails to satisfy your reason of the guilt of the accused.
>
> A reasonable doubt is not . . . a possible doubt . . . ."

Littlejohn says this argument suggested a higher standard of doubt than is required for an acquittal and lowered the degree of proof for a conviction.

Assuming the prosecuting attorney's argument misstated the definition of reasonable doubt, the defendant is not entitled to relief. There was not an objection to this argument at the time it was made and the court correctly charged on reasonable doubt. We held in *State v. Jones*, 336 N.C. 490, 445 S.E.2d 23 (1994), that under these circumstances, there is not prejudicial error.

Defendant Littlejohn argues finally under this assignment of error that the prosecuting attorney misstated the law when he argued that Littlejohn should be found guilty of assault with a deadly weapon with intent to kill inflicting serious injury. The prosecuting attorney argued:

> [R]emember His Honor's instructions as to acting in concert. Because acting in concert, that theory . . . would apply to each and every element of . . . the felony of assault with a deadly weapon, with intent to kill, inflicting serious injury . . .[;] as to [those] elements, as His Honor reads them to you, recall that acting in concert . . . applies to each and every one of those acts or elements.

The defendant Littlejohn contends that this instruction allowed the intent to kill element of the assault to be imputed to him, without proof that he intended to kill. *State v. Reese*, 319 N.C. 110, 141-42, 353 S.E.2d 352, 370.

We do not read this argument to the jury as does the defendant. Nowhere in this argument does the prosecuting attorney say that the intent to kill of the one who did the stabbing may be imputed to Littlejohn. He argued that the jury should listen to the judge's instruction, which told the jurors that if two or more persons act together to commit a crime, they are acting in concert. This being so, argued the prosecutor, the action of any of them is imputed to the others. This is a correct statement of the law of acting in concert. *State v. Gilmore*, 330 N.C. 167, 409 S.E.2d 888 (1991).

This assignment of error is overruled.

[9] Littlejohn argues finally that it was error for the court not to give his requested instruction that the jurors should find he was not guilty if they found he withdrew from the concerted activity after the culprits were inside the Whites' apartment. Littlejohn says that there was evidence that he withdrew from the common plan when he said "ain't no happening," which he says was a prearranged signal by which he meant "to call the whole thing off."

The evidence did not support a charge as to Littlejohn's withdrawal from the concerted action. Although Littlejohn says Dayson persuaded him to participate in the crimes, he would be a part of the concerted action if he agreed to participate. He contends that his saying "ain't no happening" was a signal that he would not participate further. All the evidence, however, shows he continued to participate. He continued pointing his shotgun at the victims. He took Darrian Perry outside to find items supposedly hidden in Jimmy White's car. He let two of the participants into the house. All the evidence shows Littlejohn was active in the event until the end.

This assignment of error is overruled.

NO ERROR.

Justices LAKE and ORR did not participate in the consideration or decision of this case.

APPENDIXES

ORDER ADOPTING AN AMENDMENT
TO RULES FOR
COURT-ORDERED ARBITRATION

AMENDMENT TO THE RULES OF
PROFESSIONAL CONDUCT
OF THE NORTH CAROLINA STATE BAR
REGARDING THE DEPOSIT OF IOLTA FUNDS

AMENDMENT TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
RELATING TO THE PALS PROGRAM

AMENDMENT TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
REGARDING DISCIPLINE AND DISABILITY

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING MEMBERSHIP—ANNUAL
MEMBERSHIP FEES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PROCEDURES FOR THE MEMBERSHIP AND FEES COMMITTEE

AMENDMENTS TO THE RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP—ANNUAL MEMBERSHIP FEES & ASSESSMENTS

ORDER ADOPTING AN AMENDMENT TO RULES FOR COURT-ORDERED ARBITRATION

Rule 2(b) of the Rules for Court-Ordered Arbitration in North Carolina, 325 N.C. 735, amended 327 N.C. 712, is hereby further amended to read as follows. The amendment shall be effective August 1, 1995.

2(b) Eligibility.

An arbitrator shall be a member of the North Carolina State Bar and have been licensed to practice law for five years. The arbitrator shall have been admitted in North Carolina for at least the last two years of the five year period. Admission outside North Carolina may be considered for the balance of the five year period, so long as the arbitrator was admitted as a duly licensed member of the bar of a state(s) or a territory(ies) of the United States or the District of Columbia.

In addition, an arbitrator shall complete the arbitrator training course prescribed by the Administrative Office of the Courts and be approved by the Senior Resident Superior Court Judge and the Chief District Court Judge for such service. Arbitrators so approved shall serve at the pleasure of the appointing court(s).

Adopted by the Court in Conference this 6th day of July, 1995. The Appellate Court Reporter shall publish this amendment at the earliest practicable time.

Frye, J.
For the Court

AMENDMENT TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR REGARDING THE DEPOSIT OF IOLTA FUNDS

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 July 21, 1995.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2 10.3(a) be amended by striking the words, "the Federal Savings & Loan Insurance Corporation, or the North Carolina Guaranty Corporation", so that the entire rule reads as follows (deletions interlined):

10.3 Interest on Lawyers' Trust Accounts

(a) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create or maintain an interest bearing trust account for those funds of clients which, in the lawyer's good faith judgement, are nominal in amount or are expected to be held for a short period of time. Funds deposited in a permitted interest bearing trust account under the plan must be available for withdrawal upon request and without delay. The account shall be maintained in a depository institution authorized by state or federal law to do business in North Carolina and insured by the Federal Deposit Insurance Corporation, ~~the Federal Savings and Loan Insurance Corporation, or the North Carolina Guaranty Corporation~~. The North Carolina State Bar shall furnish to each lawyer or firm which elects to participate in the Interest on Lawyers' Trust Account Program a suitable plaque or scroll indicating participation in the program, which plaque or scroll shall be exhibited in the office of the participating lawyer or firm. Such scroll or plaque will contain language substantially as follows:

"THIS OFFICE PARTICIPATES IN THE NORTH CAROLINA STATE BAR'S INTEREST ON LAWYERS' TRUST ACCOUNT PROGRAM. Under this program funds received on behalf of a client which are nominal in amount or are expected to be held for a short period of time will be deposited with other similar funds in a joint interest-bearing trust account. The interest generated on all funds so deposited will be remitted to the North Carolina State Bar to fund programs for the public's benefit."

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 July 21, 1995.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of August, 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 7th day of September, 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 7th day of September, 1995.

s/Orr, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR RELATING TO THE PALS PROGRAM

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 July 21, 1995.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar providing procedures for the Positive Action for Lawyers (PALS) Committee, as particularly set forth in 27 N.C.A.C. lD .0606(d), be amended by deleting the word, "within", in the first sentence and by substituting in lieu thereof the words, "in not less than", so that the entire subsection will read as follows (additions in bold type, deletions interlined):

.0606 Suspension for Impairment, Reinstatement

If it appears that an attorney's ability to practice law has been impaired by drug or alcohol use, the committee may petition any superior court judge to issue an order in the court's inherent authority suspending the attorney's license to practice law in this state for up to 180 days.

. . .

(d) Except as set out in Rule .0606(j) below, the petition shall request the court to issue an order requiring the attorney to appear ~~within~~ **in not less than** 10 days and show cause why the attorney should not be suspended from the practice of law. No order suspending an attorney's license shall be entered without notice and a hearing, except as provided in Rule .0606(j) below.

. . .

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 July 21, 1995.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of August, 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 7th day of September, 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 7th day of September, 1995.

s/Orr, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR REGARDING DISCIPLINE AND DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 21, 1995.

BE IT RESOLVED by the Council of the North Carolina State Bar that the rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C. 1B .0104(6) and .0108(a), be amended. In regard to Rule .0104(6) by deleting the words, "or to refer the matter of discipline to the commission for hearing and determination", and, with respect to Rule .0108(a), by adding the following language as a new subsection (7), "to enter an order suspending a member pending disposition of a disciplinary proceeding when the member has been convicted of a serious crime or has pled no contest to a serious crime and the court has accepted the plea", so that the two rules as amended shall read as follows (additions in bold type, deletions interlined).

.0104 State Bar Council: Powers and Duties in Discipline and Disability Matters

The Council of the North Carolina State Bar will have the power and duty

. . .

(6) to order the disbarment of any member whose resignation is accepted. ~~or to refer the matter of discipline to the commission for hearing and determination.~~

Rule .0108 Chairperson of the Hearing Commission: Powers and Duties

(a) The chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar will have the power and duty

. . .

(7) to enter an order suspending a member pending disposition of a disciplinary proceeding when the member has been convicted of a serious crime or has pled no contest to a serious crime and the court has accepted the plea.

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 July 21, 1995.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of August, 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 7th day of September, 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 7th day of September, 1995.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP—ANNUAL MEMBERSHIP FEES

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 21, 1995.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning membership and membership fees, as particularly set forth in 27 N.C.A.C. 1A .0203, be amended as follows (additions in bold type, deletions interlined).

.0203 Annual Membership Fees; When Due.

(a) Amount and Due Date

The annual membership fee shall be in the amount as provided by law and shall be due and payable to the secretary of the North Carolina State Bar on January 1 of each year and the same shall become delinquent if not paid on or before July 1 of each year.

(b) Late Fee

Any attorney who fails to pay the entire annual membership fee in the amount provided by law and the annual Client Security Fund assessment approved by the N.C. Supreme Court on or before July 1 of each year shall also pay a late fee of $30.

(c) ~~(b)~~ Waiver of All or Part of Dues

No part of the annual membership fee or **Client Security Fund assessment** shall be prorated or apportioned to fractional parts of the year, and no part of the membership fees or **Client Security Fund assessment** shall be waived or rebated for any reason with the following exceptions:

(1) A person licensed to practice law in North Carolina for the first time by examination ~~or comity~~ shall not be liable for dues or the **Client Securi-**

ty Fund assessment during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the armed forces, whether in a legal or nonlegal capacity, will be exempt from payment of dues and **Client Security Fund assessment for any year in which** ~~so long as~~ the member is on active duty in the military service;

(3) A person licensed to practice law in North Carolina who files a petition for inactive status **on or** before Dec. 31 of a given year shall not be liable for the membership fee or the **Client Security Fund assessment** for the following year if the petition is granted. **A petition shall be deemed timely if it is postmarked on or before December 31.**

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 July 21, 1995.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of August, 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 7th day of September, 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 7th day of September, 1995.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PROCEDURES FOR THE MEMBERSHIP AND FEES COMMITTEE

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 21, 1995.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning procedures for the membership and fees committee, as particularly set forth in 27 N.C.A.C. 1D .0902 - .0904, be amended as follows (additions in bold type, deletions interlined):

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

Any member who has been transferred to inactive status may petition the council for an order reinstating the member as an active member of the North Carolina State Bar.

(b) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in an application form prescribed by the council and has signed the form under oath;

(2) that the member satisfied the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was transferred to inactive status, or that the member was exempt from such requirements pursuant to Rule .1517 of this subchapter;

(3) ~~(2)~~ that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the prac-

tice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest;

(4) ~~(3)~~ that the member has paid a $125.00 reinstatement fee, the membership fees for the current year in which the application is filed, **all past due fees, fines and penalties owed the Board of Continuing Legal Education** and all costs incurred by the North Carolina State Bar in investigating and processing the application. The reinstatement fee and costs shall be retained by the North Carolina State Bar but the membership fees shall be refunded if the petition is denied.

. . .

~~Failure to Pay Membership Fees~~

.0903 **Suspension for Non-Payment of Membership Fees, Late Fee or Client Security Fund Assessment**

(a) Notice of Overdue Fees

Whenever it appears that a member has failed to comply with the rules regarding payment of the annual membership fee **and/or who has failed to pay the required Client Security Fund assessment approved by the N.C. Supreme Court in a timely fashion,** the secretary shall prepare a written notice

(1) directing the member to show cause within ~~60~~**30** days of the date of the notice why he or she should not be suspended from the practice of law and

(2) demanding payment of a ~~$75~~ **$30** late fee.

(b) Service of the Notice

The notice shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(c) Entry of Order of Suspension for Nonpayment of Dues, **Late Fee or Client Security Fund Assessment**

Whenever it appears that a member has failed to comply with the rules regarding payment of the annual membership fee, and/or the **Client Security Fund assessment** and/or any late fees imposed pursuant to Rule .0203(b) ~~.0903(a) above~~ **of Subchapter A** and that more than ~~6~~ 30 days have passed from service of the notice to show cause, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the Council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(d) Late Tender of Membership Fees

If a member tenders the annual membership fee, **required Client Security Fund assessment** and the ~~$75~~ **$30** late fee to the N.C. State Bar after July 1 of a given year, but before a suspension order is entered by the council, no order of suspension will be entered.

.0904 Reinstatement After Suspension for Failure to Pay Fees

(a) Reinstatement Within 30 Days of ~~Entry~~ **Service** of Suspension Order

A member who has been suspended for nonpayment of the annual membership fee, **and/or Client Security Fund assessment,** and/or late fees may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after ~~entry of~~ **service of the suspension order upon the member.** The secretary shall enter an order reinstating the member to active status upon receipt of a timely ~~petition~~ **written request** and satisfactory showing by the member of payment of all membership fees, **Client Security Fund assessments,** late fees and costs. **Such a member shall not be**

required to file a formal reinstatement petition or pay a $125 reinstatement fee.

(b) Reinstatement More than 30 Days After Service ~~Entry~~ of Suspension Order

At any time more than 30 days after ~~entry~~ **service** of an order of suspension on a **member**, a member who has been suspended for nonpayment of dues, **Client Security Fund assessment** and/or late fees may petition the council for an order of reinstatement. The petition will be filed with the secretary, who will transmit a copy to the counsel. **The member shall pay all delinquent membership fees, Client Security Fund assessments, late fees and costs, including a $125 reinstatement fee, prior to entry of an order of reinstatement by the council.**

(c) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in a form to be prescribed by the council and has signed the form under oath.

(2) that the member satisfied the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was suspended, or that the member was exempt from such requirements pursuant to Rule .1517 of this subchapter.

(3) ~~(2)~~ that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest.

(4) (~~3~~) that the member has paid a $125 reinstatement fee, a ~~$75~~ $30 late fee, all past and current membership fees, **including all annual Client Security Fund assessments, all past due fees, fines and penalties owed the Board of Continuing Legal Education and** ~~plus~~ all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

(d) Procedure

The petition for reinstatement shall be handled as provided for in Rule .0902(c) - (g) of this subchapter, governing petitions for reinstatement from inactive status.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing 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 July 21, 1995.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of August, 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 7th day of September, 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 7th day of September, 1995.

s/Orr, J.
For the Court

AMENDMENTS TO RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at its regular quarterly meeting on October 20, 1995.

BE IT RESOLVED that Rules. 0404 and 0502(2) of the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended as shown by the RESOLUTION of the Board of Law Examiners as attached hereto.

RESOLUTION

WHEREAS, the Board of Law Examiners of the State of North Carolina held a meeting in its offices in the N.C. State Bar Building, 208 Fayetteville Street Mall, Raleigh, North Carolina, on October 18, 1995; and

WHEREAS, at this meeting, the Board considered amendments to Rule .0404 entitled Fees of the Rules Governing Admission to the Practice of Law in the State of North Carolina; and Rule .0502(2) entitled Requirements for Comity Applicants; and

WHEREAS, on motion by Billie L. Poole, seconded by Richard S. Jones, Jr. it was RESOLVED that Rules .0404 and .0502(2) in the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended to read as follows:

.0404 FEES

Every application by an applicant who:

(1) is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $500.00.

(2) is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $1,000.00.

(3) is filing to take the North Carolina Bar Examination using a Supplemental Application shall be accompanied by a fee of $400.00.

(4) is filing after the deadline set out in Rule .0403(1) shall be accompanied by a late fee of $200.00 in addition to all other fees required by these rules.

.0502(2) REQUIREMENTS FOR COMITY APPLICANTS

Pay to the Board with each written application, a fee of $1,250.00, no part of which may be refunded to the applicant whose application is denied;

NOW, THEREFORE BE IT RESOLVED by unanimous vote of the Board of Law Examiners of the State of North Carolina that Rules .0404 and .0502(2) of the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended to read as set out above; and that the action of this Board be certified to the Council of the North Carolina State Bar and to the North Carolina Supreme Court for approval.

Enacted at a regularly scheduled meeting of the Board of Law Examiners of the State of North Carolina on October 18, 1995.

Given over my hand and seal of the Board of Law Examiners this the 18th day of October, 1995.

s/Fred P. Parker III
Executive Director

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules Governing Admission to the Practice of Law in the State of North Carolina was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 20, 1995.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of October, 1995.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendment to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of November, 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 2nd day of November, 1995.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP — ANNUAL MEMBERSHIP FEES & ASSESSMENTS

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 20, 1995.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning membership, as particularly set forth in 27 N.C.A.C. lA .0203, and 27 N.C.A.C. 1D .0903(d) be amended as follows (additions in bold type, deletions interlined).

.0203 Annual Membership Fees; When Due.

(a) Amount and Due Date

The annual membership fee shall be in the amount as provided by law and shall be due and payable to the secretary of the North Carolina State Bar on January 1 of each year and the same shall become delinquent if not paid ~~on~~ ~~or~~ before July 1 of each year.

(b) Late Fee

Any attorney who fails to pay the entire annual membership fee in the amount provided by law and the annual Client Security Fund assessment approved by the N.C. Supreme Court ~~on~~ ~~or~~ before July 1 of each year shall also pay a late fee of $30.

. . .

.0903 Suspension for Non-Payment of Membership Fees, Late Fee or Client Security Fund Assessment

. . .

(d) Late Tender of Membership Fees

If a member tenders the annual membership fee, required Client Security Fund assessment and the ~~$75~~ **$30** late fee to the N.C. State Bar after ~~July 1~~ **June 30** of a given year, but before a suspension order is entered by the council, no order of suspension will be entered.

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 July 21, 1995.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of August, 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 7th day of September, 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 7th day of September, 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

APPEAL AND ERROR

§ 150 (NCI4th). Preserving constitutional issues for appeal

Defendant's contention that his statement was obtained in violation of the Sixth Amendment was rejected where it was first raised on appeal. **State v. Bunnell,** 74.

Where defendant did not make an argument at trial for exclusion of his incriminating statement to the police based on the Fourth Amendment, he may not properly present an argument based thereon in the Supreme Court. **State v. Daughtry,** 488.

§ 155 (NCI4th). Preserving question for appeal; effect of failure to make motion, objection, or request; criminal actions

The question of whether all but one of defendant's statements contained inadmissible hearsay was not preserved for appeal where defendant objected to only one of the statements. **State v. Johnson,** 32.

Defendant failed to preserve for appellate review an issue as to an instruction on premeditation where he did not object to the instruction, and defendant waived his right to appellate review of this issue by failing to contend that the instruction constituted plain error. **State v. Truesdale,** 229.

Defendant failed to preserve an assignment of error to the admission of testimony for appellate review where the portion of testimony about which defendant complains was neither mentioned in defendant's motion to exclude nor objected to at trial. **State v. Daughtry,** 488.

Defendant failed to preserve for appellate review under Appellate Rule 10(b)(2) an assignment of error to the trial court's failure to instruct on the lack of mental capacity to form a specific intent to kill where defendant failed to timely object to the court's instructions, and defendant waived appellate review under Appellate Rule 10(c)(4) by failing specifically to contend that the error amounts to plain error. **State v. Wilson,** 720.

§ 504 (NCI4th). Invited error

Where defendant made a written request for an instruction on transferred intent, defendant cannot complain on appeal that the evidence did not support such an instruction. **State v. Lyons,** 646.

ASSAULT AND BATTERY

§ 13 (NCI4th). Criminal assault and battery; aiders and abettors

The trial court properly denied defendant's motion to dismiss a charge of assault with a deadly weapon with intent to kill inflicting serious injury where the jury could find that defendant and an accomplice were acting in concert when the victim was stabbed and that they both intended that the victim be killed. **State v. Littlejohn,** 730.

ASSIGNMENTS

§ 2 (NCI4th). Validity of assignment; rights and interests assignable

A motorist injured in an automobile accident could validly assign the proceeds of his claim against the tortfeasor to plaintiff hospital to pay for medical services for injuries received in the accident. **Charlotte-Mecklenburg Hospital Auth. v. First of Ga. Ins. Co.,** 88.

CONSPIRACY

§ 13 (NCI4th). Criminal conspiracy generally

Even if Wharton's Rule were a part of the law of North Carolina, it would have no application in this case because murder does not require more than one person to commit and the immediate consequences of the crime do not fall only on the persons who commit it. **State v. Larrimore,** 119.

§ 18 (NCI4th). Conspiracy as distinguished from underlying substantive offense

There was no plain error in submitting both first-degree murder and conspiracy to murder to the jury. **State v. Larrimore,** 119.

§ 31 (NCI4th). Sufficiency of evidence; conspiracies to murder

The trial court did not err in a prosecution for conspiracy to commit first-degree murder by denying defendant's motions to dismiss due to insufficient evidence where defendant contended that there was insufficient evidence of a meeting of the minds. **State v. Larrimore,** 119.

CONSTITUTIONAL LAW

§ 252 (NCI4th). Discovery; particular information or materials sought; miscellaneous

In a prosecution for murder of a police officer who was executing a search warrant for defendant's apartment wherein defendant contended he and others in his apartment did not hear the police identify themselves because they were listening to a certain compact disc, the State did not violate *Brady v. Maryland* by failing to disclose to defendant that this compact disc was discovered in defendant's stereo system because this evidence would not have affected the outcome of the trial and was thus not material. **State v. Lyons,** 646.

§ 309 (NCI4th). Effectiveness of assistance; counsel's abandonment of client's interest

The Supreme Court will not pass upon defendant's assignment of error that his right to the effective assistance of counsel was denied by his attorney's concession in closing argument that defendant was guilty of involuntary manslaughter or second-degree murder where the record is silent as to whether defendant consented to his attorney's concession of guilt. **State v. House,** 187.

§ 338 (NCI4th). Jury selection

A conspiracy and first-degree murder defendant's Sixth Amendment right to a trial by jury was not violated by the allowance of peremptory challenges by the State. **State v. Larrimore,** 119.

§ 342 (NCI4th). Presence of defendant at proceedings generally

The trial court did not err in a conspiracy and first-degree murder prosecution by conducting six unrecorded bench conferences not attended by defendant. **State v. Larrimore,** 119.

It will not be assumed that defendant was absent from his capital trial on several occasions where the court reporter did not consistently record defendant's presence while court was in session, but the transcript does not indicate that he was absent from the trial. **State v. Daughtry,** 488.

CRIMINAL LAW—Continued

§ 78 (NCI4th). Change of venue; pretrial publicity; circumstances insufficient to warrant change

The trial court did not err in the denial of defendant's motion for change of venue of his murder, kidnapping and rape trial based on pretrial publicity. **State v. Gregory,** 365.

§ 101 (NCI4th). Information subject to disclosure by State; defendant's statement

A telephone statement by defendant that he meant to kill the victim was not impermissibly used to impeach defendant's expert in psychology because it was not revealed to the defense until the fourth day of defendant's murder trial where defendant had made substantially the same statement in his formal confession but elected to keep this information from his expert, and the defense was aware of the conversation and had relayed its contents to the expert before he testified. **State v. Jackson,** 301.

§ 107 (NCI4th). Reports not subject to disclosure by State

There was no error in a noncapital first-degree murder prosecution where the trial court denied defendant's motion for disclosure of all files pertaining to a witness's activities as a drug informant. **State v. White,** 264.

§ 113 (NCI4th). Regulation of discovery; failure to comply

Although the trial court ordered the State to make any exculpatory evidence in its possession available to defendant at least twenty days prior to defendant's trial for murder and armed robbery, defendant was not prejudiced by the State's nondisclosure, prior to trial, of specific information tending to implicate another person as the perpetrator of the crimes where all of this information was ultimately provided to defendant at trial. **State v. Taylor,** 52.

The trial court did not err by failing to suppress defendant's statement during a telephone conversation that he had killed a man and meant to kill him as a sanction for the State's violation of discovery by failing to reveal the statement to defense counsel until the fourth day of defendant's murder trial. **State v. Jackson,** 301.

§ 286 (NCI4th). Miscellaneous grounds for continuance; pendency of other prosecutions

There was no violation of defendant's constitutional rights where defendant was tried noncapitally on an indictment charging her with the first-degree murder of her stepson in 1973, moved that this trial be continued until after the pending capital trial for the murder of her husband, and that motion was denied. **State v. White,** 264.

§ 288 (NCI4th). Procedure on motion for continuance; generally; necessity and time for motion

There was no abuse of discretion in a noncapital first-degree murder prosecution in the denial of defendant's motion for a continuance where the ruling was not supported by any findings or analysis indicating that the trial court seriously considered the motion or the factors listed in N.C.G.S. § 15A-952(g). **State v. White,** 264.

§ 375 (NCI4th). Expression of opinion on evidence during trial; miscellaneous comments and actions

There was no error in a first-degree murder prosecution in a comment by the court that "I think I've tested the jury's attention span for today" during defendant's testimony or in a later comment that on the next day the court would give the jury the law that pertains to this "sad situation." **State v. Campbell,** 612.

CRIMINAL LAW—Continued

directed solely toward defendant's failure to offer evidence to rebut the State's case, and were in response to defense counsel's jury argument. **State v. Taylor,** 52.

There was no error in a first-degree murder prosecution where the prosecutor commented in his argument to the jury on defendant's failure to testify, defense counsel objected, and the court instructed the jury not to consider the statement of counsel and that defendant had no obligation to offer evidence. **State v. Bowie,** 199.

The prosecutor did not improperly comment on defendant's failure to testify in his closing argument when he referred to when defendant "comes and tries to hide," stated that only the three victims and the perpetrator knew exactly what happened inside the mobile home, and stated that "you haven't heard anything about any accident." **State v. Porter**, 320.

The prosecutor's argument that defendant's "statement came in but he didn't testify" was not so egregious as to require the trial court to intervene on its own motion, and any error in the prosecutor's argument that defendant wasn't under oath or subject to cross-examination was cured by the court's instruction that the jury should not consider defendant's failure to testify and its admonishment of the prosecutor. **State v. Littlejohn**, 730.

§ 432 (NCI4th). Argument of counsel; appeals to prejudice, passion, and the like

There was no impropriety requiring ex mero motu intervention in a first-degree murder prosecution where defendant contended that the prosecution had argued that defendant was not a human being. **State v. Campbell**, 612.

§ 433 (NCI4th). Argument of counsel; defendant as professional criminal, outlaw, or bad person

There was no gross impropriety in a prosecution for conspiracy and first-degree murder where the prosecutor in his closing argument described defendant as the quintessential evil and one of the most dangerous men in the state. **State v. Larrimore,** 119.

§ 434 (NCI4th). Argument of counsel; defendant's prior convictions or criminal conduct

There was no error in a first-degree murder prosecution where defendant contended that the prosecutor's argument emphasized the suffering of the victim of defendant's prior misconduct. **State v. Campbell**, 612.

§ 436 (NCI4th). Argument of counsel; defendant's callousness, lack of remorse, or potential for future crime

The prosecutor's references to defendant's lack of remorse and bad character in his closing argument in a capital sentencing proceeding were not improper. **State v. Gregory,** 365.

There was no error in a capital first-degree murder prosecution where the trial court did not intervene ex mero motu when the prosecutor argued that he did not think that defendant should be able to dodge or avoid or be free from responsibility by being found not guilty by reason of insanity, that a verdict of not guilty by reason of insanity is the same as a not guilty verdict, and that the jury should find defendant guilty in order to prevent him living in the jury's neighborhoods and committing more crimes. **State v. Lynch,** 435.

CRIMINAL LAW—Continued

There was nothing improper in a first-degree murder prosecution where the prosecutor argued that defendant should be convicted so that he would not commit crimes in the future. **State v. Campbell**, 612.

There was no error in the sentencing hearing in a first-degree murder prosecution where defendant contended that the prosecutor's argument that defendant had enjoyed the killing was not based on the evidence and was extremely inflammatory. **Ibid.**

§ 438 (NCI4th). Argument of counsel; miscellaneous comments on defendant's general character and truthfulness

Though the prosecutor's argument about the credibility of defendant's testimony based on a redaction in defendant's confession which changed the number of people who first entered the victims' residence from three to two was unfair, the argument was not so grossly improper that the trial court should have intervened on its own motion. **State v. Littlejohn**, 730.

§ 439 (NCI4th). Argument of counsel; comment on character and credibility of witnesses generally

There was no gross impropriety in a prosecution for conspiracy and first-degree murder where defendant contended that the prosecutor in his argument improperly attempted to entice certain jurors into identifying with certain prosecution witnesses. **State v. Larrimore**, 119.

There was no error in a prosecution for conspiracy and first-degree murder in an argument by the prosecutor that an officer had the greatest degree of believability where the prosecutor was responding to assertions made by defendant. **Ibid.**

There was no error in a prosecution for conspiracy and first-degree murder where the prosecutor argued that a defense witness was not worthy of consideration or belief. **Ibid.**

There was no error in a prosecution for conspiracy and first-degree murder in the prosecutor's argument concerning the testimony of the wife of a coconspirator. **Ibid.**

§ 442 (NCI4th). Argument of counsel; comment on jury's duty

There was no error in a prosecution for conspiracy and first-degree murder in the prosecutor's argument that the jury is the conscience of the community. **State v. Larrimore**, 119.

§ 445 (NCI4th). Argument of counsel; interjection of personal beliefs; other comments

The prosecutor did not improperly inject his own beliefs, personal opinions or knowledge by his jury argument that defendant lied during his testimony. **State v. Solomon**, 212.

Assuming impropriety in the prosecutor's argument expressing his disapproval of defendant being educated at Shaw University at taxpayer expense while discussing the nonstatutory mitigating circumstance that defendant had sought to better himself educationally during his confinement, the argument was not so prejudicial to defendant's case as to amount to gross impropriety. **State v. Garner**, 573.

The Supreme Court could not say in a capital first-degree murder prosecution that there was error requiring correction ex mero motu where defendant contended that the prosecutor conveyed to the jury his opinion that the case warranted full prosecution. **State v. Campbell**, 612.

CRIMINAL LAW—Continued

§ 446 (NCI4th). Argument of counsel; inflammatory comments generally; significance or impact of case

There was no error in the sentencing hearing in a first-degree murder prosecution where defendant contended that the prosecutor argued that the jury was obligated to return a sentence of death because the community expected it. **State v. Campbell,** 612.

§ 447 (NCI4th). Argument of counsel; comment on rights of victim, victim's family

There was no error in a prosecution for conspiracy and first-degree murder where defendant contended that the prosecutor's argument improperly sought to invoke sympathy for the victim but in context the prosecutor was arguing that the position of the body was explained by the circumstances in evidence. **State v. Larrimore,** 119.

There was no error in a prosecution for conspiracy and first-degree murder in the prosecutor's reference to the victim's family. **Ibid.**

The prosecutor's use of victim impact statements during his closing argument in a capital sentencing proceeding did not render defendant's trial fundamentally unfair where the statements were made as a part of the prosecutor's argument that the deaths of the victims represented a unique loss to their families. **State v. Gregory,** 365.

§ 452 (NCI4th). Argument of counsel; comment on aggravating or mitigating circumstances

The prosecutor was properly characterizing and contesting the weight and validity of a nonstatutory mitigating circumstance when he argued to the jury in a capital sentencing proceeding that the purpose of submitting the nonstatutory mitigating circumstance that defendant was convicted by the testimony of an accomplice was designed to influence the jury to question at sentencing whether it rightly found his guilt at the guilt-innocence phase of the trial and he did not know this was a mitigating circumstance since defendant had already been found guilty beyond a reasonable doubt. **State v. Gregory,** 365.

The prosecutor was merely contesting the weight of defendant's proffered nonstatutory mitigating circumstance that he had served his country in time of war when he mentioned that defendant served his country despite the conflict with his religious beliefs and argued that defendant's belief was not "thou shalt not kill" but was "kill anybody else but not Moslems." **Ibid.**

The prosecutor did not denigrate the capital sentencing process during his closing argument but merely encouraged the jury to focus on facts he believed justified the death penalty when he told jurors to focus on the crime instead of the mitigating evidence, referred to some of the proffered mitigators as "lawyer talk," and asked "so what?" after he mentioned the nonstatutory mitigating circumstance that defendant had been a good prisoner. Further, the prosecutor did not mislead the jury by his shorthand description of the impaired capacity mitigating circumstance when he predicted defense counsel would argue that defendant didn't know what he was doing and didn't know it was against the law to do something like the murder. **State v. Powell,** 674.

§ 454 (NCI4th). Argument of counsel; comment on sentence or punishment; capital cases, generally

The trial court's prompt actions cured any possible error created by the prosecutor's argument that defendant had already received a life sentence for another murder

CRIMINAL LAW—Continued

§ 775 (NCI4th). Instructions on defense of involuntary intoxication

The trial court did not err in a prosecution for conspiracy and first-degree murder by not giving an instruction on voluntary intoxication where defendant did not make the requisite showing that either defendant or the accomplice was utterly incapable of forming the requisite intent. **State v. Larrimore,** 119.

§ 787 (NCI4th). Instructions on accident

The trial court did not err in the prosecution of defendant for the noncapital first-degree murder of her stepson by instructing the jury that it could consider evidence of defendant's involvement in her husband's murder to prove the absence of accident. **State v. White,** 264.

There was no plain error in a noncapital first-degree murder prosecution for the murder of defendant's four year old stepson in 1973 where the court instructed on accident as a theory of acquittal but did not include "not guilty by reason of accident" in the final mandate. **Ibid.**

§ 794 (NCI4th). Acting in concert instructions appropriate under the evidence, generally

The evidence did not require the trial court to give defendant's requested instruction that jurors should find defendant not guilty if they found he withdrew from the concerted activity after the culprits were inside the victims' home. **State v. Littlejohn,** 730.

§ 817 (NCI4th). Instructions on witness credibility; corroborative evidence

There was no error in a prosecution for conspiracy and first-degree murder in the court's instruction that statements in prior proceedings or to other persons should not be considered as evidence of the truth but as corroboration or impeachment. **State v. Larrimore,** 119.

§ 818 (NCI4th). Instructions on interested witnesses generally

Defendant's request for an instruction on accomplice testimony did not include a request for an instruction on testimony by interested witnesses, and the trial court was not required to instruct on the credibility of interested witnesses absent a request by defendant. **State v. Leach,** 236.

§ 819 (NCI4th). Instructions on interested witnesses; particular instructions

There was no error in a prosecution for conspiracy and first-degree murder where the court instructed the jurors that if they found one or more witnesses were interested in the outcome, they could take this interest into account and would treat such testimony the same as any other believable evidence if they believed such testimony in whole or in part, or where the court instructed the jurors that there was evidence that a particular witness was an accomplice and would be considered an interested witness whose testimony would be considered with the greatest care and caution, but treated as any other believable testimony if believed. **State v. Larrimore,** 119.

§ 836 (NCI4th). Instructions on State's witnesses; witness testifying under sentence reduction agreement

There was no plain error in a prosecution for conspiracy and first-degree murder from an instruction given during jury selection on interested witnesses in explanation of the line of questions posed by the prosecution. **State v. Larrimore,** 119.

CRIMINAL LAW—Continued

rated testimony of a coconspirator or considered as well corroborating evidence presented at trial. **State v. Larrimore,** 119.

§ 1298 (NCI4th). Capital punishment generally

Sentences of death imposed upon defendant for two first-degree murders were not arbitrary and capricious because the State permitted a codefendant to plead guilty to noncapital offenses for his participation in these crimes in return for his truthful testimony against defendant. **State v. Gregory,** 365.

The North Carolina death penalty statute is not unconstitutional. **State v. Powell,** 674.

§ 1300 (NCI4th). Capital sentencing procedure; separate sentencing proceeding

The trial court properly denied defendant's motion for separate juries for the guilt and sentencing phases of his capital trial. **State v. Daughtry,** 488.

§ 1309 (NCI4th). Capital sentencing procedure; submission and competence of evidence generally

The trial court was not required to perform the Rule 403 balancing test in deciding whether to permit the State to introduce a photograph in a capital sentencing proceeding because the Rules of Evidence do not apply in sentencing proceedings. **State v. Daughtry,** 488.

§ 1310 (NCI4th). Capital sentencing procedure; necessity of prejudice from admission or exclusion of evidence

The trial court did not abuse its discretion in a capital first-degree murder sentencing hearing by overruling defendant's objections and refusing a mistrial after evidence was elicited that defendant had stated that he wanted "to shoot at blacks and to watch them dance." **State v. Lynch,** 435.

§ 1314 (NCI4th). Capital sentencing procedure; evidence of aggravating and mitigating circumstances

A color photograph of a murder victim's naked body that showed a stick protruding from the body and injuries to the rectal area, which had been excluded from the guilt phase, was relevant and admissible in the sentencing phase to show the especially heinous, atrocious, or cruel aggravating circumstance. **State v. Daughtry,** 488.

The trial court in a capital sentencing proceeding erred by refusing to permit defendant's psychiatric expert to answer questions as to whether he had seen indications of remorse on defendant's part since this evidence was relevant to the nonstatutory mitigating circumstance that defendant exhibited remorse within a short time following the crime, but this error was harmless beyond a reasonable doubt. **Ibid.**

§ 1318 (NCI4th). Capital sentencing procedure; instructions generally

The trial court did not err in a first-degree murder sentencing hearing in the use of the term "may" in sentencing recommendation issues three and four because this gave the jury discretion in considering proven mitigating circumstances. **State v. Campbell,** 612.

§ 1320 (NCI4th). Capital sentencing procedure; instructions; consideration of evidence

There was no error in the sentencing hearing in a first-degree murder prosecution where the court did not ex mero motu instruct the jury that it could not consider the

CRIMINAL LAW—Continued

Defendant's constitutional rights were not violated by the instructions in a capital sentencing proceeding which allowed jurors to determine whether a nonstatutory mitigating circumstance had mitigating value. **Ibid.**

The trial court's instructions on Issues Three and Four in a capital sentencing proceeding were proper. **Ibid.**

The trial court did not err by instructing that each juror "may" consider any mitigating circumstance found in sentencing issue two when answering issues three and four. **State v. Garner**, 573.

§ 1326 (NCI4th). Capital sentencing procedure; instructions on aggravating and mitigating circumstances; burden of proof

The trial court did not erroneously instruct the jury on defendant's burden of proving mitigating circumstances. **State v. Daughtry,** 488.

The trial court did not err in a first-degree murder prosecution by failing to define for the jury the term preponderance of the evidence as that term relates to a defendant's burden to prove mitigating circumstances. **State v. Lynch,** 435.

§ 1327 (NCI4th). Capital sentencing procedure; instructions; aggravating and mitigating circumstances; duty to recommend death sentence

The trial court did not err in a first-degree murder prosecution when it instructed the jury that it had a duty to return a recommendation of death if it found the aggravating circumstances in the light of the mitigating circumstances were sufficiently substantial to call for the death penalty. **State v. Lynch,** 435.

The trial court did not err by instructing the jury that it had a "duty" to recommend a sentence of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstance and that the aggravating circumstance was sufficient to call for such a penalty. **State v. Powell**, 674.

§ 1332 (NCI4th). Capital sentencing procedure; instructions; sentence recommendation by jury as binding on court

The trial court did not err by refusing to give defendant's requested instruction that the jury's verdict in a capital sentencing proceeding "bound" the trial court and was not merely a recommendation. **State v. Garner**, 573.

§ 1334 (NCI4th). Consideration of aggravating circumstances; notice

The trial court did not commit constitutional error by denying defendant's motion for disclosure of the aggravating circumstances upon which the State intended to rely. **State v. Daughtry,** 488.

The trial court did not err in a first-degree murder prosecution by failing to require the prosecution to make pretrial disclosure of the aggravating circumstances on which it would rely and any evidence tending to negate or establish such factors. **State v. Lynch,** 435.

§ 1337 (NCI4th). Particular aggravating circumstances; previous conviction for felony involving violence

The trial court's submission in a capital trial of the aggravating circumstances of a previous conviction of a violent felony and commission of the murder while defendant was engaged in an attempted armed robbery of a pawn shop did not constitute impermissible "double counting" where the court's instructions did not permit the jury

to consider the attempted armed robbery as evidence of the previous conviction of a violent felony circumstance. **State v. Davis,** 1.

§ 1338 (NCI4th). Particular aggravating circumstances; avoiding arrest or effecting escape

The evidence was sufficient to support the trial court's submission of the aggravating circumstance that two murders were committed for the purpose of avoiding or preventing a lawful arrest. **State v. Gregory,** 365.

§ 1339 (NCI4th). Particular aggravating circumstances; capital felony committed during commission of another crime

Separate evidence existed in a capital sentencing proceeding to support the trial court's submission of both the aggravating circumstance that the murder was especially heinous, atrocious, or cruel and the aggravating circumstance that it was committed while defendant was engaged in the commission of a sex offense. **State v. Daughtry,** 488.

§ 1340 (NCI4th). Particular aggravating circumstances; effect of felony-murder rule

Where the evidence was sufficient to support defendant's conviction of first-degree murder based on both felony murder and premeditation and deliberation, the trial court did not err in submitting the underlying felony of attempted armed robbery as an aggravating circumstance. **State v. Davis,** 1.

The trial court did not err by submitting the aggravating circumstances that each murder was committed while defendant was engaged in the commission of a rape, and also while he was engaged in the commission of a kidnapping, although defendant was convicted of two counts of rape and two counts of kidnapping, where defendant was convicted on two counts of first-degree murder upon both the theory of premeditation and deliberation and the theory of felony murder. **State v. Gregory,** 365.

§ 1341 (NCI4th). Particular aggravating circumstances; pecuniary gain

The trial court did not err by submitting the aggravating circumstance that a first-degree murder was committed for pecuniary gain where defendant's conviction rested solely on the felony murder rule with armed robbery as the underlying felony. **State v. Powell,** 674.

§ 1343 (NCI4th). Particular aggravating circumstances; especially heinous, atrocious, or cruel offense; instructions

The trial court's pattern jury instruction on the especially heinous, atrocious, or cruel aggravating circumstance provided constitutionally sufficient guidelines to the jury. **State v. Gregory,** 365.

The trial court's instruction that the jury should not "focus on the sexual offense but instead focus on the manner of [the victim's] killing" when considering the heinous, atrocious, or cruel aggravating circumstance was sufficient to prohibit the jury from considering the same evidence in support of this circumstance and the circumstance that the murder was committed while defendant was engaged in a sex offense. **State v. Daughtry,** 488.

The trial court's instruction on the heinous, atrocious, or cruel aggravating circumstance was not unconstitutionally vague. **Ibid.**

The especially heinous, atrocious, or cruel aggravating circumstance is constitutional. **State v. Lynch,** 435.

The trial court did not err in a first-degree murder prosecution by submitting to the jury the "especially heinous, atrocious, or cruel" aggravating circumstance with instructions that allegedly failed adequately to limit the application of the circumstance. **State v. Campbell**, 612.

§ 1345 (NCI4th). Particular aggravating circumstances; especially heinous, atrocious, or cruel offense; evidence sufficient to support finding

The trial court did not err in a capital first-degree murder prosecution by submitting the especially heinous, atrocious or cruel aggravating circumstance to the jury. **State v. Lynch,** 435.

§ 1346 (NCI4th). Particular aggravating circumstances; creating risk of death to more than one person

The trial court did not err in a first-degree murder prosecution by overruling defendant's objections and denying his motion to preclude use of the aggravating circumstance of creating risk of death to more than one person. **State v. Lynch,** 435.

§ 1347 (NCI4th). Particular aggravating circumstances; murder as course of conduct

The evidence was sufficient to support the trial court's submission of the course of conduct aggravating circumstance in a capital sentencing proceeding where defendant murdered the two victims after kidnapping and raping them and shot and wounded a male companion of the victims. **State v. Gregory,** 365.

The trial court did not err in a first-degree murder prosecution by overruling defendant's objection and denying his motion to preclude use of the course of conduct aggravating circumstance. **State v. Lynch,** 435.

Defendant's commission of a prior convenience store robbery and murder of a store clerk and his subsequent shooting of a taxicab driver were sufficiently connected to two murders by defendant at a motel to support the trial court's instruction permitting the jury to find the "course of conduct" aggravating circumstance for the two motel murders based on the convenience store and taxicab crimes. **State v. Garner**, 573.

§ 1349 (NCI4th). Submission of mitigating circumstances

The trial court's instructions could not have caused a juror reasonably to understand the final instruction regarding nonstatutory mitigating circumstances to refer back to all of the mitigating circumstances so as to permit the jury to determine whether statutory mitigating circumstances found by the jury had mitigating value. **State v. Garner**, 573.

§ 1351 (NCI4th). Consideration of mitigating circumstances; burden of proof

The trial court did not err in a first-degree murder prosecution by instructing the jury that defendant bore the burden of proving mitigating circumstances to the satisfaction of the jury. **State v. Lynch,** 435.

The trial court's use of the words "satisfy you" to explain the burden of proof applicable to mitigating circumstances was not error. **State v. Garner**, 573.

The trial court did not err in a first-degree murder prosecution in its instructions on the burden of proof applicable to mitigating circumstances through the use of the terms "satisfaction" and "satisfy" in defining the burden of proof. **State v. Campbell,** 612.

§ 1355 (NCI4th). Particular mitigating circumstances; lack of prior criminal activity

The trial court did not err in failing to submit the mitigating circumstance that defendant had no significant history of prior criminal activity where defendant's criminal history included numerous beatings of the victim, an incident in which defendant shot an acquaintance in the leg, a conviction for driving while impaired, and a guilty plea to assault inflicting serious injury. **State v. Daughtry,** 488.

Evidence presented at a captial sentencing hearing did not require the trial court to submit the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. **State v. Powell,** 674.

§ 1360 (NCI4th). Particular mitigating circumstances; impaired capacity of defendant; instructions

The evidence in a capital sentencing hearing was insufficient to support a finding of the statutory impaired capacity mitigating circumstance based upon evidence by defendant's family and friends concerning his drinking of beer and character changes indicating a mental breakdown. **State v. Garner,** 573.

§ 1362 (NCI4th). Particular mitigating circumstances; age of defendant

There was no error in a first-degree murder sentencing hearing where the trial court failed to submit the statutory mitigating circumstance of the age of the defendant. **State v. Bowie,** 199.

The trial court's instruction to the jury in a capital sentencing proceeding that "[t]he 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" did not limit the consideration of the age of defendant as a mitigating circumstance solely to chronological age. **State v. Gregory,** 365.

The trial court properly declined to submit defendant's age as a mitigating circumstance in this capital sentencing proceeding although defendant contended that the evidence showed his emotional age to be younger than his chronological age of twenty-seven at the time of the crime. **State v. Daughtry,** 488.

§ 1363 (NCI4th). Other mitigating circumstances arising from the evidence

The trial court in a capital sentencing proceeding did not err by refusing to submit as a mitigating circumstance for each of two first-degree murders that a codefendant would not receive the death penalty for his participation in these crimes pursuant to a plea bargain with the State. **State v. Gregory,** 365.

The evidence did not require the trial court to submit the nonstatutory mitigating circumstances that "defendant had provided child support for his child by another woman for several years" and "defendant was the sole supporter of [the victim] while they were living together." **State v. Daughtry,** 488.

The trial court properly ruled that the portion of a requested mitigating circumstance referring to the effect of defendant's alcohol dependence upon his judgment was subsumed within the submitted circumstance that "defendant has a history of chronic alcohol dependency and abuse," and the evidence was insufficient to require submission of the portion of the requested instruction referring to marijuana dependence where a psychiatrist testified only that defendant had abused marijuana. **Ibid.**

The trial court properly refused to submit the mitigating circumstance that "defendant never developed a normal father-son relationship with his father" because it was subsumed within other submitted circumstances. **Ibid.**

CRIMINAL LAW—Continued

The trial court erred by failing to submit defendant's requested mitigating circumstance that defendant exhibited remorse and sorrow "and has continued to do so" where defendant cried on the stand when asked about his reaction to the victim's death and the sexual offense committed against her, but this error was harmless beyond a reasonable doubt. **Ibid.**

The trial court's failure to submit defendant's requested mitigating circumstance that "defendant at no time resisted arrest or attempted to flee from Johnston County" was harmless error. **Ibid.**

The trial court did not err by failing to submit as a nonstatutory mitigating circumstance in a capital sentencing proceeding that defendant's accomplice had not been and may not be tried capitally. **State v. Garner**, 573.

The trial court did not err by failing to instruct that if any juror found that defendant had the ability to adjust to prison life, the juror must give that circumstance mitigating value. **Ibid.**

The trial court did not err by failing to instruct the jury that the nonstatutory mitigating circumstance that defendant had been a good prisoner while incarcerated in jail had mitigating value per se. **State v. Powell**, 674.

§ 1373 (NCI4th). Death penalty held not excessive or disproportionate

A sentence of death imposed upon defendant for first-degree murder of a pawn shop employee was not excessive or disproportionate to the penalty imposed in similar cases. **State v. Davis,** 1.

There was no error in two death sentences where the evidence supports the findings of the aggravating circumstances, the sentences were not imposed under the influence of passion, prejudice or any other arbitrary factor, and the sentences of death were not excessive or disproportionate to the penalties imposed in similar cases. **State v. Bowie,** 199.

Sentences of death imposed upon defendant for two first-degree murders were not disproportionate where the victims were kidnapped and repeatedly raped before they were killed. **State v. Gregory,** 365.

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where the victim was murdered in a brutal, merciless, and dehumanizing attack which included severe blunt-trauma injuries and a depraved sexual offense. **State v. Daughtry,** 488.

A sentence of death in a first-degree murder prosecution was not disproportionate. **State v. Lynch,** 435.

Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate where defendant slit the throat of a motel clerk whom he later shot and killed, and he also shot and killed a second motel clerk before robbing the motel. **State v. Garner**, 573.

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant brutally killed a convenience store employee with a tire iron during a robbery of the store. **State v. Powell**, 674.

A sentence of death for a first-degree murder was not disproportionate. **State v. Campbell**, 612.

EVIDENCE AND WITNESSES—Continued

§ 190 (NCI4th). Physical or mental condition or appearance of victim

The trial court did not err in a first-degree murder prosecution in excluding expert testimony concerning the victim's mental condition where the victim's actions, regardless of mental condition, did not constitute sufficient provocation to negate premeditation and deliberation on the part of defendant. **State v. Hightower**, 735.

§ 203 (NCI4th). Insanity among relatives of accused

In a capital prosecution for first-degree murder, the trial court was correct in not allowing questions about family history and mental illness without a foundation. **State v. Lynch**, 435.

§ 212 (NCI4th). Events or conduct prior to or subsequent to accident, offense, or other event; previous accidents or injuries

There was no error in a first-degree murder prosecution in the admission of evidence that the four year old victim had suffered from a skull fracture and severe burns on his leg and ankle several weeks before his death. **State v. White**, 264.

§ 217 (NCI4th). Events or conduct subsequent to accident, offense, or other event

The Court of Appeals did not err in considering the granting of a summary judgment motion for defendant social host by declining to consider any evidence of the driver's condition or appearance after he had left the party. **Camalier v. Jeffries**, 699.

§ 263 (NCI4th). Character or reputation of persons other than witness generally; defendant

Testimony by defendant's former wife that defendant loved his mother dearly and, in her opinion, would never swear or profane his mother's grave was not hearsay but was relevant character evidence admissible to rebut the implication in the State's evidence that defendant declined to swear his innocence on his mother's grave because he knew he was guilty. **State v. Powell**, 674.

§ 342 (NCI4th). Other crimes, wrongs, or acts; admissibility to show intent; theft offenses

Evidence that defendants committed an armed robbery of a McDonald's restaurant one week prior to the shooting of a pawn shop employee was admissible to show intent in a prosecution for attempted armed robbery of the pawn shop. **State v. Davis**, 1.

§ 351 (NCI4th). Other crimes, wrongs, or acts; admissibility to show motive, reason, or purpose; homicide offenses generally

Testimony by defendant's girlfriend that defendant supported himself and her and their cocaine habit when his only source of income was AFDC and Social Security checks for the benefit of his son and that defendant stopped receiving both checks when his former wife took custody of the son was properly admitted for the limited purpose of showing defendant's motive for a robbery-murder. **State v. Powell**, 674.

§ 357 (NCI4th). Other crimes, wrongs, or acts; admissibility to show motive, reason, or purpose; drug offenses

In a prosecution for first-degree murder of a law officer who was executing a search warrant for defendant's apartment, testimony by a witness that he had purchased marijuana from defendant the day before the shooting was properly admitted

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

§ 1215 (NCI4th). Application of Bruton rule; confession by nontestifying defendant; admissibility where portions referring to or implicating codefendant deleted

Defendant's rights were not violated by the introduction of his redacted confession on the ground that, when part of his confession was introduced, he had a right to have the other part introduced. **State v. Littlejohn**, 730.

§ 1224 (NCI4th). Confessions and other inculpatory statements; matters affecting admissibility or voluntariness; delay in arraignment

Defendant's confession was not inadmissible because he was interrogated for ten hours and confessed prior to being taken before a magistrate in violation of G.S. 15A-501(2). **State v. Littlejohn**, 730.

§ 1226 (NCI4th). Confessions and other inculpatory statements; matters affecting admissibility or voluntariness; promise to keep statement confidential

Assuming the trial court erred by admitting in-custody statements in which defendant gave details about a murder after defendant asked to speak off the record and the officer tore up the Miranda waiver form defendant had signed, such error was rendered harmless by defendant's prior confession, before he asked to speak off the record, that he "went off on" the victim because she slapped him as he tried to rob the convenience store where she worked. **State v. Powell**, 674.

§ 1227 (NCI4th). Confessions and other inculpatory statements; matters affecting admissibility or voluntariness; impropriety of prior or subsequent confession

The trial court did not err in a first-degree murder prosecution by not excluding defendant's statement, which defendant claimed was tainted by an earlier statement which was excluded due to a violation of the juvenile code. **State v. Bunnell**, 74.

§ 1229 (NCI4th). Confessions and other inculpatory statements; statement made to person other than police officer

A "fantasy statement" made by defendant to another inmate while he was in Central Prison awaiting trial which detailed defendant's participation in the shooting of the male victim and the kidnapping, rape and murder of each of the two female victims was admissible as an admission of a party opponent. **State v. Gregory**, 365.

§ 1233 (NCI4th). Procedural safeguards and warnings as to rights; confession made to person other than police officer

The trial court properly found that defendant's girlfriend and a male friend were not acting as agents of the police when they tape recorded a telephone conversation with defendant while he was in jail awaiting trial for first-degree murder so that the conversation did not constitute police-initiated questioning after defendant had requested and conferred with an attorney, and the admission of the recorded conversation and a transcript thereof did not violate defendant's Fifth Amendment rights. **State v. Powell**, 674.

§ 1235 (NCI4th). What constitutes custodial interrogation; custodial interrogation defined

The trial court did not err in a prosecution for being an accessory to first-degree murder by denying defendant's pretrial motion to suppress an inculpatory statement

made to police officers the day after the fire in which the victims died where defendant contended that the statement was obtained as a result of a custodial interrogation without Miranda warnings. **State v. Johnson,** 32.

§ 1240 (NCI4th). Particular statements as volunteered or resulting from custodial interrogation; statements made during general investigation at police station

Defendant's freedom of movement was not restrained during his interview by the police so as to render him in custody for Fifth Amendment purposes, a reasonable person would have felt free to leave at the time defendant asked for a lawyer so that the prohibitions of *Edwards v. Arizona* did not apply, and defendant's rights were not violated when an officer told him he could continue talking to the officers without an attorney if he wished. **State v. Daughtry,** 488.

§ 1268 (NCI4th). Confessions and other inculpatory statements; waiver of constitutional rights; necessity that second waiver be obtained

The trial court did not err in a first-degree murder prosecution by admitting a defendant's confession where the defendant was given Miranda warnings, questioned by one detective, and contended that he should have been advised of his rights again before being questioned by the second detective after a ten to fifteen minute break. **State v. Bowie,** 199.

§ 1275 (NCI4th). Confessions and other inculpatory statements; waiver of constitutional rights; use of drugs or alcohol by defendant

The trial court did not err in denying defendant's motion to suppress an in-custody statement made by defendant on the ground she lacked the capacity to knowingly and voluntarily waive her rights because she had consumed alcohol. **State v. Wilson,** 720.

§ 1278 (NCI4th). Confessions and other inculpatory statements; particular circumstances affecting validity of waiver of constitutional rights; miscellaneous

Although a defendant in a first-degree murder prosecution contended that the totality of circumstances surrounding his statement, the presence of psychological coercion, and his condition show that his statement should not have been admitted, the court found based on substantial evidence that no threats or promises induced defendant to make his statement, defendant was not under the influence of alcohol, was not in need of medical attention, and did not request food or beverage. **State v Bowie,** 199.

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress a statement to police and a knife obtained as a result where, upon a review of the totality of the circumstances, it is clear that defendant was not coerced or threatened into confessing his participation in this murder, and the trial court did not err in concluding that defendant freely, knowingly, and intelligently waived his rights and voluntarily gave an inculpatory statement to police. **State v. Knight,** 531.

§ 1305 (NCI4th). Confessions and other inculpatory statements; matters affecting admissibility or voluntariness; age of accused

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress a statement he had given to an SBI agent where defendant

EVIDENCE AND WITNESSES—Continued

placed great emphasis on his age and his testimony that the warnings concerning his rights did not mean anything to him when he waived them. **State v. Bunnell,** 74.

§ 1357 (NCI4th). Proof of entire statement or conversation containing confession generally

Defendant's hearsay statement to his girlfriend on the same day he confessed to the police that he had shot a gun but had not shot anyone was not admissible under the principle that, when the State offers part of a confession, the accused may require the entire confession to be admitted into evidence. **State v. Jackson,** 301.

§ 1496 (NCI4th). Physical evidence; other weapons or devices; pipe

A chrome bar or pipe recovered from underneath a murder victim's automobile at the scene of the shooting was not relevant in this murder prosecution and was properly excluded as an exhibit where defendant did not contend he acted in self-defense. **State v. Jackson,** 301.

§ 1501 (NCI4th). Bloody or torn clothing; victim

The trial court did not err during a first-degree murder prosecution by admitting the victim's bloody clothes into evidence and allowing the prosecutor to brandish them before the jury during closing argument. **State v. Knight,** 531.

§ 1659 (NCI4th). Admissibility of photographs to illustrate testimony; limiting instructions

Any error in the trial court's instruction that the jury in a murder trial could consider certain photographs "as evidence of facts that they illustrate" when some photographs were admitted for illustrative purposes only was not plain error. **State v. Daughtry,** 488.

§ 1694 (NCI4th). Photographs of homicide victims; location and appearance of victim's body

The trial court did not err in a prosecution for conspiracy and first-degree murder by admitting a photograph of the victim where the photograph served to illustrate the coroner's testimony, specifically the visible wounds on the victim's body. **State v. Larrimore,** 119.

Two photographs showing a murder victim's body as it was discovered, four photographs from the autopsy, and ten slides from the autopsy, all of which were in color, were not unfairly prejudicial or unduly repetitive, and defendant was not prejudiced by the manner in which they were presented to the jury. **State v. House,** 187.

The trial court did not err in a noncapital first-degree murder prosecution by admitting a photograph of the victim in his casket in a funeral home where this photograph was the only physical evidence to illustrate testimony about the condition of the victim's body shortly after the time of his death. **State v. White,** 264.

The trial court did not err by admitting for illustrative purposes four photographs of a murder victim's naked body at the crime scene. **State v. Daughtry,** 488.

The trial court did not abuse its discretion in a capital first-degree murder prosecution by admitting photographs of the victims at the crime scene and at the autopsy. **State v. Lynch,** 435.

EVIDENCE AND WITNESSES—Continued

§ 1695 (NCI4th). Photographs of homicide victims; decomposed body

The trial court did not abuse its discretion in the denial of defendant's pretrial motion to exclude two photographs of the bodies of two murder and rape victims depicting enlarged wounds caused by decomposition and small animals. **State v. Gregory,** 365.

§ 1715 (NCI4th). Photographs; weapon or device allegedly used in crime

There was no error in a prosecution for conspiracy and first-degree murder in the admission of a photograph of a pistol purported to be identical to the pistol used in the murder. **State v. Larrimore,** 119.

§ 1730 (NCI4th). Videotapes; witness's testimony; criminal case

The trial court did not err by admitting a videotape illustrating testimony describing the route along which a homicide victim had been dragged behind defendant's logging truck and the location of blood along the route. **State v. House,** 187.

§ 2162 (NCI4th). Opinion testimony by experts; need for formal tender of witness for, or finding as to, qualification

The trial court did not err in a noncapital first-degree murder prosecution for the death of a four year old child by admitting testimony from three nurses who were in the emergency room when the victim was brought in where the trial court implicitly accepted the nurses as expert witnesses and defendant waived her right to raise that issue on appeal by failing to specifically object to their qualifications at trial. **State v. White,** 264.

§ 2172 (NCI4th). Basis or predicate for expert's opinion; admissibility of facts on which conclusion is based

Defendant's mental health expert should have been permitted to testify concerning what she had been told about an episode during a jail interview of defendant by another member of the medical group charged with evaluating defendant's mental health status to show the basis for the expert's opinion, but the exclusion of this testimony was harmless error. **State v. Davis,** 1.

§ 2203 (NCI4th). Expert testimony; fingerprints; finding as to expertise; qualification of particular witnesses

The trial court did not err in a first-degree murder prosecution by admitting evidence concerning fingerprints taken from defendant in 1989 where the prosecutor deleted any reference to the date the fingerprints were taken after defendant objected. **State v. Baity,** 65.

§ 2210 (NCI4th). Expert testimony; existence of bloodstains; opinion as to source

The trial court did not err by allowing an expert in forensic serology and bloodstain pattern interpretation to state opinions about the position of a murder victim's body when she was struck by a blunt object and the number and force of blows inflicted upon her based upon his examination of the bloodstain patterns found at the crime scene. **State v. Daughtry,** 488.

§ 2211 (NCI4th). Expert testimony; DNA analysis

The trial court did not err by allowing an SBI agent, who was an expert in DNA analysis and molecular genetics, to testify about the results of DNA testing on blood samples found on pants worn by defendant on the night of a murder and the statisti-

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

§ 2791 (NCI4th). Question calling for witness's comment as to credibility

The trial court did nor err by refusing to permit defense counsel to ask a defense witness whether she knew she was under oath and to ask defendant whether he had accurately pointed out to the prosecutor all of the places in his pretrial statements that were untrue. **State v. Solomon,** 212.

§ 2797 (NCI4th). Counsel's questioning of witness; impertinent or insulting questions

There was no error in a first-degree murder prosecution where defendant contended that the prosecutor asked impertinent and insulting questions of two witnesses which could not possibly have elicited relevant evidence. **State v. Knight,** 531.

§ 2877 (NCI4th). Cross-examination in homicide actions

There was no error in a first-degree murder prosecution where the court overruled defendant's objections to questions asked by the prosecutor to defendant on cross-examination concerning the fabrication of a defense. **State v. Rush,** 174.

§ 2890.5 (NCI4th). Cross-examination as to particular actions or prosecutions; knowledge or expertise

The trial court did not err in the noncapital first-degree murder prosecution of defendant for the 1973 death of her four year old stepson by excluding evidence on cross-examination about the competency of the medical examiner who removed a piece of plastic from the victim's throat and who signed the 1973 death certificate stating that the death was accidental. **State v. White,** 264.

§ 2916 (NCI4th). Impeachment of credibility; cross-examination; scope and extent

Evidence elicited by the prosecutor on cross-examination of a psychiatrist about his reasons for reviewing statements by the codefendants and by defendant but not using them as a basis for his opinion testimony, including evidence that he knew the codefendants' statements contained versions of the events on the night of two murders different from defendant's statements, was relevant to impeach the witness's expert testimony. **State v. Gregory,** 365.

§ 2966 (NCI4th). Basis for impeachment; fear or threats

The trial court did not err in a prosecution for conspiracy and first-degree murder by permitting a State's rebuttal witness to testify that she had been threatened by her boyfriend, a former employee of defendant, should she testify. **State v. Larrimore,** 119.

§ 2967 (NCI4th). Basis for impeachment; hostile feelings or actions

The trial court did not abuse its discretion when it refused to allow defendant to recall a detective to show he was biased in his previous testimony in this first-degree murder trial because he had been disciplined in 1990 for an incident involving the brother of defendant's girlfriend. **State v. Jackson,** 301.

§ 2973 (NCI4th). Basis for impeachment; character for truthfulness or untruthfulness

The trial court did not err in a prosecution for conspiracy and first-degree murder by permitting limited evidence concerning past assaults upon a witness by her boyfriend, a former employee of defendant, where the witness testified that she had been threatened by her boyfriend should she testify. Where the witness has been the

EVIDENCE AND WITNESSES—Continued

subject of past acts of violence and thereby has reason to fear another individual, those acts are relevant to the issue of the witness's character for truthfulness or untruthfulness. **State v. Larrimore,** 119.

§ 3033 (NCI4th). Basis for impeachment; false testimony or swearing

The trial court did not err in a prosecution for conspiracy and first-degree murder by allowing the State to cross-examine defendant regarding his affidavit of indigency. **State v. Larrimore,** 119.

§ 3090 (NCI4th). Proof of inconsistent statements; proof by other witnesses; material matter

The trial court did not err in a prosecution for conspiracy and first-degree murder by admitting a detective's testimony that another person had related defendant's statements concerning a truck used in the crime where the testimony elicited from the detective was admissible as a prior inconsistent statement to impeach the person talking to the detective. **State v. Larrimore,** 119.

§ 3094 (NCI4th). Proof of inconsistent statements; use of transcript or recording of prior proceeding

The trial court did not err and defendant's confrontation rights were not violated in a prosecution for conspiracy and murder where defendant utilized testimony to bolster his theory of someone else's involvement in the plot to kill the victim and the State used the witness's testimony from a prior trial in rebuttal. **State v. Larrimore,** 119.

§ 3169 (NCI4th). Prior inconsistent statements; degree of consistency; substantial corroboration

The trial court did not err in a first-degree murder prosecution by admitting a prior statement by a witness where defendant argued that the prior statement was inconsistent with his testimony on direct examination at trial in that the witness did not testify on direct examination that the victim was carrying a gun when he arrived on the scene and the statement said that the victim was carrying a gun when he appeared in the parking lot. **State v. Baity,** 65.

GUARANTY

§ 14 (NCI4th). Assignment of guaranty

Rights under a special guaranty addressed to a specific entity are assignable unless: assignment is prohibited by statute, public policy, or the terms of the guaranty; assignment would materially alter the guarantor's risks, burdens, or duties; or the guarantor executed the contract because of personal confidence in the obligee. **Kraft Foodservice v. Hardee,** 344.

Defendant's personal guaranty addressed to Seaboard Foods, Inc. in which he promised to pay amounts owed for goods and merchandise sold and delivered on open account to Quick Fill, Inc., a company of which he was the president, could be enforced by plaintiff as Seaboard's assignee. **Ibid.**

HOMICIDE

§ 135 (NCI4th). Sufficiency of indictment; murder; compliance with short-form indictment

The short-form indictment in G.S. 15-144 was sufficient to charge defendant with first-degree murder. **State v. Garner,** 573.

HOMICIDE—Continued

§ 228 (NCI4th). Sufficiency of evidence; first-degree murder; motion to dismiss; nonsuit

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to dismiss all charges against him. **State v. Lynch,** 435.

§ 232 (NCI4th. Sufficiency of evidence; first-degree murder; eyewitness and other corroborative evidence

The State's evidence was sufficient to support defendant's conviction of first-degree murder based on premeditation and deliberation where eyewitnesses saw defendant fire a shot into the victim's head at close range, and the victim in no way provoked the shooting. **State v. Leach,** 236.

§ 244 (NCI4th). Sufficiency of evidence; first-degree murder; malice, premeditation, and deliberation; intent to kill, generally

There was sufficient evidence of premeditation and deliberation in a first-degree murder prosecution. **State v. Baity,** 65; **State v. Bunnell,** 74.

The State's evidence was sufficient to show that defendant acted with a specific intent to kill after premeditation and deliberation so as to support his conviction of first-degree murder of a police officer who was executing a search warrant for defendant's apartment. **State v. Lyons,** 646.

§ 245 (NCI4th). Sufficiency of evidence; first-degree murder; manner of proving premeditation and deliberation; circumstantial evidence

The evidence of specific intent to kill after premeditation and deliberation was sufficient to be submitted to the jury in a first-degree murder prosecution. **State v. Wilson,** 720.

§ 253 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; nature and execution of crime; severity of injuries along with other evidence

The State presented sufficient evidence of premeditation and deliberation to support the trial court's submission of defendant's guilt of first-degree murder to the jury where the evidence tended to show that defendant shot the victim because he had allegedly misappropriated drug money, defendant fired three shots into the unarmed victim, one bullet struck the victim in the back, and two shots struck him as he attempted to flee. **State v. Truesdale,** 229.

§ 255 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; where defendant continued to inflict injuries after victim felled

The evidence in a first-degree murder case did not require the trial court to instruct on second-degree murder where defendant and the victim argued over a drug deal, defendant shot the victim, and as the victim attempted to run away, defendant ran after him and shot him several more times at close range. **State v. Solomon,** 212.

§ 257 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; where defendant took weapon with apparent intent to use weapon

There was sufficient evidence of premeditation and deliberation to support defendants' convictions of first-degree murder of a pawn shop employee during an attempted armed robbery. **State v. Davis,** 1.

HOMICIDE—Continued

§ 299 (NCI4th). Sufficiency of evidence; second-degree murder; physical evidence connecting defendant to crime or crime scene; circumstantial evidence

A decision of the Court of Appeals that the evidence was insufficient to support defendant's conviction of second-degree murder is reversed for the reasons stated in the dissenting opinion in the Court of Appeals. **State v. Cannada,** 101.

§ 372 (NCI4th). Sufficiency of evidence; accessories; aiders and abettors; elements of offense

The trial court did not err by denying defendant's motion to dismiss charges of being an accessory before the fact where defendant contended that the State failed to produce evidence that the principal actually committed the murder. **State v. Johnson,** 32.

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder where defendant was tried as an accessory before the fact after the principal had pled guilty to second-degree murder. **State v. Larrimore,** 119.

§ 476 (NCI4th). First-degree murder; propriety of instructions; intent

The trial court did not err in a prosecution for first-degree murder in its final mandate where defendant contended that the court erred by failing to charge that either defendant or his accomplice must possess a specific intent to kill in order to convict defendant of first-degree murder under the theory of accessory before the fact. **State v. Larrimore,** 119.

There was sufficient evidence of an assault upon three murder victims to support the trial court's instruction that the jury could consider "the nature of the assault" on the issue of intent to kill where the evidence showed that defendant poured a large amount of gasoline into the victims' mobile home which was heated by kerosene space heaters. **State v. Porter,** 320.

The trial court's instructions that an intent to kill and premeditation and deliberation may be inferred from certain relevant circumstances did not establish an unconstitutional mandatory presumption because they failed to include the phrase "you are not compelled to do so." **State v. Lyons,** 646.

§ 489 (NCI4th). Premeditation and deliberation; use of examples in instructions

The trial court did not err by instructing the jury that it "may" find premeditation and deliberation from certain circumstances, "such as" circumstances listed by the court, even in the absence of evidence to support each of the circumstances listed. **State v. Leach,** 236.

The trial court's instructions that an intent to kill and premeditation and deliberation may be inferred from certain relevant circumstances did not establish an unconstitutional mandatory presumption because they failed to include the phrase "you are not compelled to do so. **State v. Lyons,** 646.

§ 494 (NCI4th). Instructions; matters considered in proving premeditation and deliberation; lethal blows after victim felled and rendered helpless

The trial court's instructions that premeditation and deliberation could be shown by the use of grossly excessive force and by the infliction of lethal wounds after the victim was felled were supported by the evidence. **State v. Truesdale,** 229.

HOMICIDE—Continued

§ 552 (NCI4th). Instructions; lesser included offenses; premeditated and deliberated murder generally; lack of evidence of lesser crime

There was no error in a prosecution for first-degree murder in not submitting second-degree murder as a possible verdict. **State v. Larrimore,** 119.

§ 558 (NCI4th). Instructions; voluntary manslaughter as lesser included offense generally

There was no prejudicial error in a first-degree murder prosecution where the court refused to submit a voluntary manslaughter instruction to the jury but the jury was instructed on first- and second-degree murder and returned a verdict of guilty of first-degree murder. **State v. Bunnell,** 74.

There was no error in a first-degree murder prosecution where defendant contended that the court's self-defense instructions incorrectly allowed a verdict of guilty of voluntary manslaughter based on a defense of imperfect self-defense only if defendant reasonably believed it was necessary to kill in self-defense. **State v. Rush,** 174.

§ 566 (NCI4th). Instructions; voluntary manslaughter as lesser-included offense of homicide; effect of self-defense

Defendant was not entitled to an instruction on voluntary manslaughter premised upon imperfect self-defense in this first-degree murder trial where defendant was not entitled to an instruction on imperfect self-defense because the evidence did not indicate that defendant formed a belief that it was necessary to kill the deceased in order to protect himself from death or great bodily harm. **State v. Lyons,** 646.

§ 582 (NCI4th). Instructions; parties; acting in concert; accessory before the fact

The trial court did not err in its instruction regarding first-degree murder by being an accessory before the fact where defendant contended that the court should have instructed the jury that it had to find that the particular person involved committed the offense rather than "another person" or "that other person." **State v. Johnson,** 32.

§ 609 (NCI4th). Instructions; self-defense; effect of lack of evidence of apprehension of death or great bodily harm

A defendant who shot a police officer executing a search warrant for defendant's apartment when officers used a battering ram to open the door and an officer stepped inside was not entitled to an instruction on perfect or imperfect self-defense in his first-degree murder trial because the evidence did not show that he had formed a reasonable belief that it was necessary to kill the person inside his doorway in order to save himself from death or great bodily harm. **State v. Lyons,** 646.

§ 643 (NCI4th). Imperfect defense of habitation

The theory of imperfect defense of habitation is not recognized in this state, and the trial court in a capital trial thus did not deny defendant due process when it failed to instruct on voluntary manslaughter based upon imperfect defense of habitation. **State v. Lyons,** 646.

§ 647 (NCI4th). Defense of habitation; prevention of forcible entry

Defendant, who shot a police officer attempting to execute a search warrant for defendant's apartment, was not entitled to any instruction on defense of habitation where he contended that he did not believe an announcement by police of their presence and unreasonably believed the policemen were would-be robbers. **State v. Lyons,** 646.

HOMICIDE—Continued

§ 659 (NCI4th). Instructions; intoxication generally

The trial court in a first-degree murder case did not shift the burden of proof by omitting defendant's proposed "final mandate" from the instructions on voluntary intoxication as it related to defendant's ability to form a specific intent to kill. **State v. Daughtry,** 488.

§ 689 (NCI4th). Instructions; misadventure or accidental death; where defendant voluntarily placed himself in volatile situation

The trial court was not required to instruct the jury on the defense of accident in a first-degree murder prosecution by defendant's evidence that he fired one shot into the air to scare the victim, the gun went off a second time accidentally and fired the fatal shot when he was startled by a loud noise, and he only intended to scare the victim and not to hurt him where the evidence was uncontradicted that defendant was engaged in unlawful conduct and acted with a wrongful purpose when the killing occurred. **State v. Riddick**, 338.

§ 704 (NCI4th). Cure of error in instructions by conviction of first-degree murder generally

Even if the trial court erred by refusing to instruct the jury on the defense of accident in a first-degree murder trial, this error was rendered harmless by the jury's verdict finding defendant guilty of first-degree murder where the trial court correctly instructed the jury as to possible verdicts of murder in the first and second degrees and involuntary manslaughter, and the jury found defendant guilty of first-degree murder on the theory of premeditation and deliberation. **State v. Riddick**, 338.

§ 706 (NCI4th). Cure of error in instructions by conviction; alleged error in regard to voluntary manslaughter instruction

Even if there was sufficient evidence to support an instruction on voluntary manslaughter in a first-degree murder prosecution, the failure to give the instruction was harmless error in light of the conviction for first-degree murder. **State v. Bowie,** 199.

Assuming the trial court's failure to instruct on voluntary manslaughter was error, such error was harmless where the court instructed on first-degree and second-degree murder, and the jury returned a verdict of guilty of first-degree murder. **State v. Leach,** 236.

§ 709 (NCI4th). Cure of error in instructions by conviction; alleged error in regard to involuntary manslaughter instruction

Even if defendant was entitled to an instruction on involuntary manslaughter based on evidence that he recklessly discharged his revolver, any error in the court's failure to instruct on involuntary manslaughter is harmless where the jury returned a verdict of guilty of first-degree murder after being instructed on first-degree and second-degree murder. **State v. Lyons**, 646.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS

§ 24 (NCI4th). Facilities for the mentally ill; clients' rights

Plaintiff is entitled to a declaratory judgment that G.S. 122C-53(i) requires a mental health facility, upon the request of a client, to release to an attorney all confidential information relating to the client without restriction. **Lavelle v. Guilford County Area Mental Illness Auth.,** 250.

JURY

JURY—Continued

§ 232 (NCI4th). Constitutionality of death qualification of juries

There was no merit to defendant's contention that he was prejudiced because death qualification of the jury resulted in a racially imbalanced jury. **State v. Garner**, 573.

§ 235 (NCI4th). Propriety of death-qualifying jury

The trial court did not commit constitutional error by denying defendant's motion to prohibit death-qualifying questions during voir dire. **State v. Daughtry,** 488.

§ 248 (NCI4th). Use of peremptory challenge to exclude on basis of race generally

A conspiracy and first-degree murder defendant's Sixth Amendment right to a trial by jury was not violated by the allowance of peremptory challenges by the State. **State v. Larrimore,** 119.

§ 258 (NCI4th). Use of peremptory challenge to exclude on basis of race; prima facie case; effect of some blacks not being peremptorily challenged by State, along with other circumstances

Defendant failed to make a prima facie showing of purposeful discrimination by the prosecutor's peremptory challenges of five black prospective jurors in this capital trial wherein the prosecutor exercised five peremptory challenges against whites and five against blacks. **State v. Gregory,** 365.

§ 260 (NCI4th). Effect of racially neutral reasons for exercising peremptory challenges

The trial court did not err in its findings and conclusions that the prosecutor's use of peremptory challenges was racially neutral in denying defendant's claim that his equal protection rights were violated by the use of peremptory challenges in a prosecution for conspiracy and first-degree murder. **State v. Larrimore,** 119.

§ 261 (NCI4th). Use of peremptory challenge to exclude on basis of capital punishment beliefs generally

The trial court did not err by allowing the State to peremptorily excuse prospective jurors who indicated opposition to the death penalty. **State v. Daughtry,** 488.

§ 262 (NCI4th). Use of peremptory challenges to remove jurors ambivalent about imposing death penalty

The trial court did not err in a first-degree murder prosecution by permitting the prosecutor to use peremptory challenges to excuse qualified jurors because of their lack of enthusiasm for or opposition to the death penalty. **State v. Lynch,** 435.

KIDNAPPING AND FELONIOUS RESTRAINT

§ 21 (NCI4th). Sufficiency of evidence; confinement, restraint, or removal for purpose of doing serious bodily harm to or terrorizing person

The State's evidence was sufficient to support defendant's conviction of second-degree kidnapping of a pawn shop employee whom he forced to crawl into the back room after shooting another employee based upon an indictment alleging that defendant unlawfully confined and restrained the victim "for the purpose of terrorizing her." **State v. Davis,** 1.

LABOR AND EMPLOYMENT

§ 223 (NCI4th). Injuries to third person, generally; respondeat superior

The Court of Appeals correctly affirmed the trial court's grant of summary judgment for defendant company on the issue of vicarious liability for an automobile accident following a retirement party. **Camalier v. Jeffries**, 699.

LIENS

§ 4 (NCI4th). Personal injury actions

Plaintiff hospital may enforce a lien under G.S. 44-49 and 44-50 for medical services rendered to a person injured in an automobile accident against money held by an insurance company and its agents for the settlement of claims for the liability of a third person arising from the accident. **Charlotte-Mecklenburg Hospital Auth. v. First of Ga. Ins. Co.**, 88.

LIMITATIONS, REPOSE, AND LACHES

§ 86 (NCI4th). Actions involving municipalities; zoning

Plaintiff's inverse condemnation claim for the taking of its advertising signs by the enforcement of defendant city's zoning ordinance regulating signs accrued on the date the ordinance was enacted, not at the end of the seven-year amortization period when the nonconforming signs were required to be removed, and plaintiff's claim was barred by the statute of limitations where it was filed more than seven years after the enactment of the ordinance. **Naegele Outdoor Advertising v. City of Winston-Salem**, 349.

MORTGAGES AND DEEDS OF TRUST

§ 119 (NCI4th). Restriction of deficiency judgments respecting purchase money mortgages and deeds of trust

The trial court did not err by dismissing plaintiff's action against the guarantors of a purchase money note used in the purchase of a restaurant. **Adams v. Cooper**, 242.

NEGLIGENCE

§ 125 (NCI4th). Negligent design, construction, inspection, installation, or the like; buildings and mobile homes

An owner of a dwelling house who was not the original purchaser has a cause of action against the builder for negligence in the construction of a backyard retaining wall which was necessary to prevent mud slides and directly affected the structural integrity of the house. **Floraday v. Don Galloway Homes**, 223.

PROCESS

§ 17 (NCI4th). Defects relating to county of action

A decision of the Court of Appeals is reversed under the authority of *Hazelwood v. Bailey*, 339 N.C. 578, holding that the designation of the incorrect county on a civil summons is not a jurisdictional defect. **Leak v. Hollar**, 99.

PUBLIC OFFICERS AND EMPLOYEES

§ 63 (NCI4th). Employee grievances and disciplinary actions generally

Petitioner's case was not time barred where he filed his appeal with the Personnel Commission within three years of the allegedly discriminatory employment decision in not selecting him for a permanent position as Disabled Veterans' Outreach Specialist. **Clay v. Employment Security Comm.**, 83.

RAPE AND ALLIED OFFENSES

§ 28 (NCI4th). First-degree sexual offense; intent

First-degree sexual offense is not a specific intent crime, and diminished capacity is thus not a defense to such crime. **State v. Daughtry,** 488.

§ 164 (NCI4th). Jury instructions; first-degree sexual offense generally

The trial court did not err by failing to instruct on diminished capacity as that defense related to a charge of first-degree sexual offense since diminished capacity is not a defense to such crime. **State v. Daughtry,** 488.

ROBBERY

§ 84 (NCI4th). Sufficiency of evidence; attempted armed robbery generally

The State presented sufficient evidence of intent to commit robbery to support defendants' conviction of attempted armed robbery of a pawn shop even though defendants fled the scene without taking any money or other property after shooting a pawn shop employee. **State v. Davis,** 1.

SEARCHES AND SEIZURES

§ 69 (NCI4th). Consent of owner or landlord of residential premises

The trial court properly concluded that a search of defendant's jacket in a third party's residence was conducted with a valid consent of the third party, that defendant had no reasonable expectation of privacy, and that a pistol and car keys seized from the jacket were admissible into evidence. **State v. Garner**, 573.

§ 130 (NCI4th). Execution of warrant; officer's duty to give notice of identity; knock and announce requirements

There was no error in a first-degree murder prosecution in the admission of evidence and defendant's incriminating statement obtained as a result of a search which defendant contends was in violation of the knock and announce principle. **State v. Knight,** 531.

§ 132 (NCI4th). Execution of warrant; danger to life or safety as exception to notice requirement; probable cause

The trial court's findings supported its conclusion that an entry by force into defendant's apartment was lawful under G.S. 15A-251(2) on the ground that officers had probable cause to believe that the giving of further notice would endanger the lives of the officers or of others, and the trial court properly denied defendant's motion to suppress evidence seized from defendant's apartment. **State v. Lyons**, 646.

§ 135 (NCI4th). Execution of warrant; exhibiting or delivering warrant

There was no error in a first-degree murder prosecution where defendant contended that certain evidence was inadmissible because it was obtained as the result of

WORD AND PHRASE INDEX