NORTH CAROLINA REPORTS

VOLUME 341

SUPREME COURT OF NORTH CAROLINA

28 JULY 1995

6 OCTOBER 1995

RALEIGH
1996

CITE THIS VOLUME
341 N.C.

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

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1. Deceased 1 March 1996.
2. Deceased 11 April 1996.

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1. Appointed and sworn in 26 Janaury 1996.
2. Appointed and sworn in 30 Janaury 1996.
3. Recalled to the Court of Appeals 1 September 1995.

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1. Resigned 15 march 1996.
2. Appointed and sworn in 26 February 1996 to a new position.
3. Appointed and sworn in 26 January 1996 to a new position.
4. Appointed and sworn in 22 April 1996 to a new position.

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17A	BELINDA J. FOSTER	Wentworth
17B	CLIFFORD R. BOWMAN	Dobson
18	HORACE M. KIMEL, JR.	Greensboro
19A	MARK L. SPEAS	Concord
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
23	RANDY LYON	Wilkesboro
24	JAMES T. RUSHER	Boone
25	DAVID T. FLAHERTY, JR.	Lenoir
26	PETER S. GILCHRIST III	Charlotte
27A	MICHAEL K. LANDS	Gastonia
27B	WILLIAM CARLOS YOUNG	Shelby
28	RONALD L. MOORE	Asheville
29	JEFF HUNT	Rutherfordton
30	CHARLES W. HIPPS	Waynesville

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3A	ROBERT L. SHOFFNER, JR.	Greenville
3B	HENRY C. BOSHAMER	Beaufort
12	PAUL F. HERZOG	Fayetteville
14	ROBERT BROWN, JR.	Durham
15B	JAMES E. WILLIAMS, JR.	Carrboro
16A	J. GRAHAM KING	Laurinburg
16B	ANGUS B. THOMPSON	Lumberton
18	WALLACE C. HARRELSON	Greensboro
26	ISABEL S. DAY	Charlotte
27A	KELLUM MORRIS	Gastonia
28	J. ROBERT HUFSTADER	Asheville

CASES REPORTED

ORDER

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

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

PETITION TO REHEAR

GENERAL STATUTES CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

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 person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 16th day of February, 1996, and said person has been issued certificate of this Board:

RALPH PATTERSON DODDS ..... Troy, New York
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 21st day of February, 1996.

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 1st day of March, 1996, and said persons have been issued certificates of this Board:

KIMBERLY ANN ALLEN ..... Houston, Texas
Applied from the State of Texas

KEVIN LEE ANDERSON ..... Durham
Applied from the District of Columbia

GREGORY JOHN BENDLIN ..... Chapel Hill
Applied from the District of Columbia

CATHERINE M. BENTZ ..... Mooresville
Applied from the State of Pennsylvania

WALTON GIBSON BONDURANT, JR. ..... Smithfield, Virginia
Applied from the State of Virginia

JAMES NICHOLAS BRENNAN, IV ..... Charlotte
Applied from the State of Virginia

ROBERT A. CAPELLA ..... Raleigh
Applied from the State of Ohio

R. SARAH COMPTON ..... Raleigh
Applied from the District of Columbia

JAMES TEAGUE CROUSE ..... San Antonio, Texas
Applied from the State of Texas

JAY MICHAEL DRILLINGS ..... Coconut Creek, Florida
Applied from the State of New York

WAYNE RICHARD EBERHARDT ..... Cary
Applied from the State of Missouri

CHARLES COSTAS EURIPIDES ..... Charlotte
Applied from the State of Virginia

ROSEMARY J. FOX ..... Charlotte
Applied from the State of Wisconsin

KAREN FRY GRAY ..... Cary
Applied from the State of Texas

KENNETH B. HAMMER ..... Cary
Applied from the States of New York and Michigan
PAUL C. HURDLE III ..... Matthews
Applied from the State of Virginia
MEI LIU ..... Charlotte
Applied from the State of Oklahoma
SUSAN RAE LUNDBERG ..... Angier
Applied from the State of Colorado
DANIEL J. MCCABE ..... Poughkeepsie, New York
Applied from the State of New York
MICHAEL GARTH MOORE ..... Columbus, Ohio
Applied from the State of Ohio
STEVEN G. NACHIMSON ..... Woodstock, New York
Applied from the State of New York
JOHN WALTER NOECKER ..... Greensboro
Applied from the State of Ohio
KURT JOHN OLSON ..... Raleigh
Applied from the District of Columbia
PAUL GEORGE PAPADOPOULOS ..... South Charleston, West Virginia
Applied from the State of West Virginia
LARRY BROWN SAMPSON ..... Raleigh
Applied from the State of Virginia
SUSAN M. SATURNO ..... Kure Beach
Applied from the State of New York
DIANE M. BIANCULLI SAVAGE ..... Cary
Applied from the State of Virginia
RICHARD M. SERBIN ..... Charlotte
Applied from the State of Pennsylvania
RICHARD NEAL SHAPIRO ..... Virginia Beach, Virginia
Applied from the State of Virginia
CAROLYN DENISE SIMS ..... Washington, District of Columbia
Applied from the District of Columbia
JAMES ROBERT TYLER, III ..... Chapel Hill
Applied from the State of Virginia
RUCHADINA LADESIREE WADDELL ..... Lake Geneva, Wisconsin
Applied from the State of Wisconsin

Given over my hand and seal of the Board of Law Examiners this the 6th day of March, 1996.

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 8th day of March, 1996, and said person has been issued certificate of this Board:

JOETTA IRENE MCQUEEN ..... Wadsworth, Ohio
Applied from the State of Ohio

Given over my hand and seal of the Board of Law Examiners this the 11th day of March, 1996.

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

I, FRED P. PARKER, III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 29th day of March, 1996 and the 5th day of April, 1996, respectfullly, and said persons have been issued license certificates.

FEBRUARY 1996 NORTH CAROLINA BAR EXAMINATION

KEVIN PATRICK BRADLEY ..... Canisteo, New York
CAROLYN VIRGINIA BURTON ..... Whittier

Given over my hand and seal of the Board of Law Examiners this the 9th day of April, 1996.

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

I, FRED P. PARKER, III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 23rd day of March, 1996 and said persons have been issued license certificates.

FEBRUARY 1996 NORTH CAROLINA BAR EXAMINATION

JEFFREY M. ACKER ..... Greensboro
SHARON HINES AGRONSKY ..... Tryon
ROSEANNE C. ATKINSON ..... Raleigh
TAMARA W. AUGUSTINE ..... Hickory
GRETCHEN DENISE AYCOCK ..... Durham
HEATHER COHEN BAKER ..... Webster
T. KENT BALDWIN ..... Ellenboro

KARY IRLE ..... Charlotte
HOWARD ALLEN JACOBSON ..... Raleigh
CHRISTOPHER CARR JONES ..... Greenville
KENT DAVIS JONES ..... Charlotte
MARY ELIZABETH JONES ..... Chapel Hill
LISA MARIE JOYCE ..... Charlotte
JOEL HOWARD KATZ ..... Raleigh
STACI F. KATZ ..... Raleigh
PATRICIA ANN KAUFMANN ..... East Aurora, New York
SARAH ANNE KEEFE ..... Fayetteville
FAITH KELLEHER ..... Charlotte
JAMES LAROSS KETNER ..... Winston-Salem
ERIKA FISHER KING ..... Jacksonville, Florida
LAYA REBECCA KUSHNER ..... Lewiston, New York
SARA RICH LINCOLN ..... Broadview Heights, Ohio
MELISSA J. MALKIN ..... Carrboro
DAVID A. MANZI ..... San Diego, California
MARY ANNE MARAGON ..... Atlanta, Georgia
KRISTIN CONNELLY MCADAMS ..... Durham
DEMYRA RENETTE MCDONALD ..... Kinston
HEATHER HARLAN MCKAIG ..... Charlotte
NICOLE MARIE MEEKS ..... Winston-Salem
MARIANN MORGAN ..... High Point
MICHELE E. MORRIS ..... Charlotte
JULIE A. MOSER ..... Massillon, Ohio
WALTER H. NEILSEN ..... Charlotte
SHEILA MARIE O'DONNELL ..... Raleigh
RENEE F. PALMER ..... Raleigh
BAXTER WORTH PASCHAL, III ..... Fayetteville
SETH M. PHELPS ..... Durham
JANET STODGELL PORGES ..... Bradenton, Florida
ROBERT J. RAMSEUR, JR. ..... Emerald Isle
AMY ELIZABETH RAY ..... Birmingham, Alabama
ROBERT JOHN REEVES ..... Rock Hill, South Carolina
KATHERINE LANGLEY ROTH ..... Fairview
PHILIP JAMES ROTH, JR. ..... Fairview
DOUGLAS TERRY SIMONS ..... Durham
CHRISTOPHER G. SMITH ..... Raleigh
LINDSAY K. SMITH-YANCEY ..... Charlotte
NORA ELIZABETH SNEBERGER ..... Charlotte
ERIC J. SOBOCINSKI ..... Chapel Hill
WILLIAM MURRAY SPRUILL, JR. ..... Raleigh
TWANDA M. STALEY ..... Winston-Salem
BENJAMIN A. STREET ..... Vansant, Virginia
BOBBY GERALD SUMNER ..... Monroe
J. SCOTT TAGGART ..... Winterville
MICHELE R. TART ..... Fowlerville, Michigan
LEE FRIEDMANN TAYLOR ..... Arden
SUSAN JESSON THOMAS ..... Charlotte
SHARON PULLEN TURNER ..... Durham
JOHNNY STEPHEN TURNER, JR. ..... Newton

KAVITA UPPAL ..... Durham
UTA CHARLOTTE M.L. FREIIN VON RECUM ..... Charlotte
SHELLEY ANN WALTERS ..... Atlanta, Georgia
MARIA COLLINS WARREN ..... Raleigh
JOHN WARNER WELLS, II ..... Columbia, South Carolina
JEFFERY JAY WERNER ..... Shelby
KIMBERLY R. WESTON ..... Chapel Hill
STEVEN EUGENE WILLIFORD ..... Tabor City
DAVID SCOTT WISZ ..... Durham
KAREN KELLEY WOLTER ..... Davidson
MALCOLM DEWITT YOUNG ..... Brevard
MICHAEL GRANT YOUNG ..... Moravian Falls
MICHAEL E. ZELLER ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 2nd day of April, 1996.

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

I, FRED P. PARKER, III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners and 5th day of April, 1996 the said persons have been issued license certificates.

FEBRUARY 1996 NORTH CAROLINA BAR EXAMINATION

SUSAN CLAIRE BECKERT ..... Charlotte
DANI MARIE BENTON ..... Charlotte
DOUGLAS J. BROCKER ..... Raleigh
LOIS DIANE BRUTON-ALLEN ..... Brooklyn, New York
KATHRYN GENEVIEVE CARROLL ..... Chapel Hill
JOHN MARTIN COONEY ..... Huntersville
MARTHA MARIE CURLEY ..... Winston-Salem
BRIAN PAUL DALE ..... Charlotte
JAMES ABBOTT LEECH DANIEL, JR. ..... Winston-Salem
AMY SUE DAVIS ..... Concord
CARRIE ANN FASULKA ..... Cornelius
JAMES BRADFORD GATEHOUSE ..... Charlotte
CHARLES RAY GOLD ..... Arlington, Virginia
MARK E. GOODSON ..... Chapel Hill
MARIA E. HALLAS ..... Raleigh
TRACEY SLOAN HINSON ..... Charlotte
MARK JOSEPH HOROSCHAK ..... Charlotte
MICHELLE ROGERS HUMPHRES ..... Durham
KIMBERLY JENENNE JORDAN ..... Raleigh
JAMES NIELS JORGENSEN ..... Jacksonville

ROSEMARY A. JUSTER ..... Waxhaw
ROBERT I. KENNY ..... Charlotte
SUN YANG KUPCIS ..... Fayetteville
WILLIAM ELLIS LATHAM, II ..... Winston-Salem
SCOTT DOUGLAS MACLATCHIE ..... Los Angeles, California
PATRICIA A. MARKUS ..... Raleigh
MARILYN MICHELLE NANCE ..... Durham
CHRYSTAL NEWMAN ..... Camp Lejeune
BETH PARRISH ..... Goldsboro
MARK CHARLES PRYBYLSKI ..... Winston-Salem
LARRY T. REIDA ..... Huntingtown, Maryland
MARY V. RINGWALT ..... New Bern
CINNAMON ROGERS ..... Washington, DC
EBHER O. ROSSI, JR. ..... Carrboro
ROY LEONARD ROWE, JR. ..... Columbia, South Carolina
KENT D. SCHENKEL ..... Wilmington
CHRISTOPHER J. SEUFERT ..... Franklin, New Hampshire
JOHN NICHOLAS SUHR, JR. ..... Charlotte
LISA PATTERSON SUMNER ..... Columbia, South Carolina
JOHN WILLIAM WEBSTER ..... Charlotte
MARGARITA MARION WHALEN ..... Charlotte
BRETT SMITH YAUGER ..... Cameron
ANDREW PETER ZOTOS ..... Raleigh

I, FRED P. PARKER, III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners and 12th day of April, 1996 the said person has been issued a license certificate.

FEBRUARY 1996 NORTH CAROLINA BAR EXAMINATION

JONATHAN WALL ..... Washington, DC

Given over my hand and seal of the Board of Law Examiners this the 12th day of April, 1996.

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

I, FRED P. PARKER, III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners and 12th day of April, 1996 the said person has been issued a license certificate.

FEBRUARY 1996 NORTH CAROLINA BAR EXAMINATION

JOHN CHRISTOPHER LATTANZA ..... Charlotte

I, FRED P. PARKER, III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners and 19th day of April, 1996 the said persons have been issued license certificates.

JULY 1995 NORTH CAROLINA BAR EXAMINATION

HEIDI CAROLYN BLOOM ..... Durham
CHRISTOPHER LEE CRITTENDON ..... Atlanta, Georgia

Given over my hand and seal of the Board of Law Examiners this the 22nd day of April, 1996.

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. MARLOW TYRONE WILLIAMS

No. 138A94

(Filed 28 July 1995)

1. Evidence and Witnesses § 2927 (NCI4th)— State's impeachment of own witness—State surprised by testimony

The trial court did not err in allowing the State to impeach its own witness with her prior inconsistent statement where defendant's girlfriend testified at trial that defendant told her that another person shot the victim, and there was nothing to indicate that the State knew or believed prior to calling defendant's girlfriend to testify that she would testify differently from her prior statement that defendant told her he had shot the victim. The fact that the prosecutor knew the girlfriend had visited defendant in jail and had ridden home with defendant's mother from trial did not show that the prosecutor knew the witness would change her testimony. N.C.G.S. § 8C-1, Rule 607.

Am Jur 2d, Depositions and Discovery § 428; Evidence §§ 668-678, 702, 706, 760, 774; Federal Rules of Evidence §§ 205-208, 373, 380, 382, 386; Perjury § 86; Witnesses §§ 739, 770, 864, 931-950, 972, 1022.

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case—modern state cases. 30 ALR4th 414.

2. Evidence and Witnesses § 705 (NCI4th)— limiting instruction not given in conjunction with testimony—no error

Although the correct procedure would have been for the trial court to give defendant's requested limiting instruction with regard to a prior inconsistent statement at the time the request was made and in conjunction with the admission of the statement, because the trial court gave a correct limiting instruction in its charge, the error was not prejudicial.

Am Jur 2d, Appeal and Error § 890; Evidence §§ 321-323, 341, 413, 461, 473, 854, 1061; Federal Rules of Evidence §§ 27-29, 93, 95, 109, 137, 222; Homicide §§ 227, 493; Trial §§ 166, 167, 434, 618, 1105, 1209, 1282-1284, 1565, 1591.

3. Evidence and Witnesses § 3164 (NCI4th)— prior inconsistent statement—extrinsic evidence properly allowed—instructions proper

The trial court did not err in allowing the State to introduce extrinsic evidence of a witness's prior inconsistent statement where the witness testified on direct examination that she had made the prior inconsistent statement, since the extrinsic evidence of this statement was thus admissible to corroborate this portion of the witness's testimony.

Am Jur 2d, Federal Rules of Evidence §§ 208, 380-383; Witnesses §§ 932, 948.

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case—modern state cases. 30 ALR4th 414.

4. Evidence and Witnesses § 3111 (NCI4th)— corroborating evidence—sufficiency of instructions

The purpose for which the jury could consider corroborating evidence was adequately explained to the jury where the court instructed the jury to consider a prior statement solely for corroborating the witness's testimony at trial if the jury found that the prior statement did corroborate the trial testimony; the court instructed the jury not to consider prior statements as evidence of the truth of what was said at the earlier time; and defendant made no special request for an instruction concerning the difference between corroborative and substantive evidence.

Am Jur 2d, Evidence §§ 321-323, 793; Federal Rules of Evidence §§ 27, 137; Homicide § 277; Trial §§ 864, 1283.

5. Criminal Law § 427 (NCI4th)— closing argument—no comment on defendant's failure to testify

Statements made by the prosecutor during his closing argument were directed solely toward defendant's failure to offer evidence to rebut the State's case, not toward defendant's failure to testify; there was no comment in the closing argument which intimated that defendant had the burden of proving his innocence; and the trial court therefore did not err in denying defendant's motion for a mistrial based on the prosecutor's closing argument.

Am Jur 2d, Evidence § 248; Homicide § 463; Trial §§ 579-597, 707, 708.

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.

Former jeopardy: Propriety of trial court's declaration of mistrial or discharge of jury, without accused's consent, on ground of prosecution's disclosure of prejudicial matter to, or making prejudicial remarks in presence of, jury. 77 ALR3d 1143.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error—modern cases. 32 ALR4th 774.

6. Constitutional Law § 164 (NCI4th)— witness's false testimony—no intentional use by State to obtain conviction

Assuming *arguendo* that the State knew that a witness's testimony that he was outside a deli when shots were fired was false, defendant's constitutional rights were not violated by the State's use of this testimony since defendant failed to show that this testimony was material and that the State knowingly and intentionally used this testimony to obtain defendant's conviction for murder.

Am Jur 2d, Criminal Law §§ 784, 829; Evidence §§ 345, 441; Perjury §§ 31, 78, 84, 116; Witnesses §§ 82, 136.

7. Evidence and Witnesses § 308 (NCI4th)— arrest for carrying concealed weapon—admissibility of evidence

The trial court in a murder prosecution did not err in admitting evidence that defendant was arrested for carrying a concealed weapon in connection with the seizure of the handgun used to commit the murder, since the evidence was relevant to show defendant's possession of the murder weapon and the circumstances under which the police obtained this weapon.

Am Jur 2d, Burglary § 59; Criminal Law § 599; Evidence §§ 734, 765; Robbery §§ 55, 59.

8. Evidence and Witnesses § 1693 (NCI4th)— photographs of murder victim—admissibility

The trial court did not err in denying defendant's motion to exclude photographs of the murder victim as inflammatory and unfairly prejudicial, since the photographs were illustrative of testimony regarding the nature and number of the victim's wounds, the condition of the body upon discovery, and the crime scene.

Am Jur 2d, Depositions and Discovery §§ 447, 449; Evidence § 961, 970-986; Expert and Opinion Evidence § 7; Federal Rules of Evidence § 89; Homicide §§ 276, 416, 417.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Rousseau, J., at the 12 July 1993 Criminal Session of Superior Court, Forsyth 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 robbery with a dangerous weapon was allowed 22 March 1994. Heard in the Supreme Court 14 February 1995.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor, Assistant Appellate Defender, for defendant-appellant.

ORR, Justice.

This case arises out of the January 1992 murder of Steven Michael Brewer and the October 1992 robbery of TJ's Deli in Winston-Salem, North Carolina. Defendant was indicted for these crimes on 3 May

1993 and capitally tried at the 12 July 1993 Criminal Session of Superior Court, Forsyth County. Following the trial, a jury returned a verdict finding defendant guilty of one count of first-degree murder and one count of robbery with a dangerous weapon. The jury was unable to reach a unanimous sentencing recommendation regarding the murder conviction, and on 23 July 1993, the trial court entered judgments imposing a sentence of life imprisonment for the first-degree murder conviction and a consecutive forty-year term of imprisonment for the robbery with a dangerous weapon conviction.

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 argument, we conclude that defendant received a fair trial free from prejudicial error, and, for the reasons stated below, we affirm his convictions and sentences.

The State presented the following evidence concerning the first-degree murder conviction: In January 1992, Michael Brewer lived with his father and mother in Clemmons, North Carolina. At the time, Michael was thirty-six years old and worked as an assistant manager at TJ's Deli in Sherwood Plaza on Robinhood Road. On 25 January 1992, Michael was in charge of opening the deli for business and closing the deli at the end of the business day.

The owner of TJ's Deli, Andrew Jones, testified that on the morning of 26 January 1992, he received a call from his employees telling him that although Michael's car was parked outside of the deli, there seemed to be no one on the premises to let them inside the deli for work. In response to this call, Mr. Jones drove over to the deli. Mr. Jones testified that after he arrived at the deli, he entered the building through the front door. Because the alarm did not sound when he entered the front door, Mr. Jones proceeded to the back of the deli to check on the system. At this time, he found Brewer's body lying on the floor in the men's bathroom. Mr. Jones testified that when he saw Brewer's body, he immediately turned around and ran to his office to call 911. Noticing that the door to his office was open, he became frightened and left the deli to call 911 from the Revco next door.

Officer Bonnie Hancock of the Winston-Salem Police Department testified that she arrived at TJ's Deli at approximately 10:45 the morning of 26 January 1992 and spoke with the EMS personnel on the scene. Officer Hancock testified that she and the EMS personnel proceeded to the back of the deli where they observed Michael Brewer's body lying face down in a pool of blood. The EMS personnel informed

Officer Hancock that the body did not have a pulse, and Officer Hancock secured the scene. Officer Hancock testified that there was a wallet located to the right of the victim's shoulder and a 9 millimeter shell casing lying on the victim's back.

Dr. Patrick Eugene Lantz, a Forsyth County medical examiner and regional forensic pathologist, testified that he examined the crime scene and subsequently performed an autopsy on Michael Brewer. Dr. Lantz testified that during the autopsy, he observed two medium-caliber gunshot wounds to the head, one wound entering on the right side of the head involving the right ear, and the other wound entering in the back of the head at the base of the skull. Dr. Lantz testified that in his opinion, the gunshot wound to the back of the head occurred first. Dr. Lantz further testified that in his opinion, based on his examination of the scene and the physical evidence, the victim's head was slightly off the floor, at or slightly below the level of the urinal, when he received the first bullet wound and that the left side of the victim's head was in contact with the floor when he received the second bullet wound. Dr. Lantz testified that the victim died as a result of the two gunshot wounds.

Mr. Jones testified that in January 1992, he kept money in a locked file cabinet in his office at the deli. On 26 January 1992, there was no money found in the file cabinet. Mr. Jones determined that $1,250 of daily cash and approximately $900 to $950 from the previous day's receipts were missing. Mr. Jones testified that other than himself, only his managers had a key to the file cabinet and that he had not given anyone permission to take the money.

Mr. Jones further testified that defendant had been an employee of his at TJ's Deli in Sherwood Plaza and at a second location on Stratford Road. Defendant began working for Mr. Jones in 1988 at the Sherwood Plaza location, left his employment, and was rehired a couple of times. Mr. Jones testified that the last time defendant worked for him was in January 1993.

Defendant's girlfriend, Tonya Dalton, testified that on 6 January 1992, she took a handgun from under her mother's bed and gave it to defendant before she left for New York to live with her aunt. Dalton identified the handgun she had given to defendant as State's Exhibit 18, a 9 millimeter Taurus handgun. Special Agent Eugene Bishop of the SBI testified that he examined the 9 millimeter Taurus handgun, bullets recovered from under the victim's head, and shell casings

recovered from the crime scene and determined that the casings and at least one of the bullets were fired from the handgun in question.

Tonya Dalton also testified that after she returned from New York on 24 March 1992, she saw the gun one more time in defendant's possession before defendant told her that the police confiscated it from him while he was sitting in a car at Wessex Apartments. Dalton testified that defendant also told her about the incident that occurred at TJ's Deli the night of 25 January 1992. Although Dalton testified at trial that defendant told her that Eugene Wilson killed Michael Brewer, she admitted that she had told police officers a week before trial that defendant told her that he killed Michael Brewer.

Eugene Wilson testified that a week before 25 January 1992, he and defendant planned to rob TJ's Deli. At this time, Wilson was an employee of the deli. Wilson further testified that defendant told him he was thinking about "popping and capping" Michael Brewer. Wilson testified that "popping and capping" meant to shoot somebody and that he told defendant he would not be a part of the plan if Michael Brewer had to die.

Wilson further testified that he worked at TJ's Deli the night of 25 January 1992. When he finished work that night, between 10:30 and 11:00 p.m., Wilson left the deli through the back door and met defendant in the alley. Wilson testified that defendant had a gun with him. Wilson further testified that he and defendant waited in the alley for about an hour to an hour and a half until Michael came out of the deli. At this time, defendant pointed the gun at Michael and told him to open the door and turn off the alarm. Michael opened the door, and defendant entered the deli with Michael. Wilson testified that thirty seconds later, defendant opened the back door and waved him inside. Wilson entered the deli and saw the men's bathroom door halfway open. Defendant stuck his arm out of the bathroom door and dropped keys on the floor for Wilson. Wilson took the keys, went through the kitchen door, and opened the office.

Wilson testified that while he was in the kitchen area and office, he heard Michael begging defendant not to hurt him and that it sounded as if Michael were crying. Wilson testified that he took the money out of the file cabinet, left the office, went through the kitchen and out the back door. Wilson testified that as he was going through the kitchen, he again heard Michael in the bathroom crying and asking defendant not to hurt him. Wilson further testified that after he had left the building and taken about three or four steps outside, he

heard "two shots go off." Wilson ran to his car, and thirty seconds later defendant appeared at the passenger side. Wilson testified that he asked defendant about the shots and that defendant first stated, "Don't worry about it. Just drive." Defendant then stated, "It ain't no witnesses. Just forget about it." Wilson testified that the next day he told Anthony Williamson that he and defendant had robbed TJ's Deli and that defendant had shot Michael Brewer.

Anthony Williamson testified that the day after the January 1992 robbery and murder, Eugene Wilson told him that he and defendant had waited outside the deli until Michael came outside; that defendant took Michael and put him in the bathroom; that at that time, Wilson took the keys to the office and took the money; and that he heard two shots after he left the deli.

The State presented the following evidence concerning the October 1992 robbery at TJ's Deli: Williamson testified that in October 1992, he was an employee of TJ's Deli on Robinhood Road and that two weeks before 2 October 1992, he discussed robbing TJ's Deli with Wilson, defendant, and Williamson's cousin, Carl Gaither. Williamson testified that the plan was to have him and Wilson working on the inside so that one of them could open the door and let Gaither and defendant in to rob the deli.

Rita Nash testified that on 2 October 1992, she was working at TJ's Deli with Williamson and Wilson. Nash testified that while she was cleaning the dining area after the deli had closed, Williamson approached her and asked that the front door be unlocked so that he and Wilson could go to Revco. Nash told Williamson that she would lock the door behind them. Nash testified that when Williamson stepped partially through the door, two men with ski masks and guns pushed him back, knocked Nash on the floor, and entered the deli. Nash further testified that one of the men grabbed her, dragged her down the hallway, and threw her into the men's bathroom, where Wilson and Williamson were standing up against one of the walls. Thereafter, the gunmen threw the nighttime manager, Joann Richardson, into the bathroom. Nash testified that at this time, Wilson and Williamson were "just very calm." Nash testified that after the gunmen left the bathroom, she and the three others remained in the bathroom for about five minutes before they went out into the restaurant and called the police.

Joann Richardson testified that on 2 October 1992, there was approximately $2,500 to $3,000 in the deli. Richardson testified that

as she was counting the money, a gunman came into the back office and pulled her down the hall to the men's bathroom. When they reached the men's bathroom, the gunman jerked her back into the office area where the money was located. Richardson testified that the gunman had a gun pointed at her face while they were in the office, so she sat down and let the man have the money.

Williamson testified that he recognized the gunmen as his cousin Gaither and defendant. Williamson testified that Gaither was carrying a small handgun and that defendant was carrying an AK-47. Williamson further testified that the day after the 2 October 1992 robbery, he met defendant at Millbrook Apartments, where defendant gave Williamson his and Wilson's share of the stolen money.

Defendant presented no evidence during the guilt phase of the trial.

I.

[1] On appeal, defendant first contends that the trial court erred in allowing the State to impeach its own witness, Tonya Dalton, with her prior inconsistent statement and by failing to give a proper limiting instruction. We disagree.

"The credibility of a witness may be attacked by any party, including the party calling him." N.C.G.S. § 8C-1, Rule 607 (1992). "[W]here the party calling a witness is genuinely surprised by the witness' change of his or her version of facts, impeachment by prior inconsistent statements is proper." *State v. Miller*, 330 N.C. 56, 62-63, 408 S.E.2d 846, 850 (1991) (citing *State v. Hunt*, 324 N.C. 343, 350, 378 S.E.2d 754, 758 (1989)). In such situations, however, "the prior inconsistent statements may only be used to impeach the witness' credibility; they may not be admitted as substantive evidence." *Id.* at 63, 408 S.E.2d at 850 (citing *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758).

In the present case, Tonya Dalton testified on direct examination that defendant told her that Eugene Wilson shot Michael Brewer. The State was then allowed to impeach Dalton with her prior inconsistent statement that defendant told her that *he* shot Michael Brewer. Specifically, the prosecutor asked Dalton if she remembered meeting with him, Detective Rowe, and another prosecutor, in the District Attorney's office the week prior to trial, and Dalton responded that she did. The prosecutor then asked Dalton whether she remembered telling them during that meeting that defendant told her he shot Michael Brewer. Over objection, Dalton answered, "Yes."

The prosecutor also asked Dalton if she remembered talking to Detective Rowe in January 1993. Dalton responded, "Yes, I do." The prosecutor asked Dalton if she remembered "telling Detective Rowe that [defendant] told [her] that he shot Michael Brewer." Dalton responded, "Yes." The prosecutor again asked Dalton what defendant told her about the events at TJ's Deli in January 1992, and Dalton responded that defendant told her that Eugene Wilson killed Michael Brewer. The prosecutor asked Dalton, "Why are you testifying differently than the statements you made to Detective Rowe in January of 1993 and the statements you made in the District Attorney's office last week?" Over objection, Dalton responded:

> Because, when I was in that room that night, I feel I was threatened and it was like I didn't really have a chance to say what the real deal was so I feel like words were put into my mouth.
>
> . . . .
>
> That night I was scared. I was. Nervous, I didn't have an exact idea of what was going on, but when I was in that room, everyone was saying different things to me as far as what happened and now I feel is my chance to speak out.

The prosecutor asked Dalton why she had not made a statement to him in his office about Eugene Wilson shooting Michael Brewer. Over objection Dalton responded that it was because she was afraid.

Our review of this testimony and the record finds nothing indicating that the State knew or believed prior to calling Dalton to testify that Dalton would testify differently from her prior statement that defendant told her he shot Michael Brewer. In fact, Dalton admitted that she had not told the police or the prosecutors during their meeting that she intended to change her version of the facts to say that defendant told her Eugene Wilson shot Michael Brewer. Further, Dalton stated that she felt as though the trial was her "chance to speak out" and that she was scared to tell the detectives prior to trial that defendant told her Eugene Wilson shot Michael Brewer, thus indicating that she had not spoken to the State about her change of testimony prior to trial.

In addition, following Dalton's testimony, the prosecutor informed the court that an officer had talked with Dalton that morning to make sure that she was going to testify consistently with what she had previously told the State and that the State was taken by sur-

prise by her testimony at trial. Based on the foregoing, we conclude that the State was surprised at trial by Dalton's change of her version of the facts, and the trial court properly allowed the State to impeach Dalton with her prior inconsistent statement.

Further, we disagree with defendant's assertion that the prosecutor's questions following Dalton's change in testimony indicate that the prosecutor was not surprised by the change. The fact that the prosecutor knew Dalton had visited defendant in jail and had ridden home with defendant's mother from trial does not show that the prosecutor knew that Dalton would change her testimony. We find no error.

[2] Defendant also argues that the trial court erred in failing to give his requested limiting instruction with regard to Dalton's prior inconsistent statement at the time the inconsistent statement was introduced. In its final charge to the jury, however, the trial court gave the following instruction:

> Also, members of the jury, evidence has been received tending to show at an earlier time various witnesses made a statement which may be—made an earlier statement which may be consistent with or in conflict with that witness's testimony at this trial. You must not consider such earlier statements as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statements were made and it [sic] is consistent with or conflicts with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing upon that witness's truthfulness in deciding whether you will believe or disbelieve his testimony at this trial.

Although the correct procedure would have been for the court to give the requested instruction at the time the request was made and in conjunction with the admission of the statement, because the trial court gave a correct limiting instruction in its charge, the error was not prejudicial. *See State v. Branch*, 288 N.C. 514, 534, 220 S.E.2d 495, 509 (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); *State v. DeBerry*, 38 N.C. App. 538, 540-41, 248 S.E.2d 356, 358 (1978).

[3] Finally, with regard to Dalton's prior inconsistent statement, defendant contends that the trial court erred in allowing the State to

introduce extrinsic evidence of Dalton's prior statement and by failing to give proper instructions regarding this statement. Because we hold that the statement was properly admitted to corroborate Dalton's testimony and that the trial court properly instructed the jury, we disagree.

Following Dalton's testimony, Detective Young of the Winston-Salem Police Department identified a statement that he took from Dalton on 20 January 1993. Prior to allowing Detective Young to read a portion of this statement into evidence, the trial court gave the following instruction to the jury:

> Now, members of the jury, what this officer is about to repeat, the statement she gave, again is offered for the purpose of corroborating Tonya Dalton, if you find it does corroborate. Again, that means if it agrees with or lends support to what she has previously said about it on the witness stand. If it doesn't agree with it, disregard it completely or disregard that portion that doesn't agree with it.

Thereafter, Detective Young read a portion of the statement into evidence, which included Dalton's statements regarding the gun she took from her mother's house and gave to defendant, how the gun was confiscated by the police, and defendant's statement to her that he shot Michael Brewer.

The only portion of the statement to which defendant objects is where Dalton told Detective Young that defendant told her he shot Michael Brewer. Citing *Hunt*, 324 N.C. 343, 378 S.E.2d 754, defendant argues this statement was inadmissible as extrinsic evidence of a prior inconsistent statement. In *Hunt*, the witness denied making a prior statement, and this Court held that an officer's statement to the contrary was inadmissible to impeach the witness' testimony. In the present case, however, Dalton testified on direct examination that she had made the prior inconsistent statement. Thus, the extrinsic evidence of this statement was admissible to corroborate this portion of Dalton's testimony. *State v. Westall*, 116 N.C. App. 534, 546, 449 S.E.2d 24, 31 (where witness testified on direct that he made an earlier statement but that it was a lie, officer's testimony regarding the witness' earlier statement was admissible to corroborate the witness' testimony regarding the earlier statement), *disc. rev. denied*, 338 N.C. 671, 453 S.E.2d 185 (1994); *see State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 212 (1991) ("[P]rior statements of a witness can be

admitted as corroborative evidence if they tend to add weight or credibility to the witness' trial testimony.").

[4] Regarding the instruction on corroboration, defendant contends the trial court should have told the jury not to consider the prior statement as substantive evidence. First, the trial court instructed the jury to consider the statement solely for corroborating the witness' testimony at trial if the jury found that the prior statement did corroborate the trial testimony. This instruction was proper. *State v. Detter*, 298 N.C. 604, 629, 260 S.E.2d 567, 585 (1979). Second, in his final charge, the trial judge instructed the jury, "You must not consider such earlier statements as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial." It is well established that in the absence of a special request, it is not error for the trial judge to fail to explain in his charge to the jury the difference between corroborative evidence and substantive evidence. *Id.* at 630, 260 S.E.2d at 585-86. Here, the purpose for which the jury could consider the evidence was adequately explained to the jury, and defendant made no special request for further instructions. Defendant's assignment of error is overruled.

II.

[5] Next, defendant contends that the trial court erred by overruling his objection to the prosecutor's closing argument. Defendant argues that the prosecutor improperly commented on defendant's right not to testify and shifted the burden of proof to defendant. Based on this argument, defendant also contends that the trial court erred in denying his motion for a mistrial. We disagree.

"[I]t is well-settled law that a defendant need not testify" and "that the burden of proof remains with the State regardless of whether a defendant presents any evidence." *State v. Howard*, 320 N.C. 718, 729, 360 S.E.2d 790, 796 (1987). Further, it is well-settled law that "[i]n closing arguments a prosecutor may not comment on the failure of a defendant to testify at trial." *Id.* at 728, 360 S.E.2d at 796 (citing *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976)). "However, it is permissible for the prosecutor to bring to the jury's attention 'a defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State.' " *Id.* (quoting *State v. Mason*, 317 N.C. 283, 287, 345 S.E.2d 195, 197 (1986)); *accord State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993).

The following pertinent portion of the prosecutor's closing argument states:

[PROSECUTOR]: . . . And don't you know, members of the jury—I'm only going to take a few more minutes of your time. You know, I—I know the mind can only absorb what the rear can endure so if you'll just give me about two more minutes I'm about finished. Don't you know, don't you just know in your heart of hearts that if this man right here was somewhere else on January the 25th and October the 2nd of 1992 other than T J's Deli, don't you think somebody would have come in here and told you where he was?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DEFENSE COUNSEL]: Motion to strike.

[PROSECUTOR]: Don't you think that?

THE COURT: Motion denied.

[PROSECUTOR]: Don't you know that in your heart of hearts? Don't you know that? If you don't know anything else, you know that. They can't do it because—

[DEFENSE COUNSEL]: Objection.

[PROSECUTOR]:—because he was where Eugene Wilson said he was on January the 25th—

THE COURT: Overruled.

[PROSECUTOR]:—and where Eugene and Anthony said he was on October the 2nd and I ask you to find him guilty on both cases.

Defendant argues that by these statements the prosecutor "clearly" meant that if defendant had been elsewhere, defendant himself would have said so in testimony, especially in light of the fact that the prosecutor was pointing at defendant while making these statements. Our review of these statements and the prosecutor's argument in its entirety leads us to conclude, however, that these statements were directed solely toward defendant's failure to offer evidence to rebut the State's case, not toward defendant's failure to testify. Furthermore, we fail to see any comment in the prosecutor's closing argument that intimates that defendant had the burden of proving his innocence. Accordingly, we find no error. *Howard*, 320 N.C. 718, 360 S.E.2d 790; *see State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982).

Defendant also contends that the trial court erred in denying his motion for a mistrial based on the prosecutor's closing argument. "Whether to grant a motion for mistrial rests in the sound discretion of the trial court." *State v. Ward*, 338 N.C. 64, 92, 449 S.E.2d 709, 724 (1994) (citing *State v. Blackstock*, 314 N.C. 232, 243, 333 S.E.2d 245, 252 (1985)), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 63 U.S.L.W. 3833 (1995). "A ruling committed to the trial court's discretion will be upset only when the defendant shows that the ruling could not have been the result of a reasoned decision." *State v. Banks*, 322 N.C. 753, 768, 370 S.E.2d 398, 407 (1988) (citing *State v. Cameron*, 314 N.C. 516, 519, 335 S.E.2d 9, 11 (1985)). " 'A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law.' " *Ward*, 338 N.C. at 92, 449 S.E.2d at 724 (quoting *Blackstock*, 314 N.C. at 243-44, 333 S.E.2d at 252).

Our review of the prosecutor's closing argument shows that the trial court did not abuse its discretion in denying defendant's motion for a mistrial, especially in light of our conclusion that the trial court properly overruled defendant's objection to the prosecutor's statements. Defendant's assignment of error is overruled.

III.

[6] Next, defendant contends that his state and federal constitutional rights were violated when the State permitted its witness, Eugene Wilson, to give testimony concerning Wilson's location at the time of the murder that the State believed to be false. Based on this contention, defendant argues that he is entitled to a new trial. We disagree.

Prior to trial in the present case, the State revealed to counsel for the defense that it had withdrawn a plea agreement with Eugene Wilson because the State believed Wilson was lying about being outside TJ's Deli when the shots were fired. The State based this belief on the results of a polygraph test Wilson took before trial. At trial, Wilson testified as a witness for the State, including his testimony that he was outside the deli when the shots were fired. On appeal, defendant contends that the State violated defendant's right to due process by presenting this evidence which the State believed to be false and by failing to take adequate steps to correct the false testimony. We disagree.

"[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269, 3 L. Ed. 2d 1217, 1221 (1959); *accord State v. McDowell*, 310 N.C. 61, 310 S.E.2d 301 (1984). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269, 3 L. Ed. 2d at 1221. Further, with regard to the knowing use of perjured testimony, the Supreme Court has established a " 'standard of materiality' under which the knowing use of perjured testimony requires a conviction to be set aside 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " *State v. Sanders*, 327 N.C. 319, 336, 395 S.E.2d 412, 424 (1990) (quoting *United States v. Agurs*, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 349-50 (1976)), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991). Thus, "[w]hen a defendant shows that 'testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction,' he is entitled to a new trial." *Id.* at 336, 395 S.E.2d at 423 (quoting *State v. Robbins*, 319 N.C. 465, 514, 356 S.E.2d 279, 308 (1987), *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987)).

In the present case, even assuming *arguendo* that the State knew that Wilson's testimony that he was outside the deli when the shots were fired was false, defendant has still failed to show both that Wilson's testimony concerning his location when the shots were fired was material and that the State knowingly and intentionally used Wilson's testimony that he was outside the deli when the shots were fired to obtain defendant's conviction. Thus, defendant's argument is without merit. *Id.* at 336-37, 395 S.E.2d at 423-24.

First, the material facts linking defendant to the crime are that Wilson met defendant in the alley outside of TJ's Deli on 25 January 1992; that defendant was armed at this time; that defendant forced Michael Brewer into the deli at gunpoint and kept him in the men's bathroom during the robbery; that Michael was found dead, shot in the men's bathroom on 26 January 1992; that defendant told Wilson there would be no witnesses; and that defendant was in possession of the murder weapon from early January 1992 until the handgun was taken by the police in April 1992. Defendant and Wilson were the only two people involved in the January 1992 robbery, and whether Wilson was located inside or outside the deli when the shots were fired is irrelevant to whether defendant shot the victim. Thus, the fact that Wilson was located outside the building when the shots were fired was not material to the case against defendant.

Second, we are confident beyond a reasonable doubt that Wilson's statement that he was outside the deli when the shots were fired did not contribute to defendant's conviction and that there was no reasonable likelihood that this statement could have affected the judgment of the jury. Thus, defendant has failed to show that the State knowingly and intentionally used Wilson's testimony concerning his location when the shots were fired to defendant's prejudice to obtain his conviction.

Accordingly, defendant's third assignment of error is overruled.

IV.

[7] Defendant also contends that the trial court erred in overruling his objection to the admission of evidence that defendant was arrested for carrying a concealed weapon. In support of his contention, defendant argues that this evidence was both irrelevant and unfairly prejudicial.

The State introduced evidence that in April 1992, a police officer with the Winston-Salem Police Department seized a 9 millimeter Taurus handgun and a .22-caliber handgun from a car occupied by defendant and another individual named David Brown. Over defendant's objection, the State then presented evidence that the officer charged defendant with possession of a concealed weapon. Later, the 9 millimeter handgun was identified as the murder weapon. On appeal, defendant concedes that the evidence that the police seized the Taurus handgun was relevant to show that defendant was in possession of the murder weapon approximately two months after the 25 January 1992 crime. Further, defendant does not challenge the State's right to introduce "*some*" evidence of the seizure. However, defendant argues that it was error to allow the State to introduce evidence that defendant was arrested for carrying a concealed weapon in association with this seizure.

Under Rule 404(b) of the North Carolina Rules of Evidence, " 'evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused.' " *State v. Rannels*, 333 N.C. 644, 657, 430 S.E.2d 254, 261 (1993) (quoting *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986)). " '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 (1988).

In the present case, we conclude that the evidence that defendant was arrested for carrying a concealed weapon in connection with the seizure of the handgun was relevant to show defendant's possession of the murder weapon and the circumstances under which the police obtained this weapon. *See Rannels*, 333 N.C. at 658, 430 S.E.2d at 262 (where evidence defendant stole the murder weapon was relevant to show not only that he possessed the weapon but the circumstances under which he acquired it); *State v. Garner*, 331 N.C. 491, 509, 417 S.E.2d 502, 512 (1992) (where evidence concerning defendant's attempted murder of a taxicab driver three weeks after the murder for which defendant was being tried was relevant to show defendant's possession and control of the weapon at a time close in proximity to that of the murder). Defendant's assignment of error is overruled.

V.

[8] Finally, defendant contends that the trial court erred in denying his motion to exclude photographs of the decedent as inflammatory and unfairly prejudicial. Defendant argues that because neither the identity of the victim nor the cause of his death were in dispute, the photographs added nothing to the presentation of the State's case and were therefore irrelevant and inadmissible. We find no error.

"Photographs of homicide victims are admissible at trial even if they are 'gory, gruesome, horrible, or revolting, so long as they are used by a witness to illustrate his testimony and so long as an excessive number of photographs are not used solely to arouse the passions of the jury.' " *State v. Thompson*, 328 N.C. 477, 491, 402 S.E.2d 386, 394 (1991) (quoting *State v. Murphy*, 321 N.C. 738, 741, 365 S.E.2d 615, 617 (1988)). " 'Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree.' " *State v. Rose*, 335 N.C. 301, 319, 439 S.E.2d 518, 528 (quoting *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988)), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 883 (1994).

"Admissible evidence may be excluded, however, under Rule 403 of the North Carolina Rules of Evidence if the probative value of such evidence is substantially outweighed by its prejudicial effect." *State v. Fisher*, 336 N.C. 684, 701-02, 445 S.E.2d 866, 876, *reconsideration denied*, 337 N.C. 697, 448 S.E.2d 535 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 665 (1995). " 'Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in light of the illustrative value of each . . . lies

within the discretion of the trial court.' " *Id.* at 702, 445 S.E.2d at 876 (quoting *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527).

In the present case, we find that the photographs admitted into evidence were illustrative of testimony regarding the nature and number of the victim's wounds and the condition of the body upon discovery and of the crime scene. *Id.* These photographs were not excessive in number, and their probative value was not substantially outweighed by any prejudicial effect. The trial court did not, therefore, abuse its discretion in denying defendant's motion to exclude them.

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

NO ERROR.

STATE OF NORTH CAROLINA v. STICARDO M. McCULLERS

No. 554A93

(Filed 28 July 1995)

1. Evidence and Witnesses § 1289 (NCI4th)— confession— detective's urging defendant to tell the truth— voluntariness

The trial court properly concluded that defendant's statements to police officers were voluntarily and freely made where the detective did not accuse defendant of lying, but rather informed him of the crime with which he might be charged and urged him to tell the truth and think about what would be better for him; at the time the detective made the statements defendant contended were coercive, the detective had already identified for defendant, and defendant had acknowledged, the others with him the night of the murder; and defendant's contention that he was intimidated or coerced by the detective's profanity was without merit in light of defendant's own use of profanity.

Am Jur 2d, Evidence §§ 548, 565.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession. 51 ALR4th 495.

2. Homicide § 263 (NCI4th)— felony murder conviction—sufficiency of evidence of underlying felony

Evidence was sufficient to show that defendant committed a robbery with a dangerous weapon, the underlying felony supporting defendant's felony murder conviction, under the theory of acting in concert where the evidence tended to show that defendant and his companions traveled to a nearby town "to get some money"; they drove around until they found the victim outside a motel where they beat him with a bat and took his money; one of defendant's companions encouraged a young child to go to motels and stores, beat people with bats, and "get paid" by going to motels and stores; defendant testified that, after he hit the victim on the head and the victim fell down, everybody jumped on him and tried to take his money; defendant watched everyone search the victim's pocket; there was substantial evidence that it was the common plan of the entire group, including defendant, to assault and rob the victim and that personal property of the victim was taken by defendant's companion by the use of a dangerous weapon whereby the victim's life was endangered.

Am Jur 2d, Homicide §§ 72-74.

3. Criminal Law § 266 (NCI4th)— continuance—no showing of prejudice—denial proper

The trial court did not err in denying defendant's motion to continue made when the State provided defendant with a list of six possible witnesses on the Friday afternoon before the trial was to begin on Monday in order for defendant to investigate these witnesses where defendant did not indicate what information the witnesses may have had that could be exculpatory, who the witnesses were, or how they related to the case, and there was no showing how defendant would have been better prepared had the continuance been granted or that defendant was materially prejudiced by the denial of his motion.

Am Jur 2d, Continuance § 42.

Hostile sentiment or prejudice as ground for continuance of criminal trial. 39 ALR2d 1314.

4. Indigent Persons § 27 (NCI4th)— funds for private investigator—denial proper

The trial court did not err in denying defendant's motion for funds for a private investigator where defendant failed to indicate

that he would have been deprived of a fair trial without the expert assistance of a private investigator or that there was a reasonable likelihood that an investigator would have materially assisted defendant in the preparation of his case.

Am Jur 2d, Criminal Law §§ 719, 771, 955, 1006.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Bowen, J., at the 2 August 1993 Criminal Session of Superior Court, Wake County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 12 April 1995.

Michael F. Easley, Attorney General, by Daniel F. McLawhorn, Special Deputy Attorney General, for the State.

Harry C. Martin, J. Matthew Martin, and Alan B. Martin for defendant-appellant.

PARKER, Justice.

Indicted for the first-degree murder of Edward Wayne Clopton ("victim") in violation of N.C.G.S. § 14-17, defendant was tried capitally. The jury found defendant guilty of first-degree murder on the theory of felony murder with the underlying felony being robbery with a dangerous weapon. Following a capital sentencing proceeding, the jury recommended that defendant be sentenced to life imprisonment; and the trial court entered judgment accordingly. The jury also found defendant guilty of robbery with a dangerous weapon. The conviction for robbery with a dangerous weapon also being the underlying felony supporting the first-degree murder conviction, the trial court arrested judgment on this conviction.

At trial the State's evidence tended to show that around 9:00 p.m. on 2 July 1992, defendant, Brian Walker, Brian Barbour, Harry Tate, and William Whitley left Clayton, North Carolina, and drove into Raleigh, North Carolina. The group began the evening by looking for someone to assault and rob near the Tower Shopping Center. The group spotted a man walking alone a few blocks from the shopping center and attacked him with baseball bats. The group then stole money and cocaine from the man. During this attack, Harry Tate was accidentally hit in the head with a baseball bat and began to bleed.

The group took Tate to Wake Medical Center; but Tate having stopped bleeding, the group left after a few minutes. The boys then began looking for a store where they could get alcohol. They were unsuccessful, so they drove to "Putt-Putt," where they met some girls who agreed to buy them alcohol. After they drank the alcohol, the group drove to a Waffle House to get something to eat. The group then began looking for someone else to assault and rob. The group wanted to injure someone so that person could suffer like Tate was suffering. They spotted the victim walking in the parking lot of Johnny's Motor Lodge.

Defendant, Tate, Walker, and Whitley attacked the victim. Defendant hit the victim on the head with a bat; the victim fell down, and everybody but defendant jumped on the victim, trying to take his money. At least $3.00 was stolen from the victim by Walker. The evidence showed that defendant and his friends were back in Clayton by 2:15 a.m. on 3 July 1992.

The victim was found lying in the parking lot on 3 July 1992 around 5:30 a.m.; he was still alive. The victim was taken to Wake Medical Center and treated for his injuries. He had brain surgery on two occasions and died on 21 July 1992 from blood clots in his lungs. The victim's cause of death was attributed to the injuries he sustained when attacked by defendant and his friends.

On 5 July 1992 Alice Perry, Whitley's sister, called the Clayton Police Department to report her brother's involvement in the beating and robbery of two men in Raleigh on 2 July 1992. Perry had become concerned when she heard Whitley telling Perry's young child about beating people in motels and stores and that the child could "get paid" at motels and stores. Whitley had also described a beating to Perry's son, the circumstances of which were similar to the beating of the victim in this case.

Defendant presented evidence at trial that he was with his girlfriend and her mother until 10:45 on the night of the murder. Defendant also presented evidence that Brian Barbour, who testified about the events of that night, was actually with his girlfriend on the night of the murder, not in Raleigh, and that the victim was still alive at 2:30 a.m.

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

[1] Defendant first assigns error to the trial court's denial of his motion to suppress inculpatory statements made by defendant to police officers. Prior to trial defendant filed a written motion to suppress. A *voir dire* on the motion was held on 26 and 27 May 1993. The trial court, after making findings of fact and conclusions of law, denied defendant's motion.

Before this Court defendant argues that the incriminating portion of defendant's statement was the product of fear or hope, violated defendant's state and federal constitutional rights, and was, hence, inadmissible. Defendant bases his argument on statements made by Detective J.W. Howard of the Raleigh Police Department while questioning defendant. During the interview the following occurred:

Q. Who knocked the man down?

A. All of us.

Q. All of us. You are going to jail. I'm not gonna sit here and tell you a lie, okay. You're going to jail. You are gonna be charged with murder. What's gonna be to your favor is for you to tell the truth and that's all we want is the truth.

A. So you're saying either way, I'm going to jail?

Q. No, but there's a big difference. Don't you think a Judge . . .

A. But that's what you just said.

Q. Listen to me. Don't you think a Judge, a jury and society will look upon you much better, if you say, I didn't mean to kill the man, I didn't know he was gonna die, than [for] you to sit there and keep denying that you done it, when I've got all these other witnesses that say you did. Which way looks the best for you? That's what I'm telling you. And you need to make it look as good for you as you can, because you're in deep trouble. Did you mean to kill the man? That's number one. Did you mean to kill him?

Defendant also argues that Howard's swearing at him rendered defendant's confession involuntary.

In determining whether a defendant's confession is voluntarily made, this Court considers the totality of the circumstances. *State v. Corley*, 310 N.C. 40, 47, 311 S.E.2d 540, 545 (1984). In the present case evidence pertaining to the circumstances surrounding defendant's statement tends to show the following.

On 28 July 1992 the Raleigh Police Department Major Crimes Task Force was investigating the victim's murder. Pursuant to this investigation, at approximately 10:00 p.m. on that date, Detective W.A. Blackmun, Detective M. Bissette, Sergeant W. Gardner, and another uniformed officer went to defendant's residence. Blackmun and Bissette went to the door and asked to speak to defendant. Defendant told the detectives he wanted to talk outside on the porch. While talking to the law enforcement officials on the porch, defendant was asked if he would come downtown to talk, and defendant said he would. Defendant accompanied the law enforcement officials voluntarily.

Defendant was eighteen years old at the time. Defendant had completed the ninth grade and part of the tenth before terminating his schooling; at the time of his arrest, he was working towards his GED. Defendant had made average to above-average grades in school but had problems paying attention.

Once defendant arrived downtown, he was escorted into an interview room on the fourth floor of the Raleigh Police Department. The room was ten feet by ten feet and contained a table, three chairs, a trash can, an ashtray, and a one-way mirror. Defendant was not handcuffed or restrained, and the door to the room was never locked. Detectives J.W. Howard and W.T. Liles first interviewed defendant; they were dressed in suits and had no weapons. Before interviewing defendant, Howard fully and properly advised defendant of his *Miranda* rights. Defendant indicated that he understood his rights and wished to waive them; defendant then signed the *Miranda* rights form on 28 July 1992, at approximately 10:30 p.m. Defendant was alert, his speech was not slurred, and he gave no indication of being under the influence of drugs or alcohol. Defendant gave a statement to these two detectives from 10:30 p.m. until approximately 11:05 p.m. This statement was taped and then transcribed. In the statement defendant admitted hitting a man in the legs outside the Tower Shopping Center and also hitting a man in the head with a bat. During defendant's statement to Howard and Liles, Howard made the statement, noted earlier, that it would be better for defendant if he said that he did not mean to kill the man than for him to keep denying that he did it and that the police had witnesses. Howard also swore at defendant on two occasions, stating: "How in the h—- did you hit Bootsy in the g—d—- head, if you were hitting the man in the legs?" and "What the h—- are you saying? I don't know what the h—- you [are] saying." Liles testified on *voir dire* that he was present while

Howard interviewed defendant and that Howard did not make any promises or threats to defendant.

Howard and Liles then left defendant alone in the room with the door unlocked. Shortly thereafter, Detectives W.A. Blackmun and M. Bissette entered the room. Blackmun recorded the interview between defendant and Blackmun, which lasted seven minutes. During this interview, defendant specifically referred to an assault that occurred "beside Johnny's Motor Lodge." Defendant stated that he hit a man on the head with a bat; that the other people he was with then jumped on the victim to take his money; and that while defendant did not get any money from the victim, he saw the others check the victim's pockets. Defendant also told Blackmun that everybody was out for money and that at least one person took money from the victim. Blackmun testified on *voir dire* that he did not make any promises or threaten defendant in any way. At the end of his statement to Blackmun and Bissette, defendant stated that he could not say that anyone had threatened him or made him say anything he did not want to say and that he was telling the truth. Defendant did not testify during the pretrial hearing.

The trial court made findings of fact essentially in accord with the evidence offered during the *voir dire*. The trial court specifically found that "[n]o law enforcement official made any threats or promises or created any coercive atmosphere near the defendant. No physical or verbal activity by the law enforcement officials induced the defendant to make the statements he did." The trial court concluded that "defendant freely, voluntarily, and understandingly waived his constitutional rights before making any statements to law enforcement officials" and that "[n]o promises, threats, coercion, [or] duress induced the defendant to make the statements he did."

> In a *voir dire* hearing on the admissibility of a defendant's confession, the trial court must determine whether the State has borne its burden of showing by a preponderance of the evidence that the defendant's confession was voluntary. The preponderance of the evidence test is not, however, to be applied by appellate courts in reviewing the findings of the trial court. The findings by the trial court are conclusive and binding upon appellate courts if supported by competent evidence in the record. . . . The trial court's conclusions of law, however, are fully reviewable by appellate courts.

State v. Corley, 310 N.C. at 52, 311 S.E.2d at 547 (citations omitted).

In the present case defendant did not except to the trial court's findings of fact. Nevertheless, based on our review of the *voir dire* evidence, we conclude the findings of the trial court are supported by competent evidence and are, hence, binding on this Court. The question then is whether the trial court, considering the totality of the circumstances, properly concluded that defendant's statements were voluntarily and freely made. Defendant relies on *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975); *State v. Fuqua*, 269 N.C. 223, 152 S.E.2d 68 (1967); and *State v. Stevenson*, 212 N.C. 648, 194 S.E. 81 (1937).

In *Stevenson* an officer had told defendant, prior to defendant confessing: "There is no use you beginning to tell a lie to me this morning, I have already got too much evidence to convict you." *Stevenson*, 212 N.C. at 649, 194 S.E. at 81. In *Stevenson* the defendant testified that he signed the confession because he feared being lynched. *Id.* The Court stated that based on the circumstances of the confession, the confession must be deemed involuntary. *Id.* at 650, 194 S.E. at 82.

In *Fuqua* the Court ordered a new trial where an officer testified he had told the defendant: "[I]f he wanted to talk to me then I would be able to testify that he talked to me and was cooperative." *Fuqua*, 269 N.C. at 225, 152 S.E.2d at 69. No evidence in the record supported the trial court's finding that the confession was not made under hope of reward, and this Court held that a review of all the circumstances surrounding the defendant's confession impelled the conclusion that "there was aroused in him an 'emotion of hope' so as to render the confession involuntary." *Id.* at 228, 152 S.E.2d at 72.

In *Pruitt* the Court held a confession was made involuntarily after noting that an officer's statement that it would be harder on defendant if he did not cooperate certainly "would imply a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.*, confess." *Pruitt*, 286 N.C. at 458, 212 S.E.2d at 102. In *Pruitt* the police had also "repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around.' " *Id.* In *Pruitt* the Court reached its decision that the confession was not voluntary after a review of the entire record. *Id.* at 454, 212 S.E.2d at 100.

In our view the present case is more nearly analogous to *State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991), where the Court held a con-

fession admissible even though a sheriff testified that he told the defendant while questioning him: "I couldn't tell him what would happen[], but it will be better for him when he came to court that he would tell—that we would tell the D.A. and the [judge] that he told the truth about it." *Id.* at 115, 400 S.E.2d at 721. The sheriff testified that he made no promises to defendant, and the trial court found that no promises or threats were made to defendant. This Court held that the sheriff's statement to defendant did not undermine the trial court's finding that the confession was given freely and voluntarily. *Id.* at 118, 400 S.E.2d at 722.

State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983), is also instructive. In *Jackson* the evidence showed that the officers had told the defendant that if he told the truth, it would come out in court and be helpful to him that he cooperated and that in the long run it would be best if he told the truth. The officers also told defendant they could not promise him anything, and the trial court found that defendant "was made no promises nor coerced nor threatened in any way." *Id.* at 578, 304 S.E.2d at 150. Upholding the voluntariness of the confession, this Court stated:

> Admonitions by officers to a suspect to tell the truth, standing alone, do not render a confession inadmissible. *State v. Dishman*, 249 N.C. 759, 107 S.E.2d 750 (1959); *State v. Thomas*, 241 N.C. 337, 85 S.E.2d 300 (1955); *State v. Thompson*, 227 N.C. 19, 40 S.E.2d 620 (1946). *See State v. Fox*, 274 N.C. 277, 163 S.E.2d 492 (1968). In *Thompson*, the defendant was told "it would be better to go on and tell us the truth than try to lie about it." We believe that the instant case falls within the language of *Thompson*. The statement attributed to [Officer] Mack, "it would certainly come out in court that he cooperated," does not provide a basis to hold that [defendant] Jackson's confession was induced by hope. Any inducement of hope must promise relief from the criminal charge to which the confession relates. *State v. Pruitt*, *supra*, 286 N.C. 442, 212 S.E.2d 92 (1975). Such does not appear in the record before us. We hold defendant's confession was not a product of hope or induced by fear. *State v. Rook*, *supra*, 304 N.C. 201, 283 S.E.2d 732 [(1981)], *cert. denied*, 455 U.S. 1038[, 72 L. Ed. 2d 155] (1982). *See State v. Simpson*, 299 N.C. 335, 261 S.E.2d 818 (1980).

Id. at 579, 304 S.E.2d at 151.

In the present case, as in *Smith* and *Jackson*, the trial court found, based on competent evidence, that "[n]o law enforcement official made any threats or promises or created any coercive atmosphere near defendant." Unlike the situations in *Pruitt* and *Stevenson*, the detective did not accuse defendant of lying, but rather informed defendant of the crime with which he might be charged and urged him to tell the truth and think about what would be better for him. Further, at the time Howard made the statements defendant contends were coercive, Howard had already identified for defendant, and defendant had acknowledged, the others with him the night of the murder. Earlier in the interview Howard had stated:

> What I want to talk with you about is when you and Chuck and Brian and Bootsy and another guy from Clayton by the name of Brian Barbour come to Raleigh and ya'll robbed an old man and hit him with a bat. That's the incident I'm talking about, okay?

Shortly thereafter, Howard asked defendant, "So who was together? Who was with ya'll that night?" Defendant responded, "Everybody that you named." Defendant knew at that point that the State had at least one witness.

Finally, defendant's contention that he was intimidated or coerced by Howard's profanity is not persuasive in light of defendant's own response when asked if he knew where Capital Boulevard was and if he "ever did anybody out on Capital Blvd.?" Defendant responded, "On Capital Blvd. God, how the h—— do y'all . . . I mean, I'm telling ya'll the truth."

Under the totality of the circumstances test, the isolated statements by Howard do not support defendant's contention that his statements were made involuntarily out of fear or hope on the part of defendant. We conclude, therefore, that the trial court did not err in determining that the statements were freely and voluntarily given and in denying defendant's motion to suppress.

[2] Next, defendant argues that the trial court erred in denying defendant's motion to dismiss the first-degree murder charge because the evidence was insufficient to show that defendant committed a robbery with a dangerous weapon, the underlying felony supporting defendant's felony-murder conviction.

> On a motion to dismiss, the trial court must view all the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable infer-

> ence to be drawn from it and resolving any contradiction in the evidence in its favor. "The question for the court is whether substantial evidence—direct, circumstantial, or both—supports each element of the offense charged and defendant's perpetration of that offense." *State v. Rannels*, 333 N.C. 644, 659, 430 S.E.2d 254, 262 (1993). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981). "If there is substantial evidence of each element of the offense charged, or any lesser included offenses, the trial court must deny the motion to dismiss . . . and submit [the charges] to the jury for its consideration; the weight and credibility of such evidence is a question reserved for the jury." *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992).

State v. Abraham, 338 N.C. 315, 328, 451 S.E.2d 131, 137 (1994) (citations omitted).

"Armed robbery is the taking of personal property from the person or presence of another, by the use or threatened use of a dangerous weapon, whereby the victim's life is endangered or threatened." *State v. Rasor*, 319 N.C. 577, 587, 356 S.E.2d 328, 334 (1987); *see also* N.C.G.S. § 14-87(a) (1993). Defendant argues that the evidence does not establish that the victim had any money when he was attacked or that defendant took or attempted to take any money or property from the victim. Defendant concedes that the evidence shows that defendant's companions searched the victim's pockets after the victim was felled but argues that this act was separate from any crime defendant intended to commit. Defendant argues he was not acting in concert with his companions when they began searching the victim's pocket and that he was not part of any common plan or purpose to commit robbery with a dangerous weapon. According to defendant, he only intended to assault the victim. We are not persuaded by defendant's argument and hold that the evidence is sufficient to support a jury's finding defendant guilty of robbery with a dangerous weapon under the theory of acting in concert.

> "Under the doctrine of acting in concert, if two or more persons act together in pursuit of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime

committed by any of the others in pursuit of the common plan." *State v. Laws*, 325 N.C. 81, 97, 381 S.E.2d 609, 618 (1989), *judgment vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, [502] U.S. [876], 116 L. Ed. 2d 174[, *reh'g denied*, 502 U.S. 1001, 116 L. Ed. 2d 648] (1991), *quoted in State v. Cook*, 334 N.C. 564, 433 S.E.2d 730 (1993). This is true even where "the other person does all the acts necessary to commit the crime." *State v. Jeff[e]ries*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993).

Abraham, 338 N.C. at 328-29, 451 S.E.2d at 137.

In this case the common plan was clearly to assault and rob the victim. Defendant stated in his confession that "[t]hat's what everybody was out for, to get some money." Perry testified that her brother, William Whitley, encouraged Perry's son to go to motels and stores and beat people with bats and to "get paid" by going to motels and stores. While talking to Perry's son, Whitley described the beating of the victim. Defendant also stated that after he hit the victim on the head and the victim fell down, "everybody just jumped on him, tried to take his [the victim's] money." Defendant watched everyone search the victim's pockets. This evidence creates a reasonable inference that the group's plan or purpose was not only to attack the victim but also to rob him.

There is also evidence of the other elements of robbery with a dangerous weapon. Defendant was wielding a bat during the assault, and Brian Walker had a metal pipe. Defendant stated that Brian Walker took some money from the victim after defendant had struck the victim in the head with a bat. There was substantial evidence that the common plan of the entire group, including defendant, was to assault and rob the victim and that personal property of the victim was taken by defendant's companion by the "use or threatened use of a dangerous weapon, whereby the victim's life [was] endangered." *Rasor*, 319 N.C. at 587, 356 S.E.2d at 334. Under the theory of acting in concert, defendant, who was present at the scene and actively involved in the assault, was guilty of robbery with a dangerous weapon. Defendant's assignment of error is without merit.

[3] Finally, defendant argues that the trial court erred in denying defendant's alternative motions to continue or to provide funds for an investigator. Defendant first argues that the trial court denied his motion to continue in violation of defendant's right to due process.

Defendant made a motion to continue after the State provided defendant with a list of six possible witnesses on 30 July 1993, the Friday afternoon before the trial was to begin.

Defendant argues that defense trial counsel not having been appointed until four months after the alleged crime, the identities of these potential witnesses, other people in the vicinity of the crime on the night of the attack, were beyond the reasonable ability of trial counsel to ascertain. Defendant further argues that he was surprised immediately before trial with this *Brady* material containing evidence not within the control or knowledge of defendant. Defendant asserts that the evidence he sought time to develop could have been helpful and probative as there was a reasonable possibility that one of these potential witnesses may have been able to establish that the victim was alive and unharmed after defendant left the city, that defendant was not the perpetrator, or that none of the victim's property was taken by defendant or his coconspirators.

> Traditionally, the decision to grant or deny a continuance rests within the discretion of the trial court. However, that discretion does not extend to the point of permitting the denial of a continuance that results in a violation of a defendant's right to due process. This Court has long held that when a motion for a continuance is based on a constitutional right, the issue presented is an issue of law and the trial court's conclusions of law are fully reviewable on appeal.

State v. Tunstall, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993) (citations omitted).

> [T]he constitutional guarantees of assistance of counsel and confrontation of witnesses include the right of a defendant to have a reasonable time to investigate and prepare his case, but no precise limits are fixed in this context, and what constitutes a reasonable length of time for defense preparation must be determined upon the facts of each case.

State v. Searles, 304 N.C. 149, 153-54, 282 S.E.2d 430, 433 (1981).

To establish that the trial court's failure to give additional time to prepare constituted a constitutional violation, defendant must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986). "[A] motion for a continuance should be supported by an affi-

davit showing sufficient grounds for the continuance." *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986). " '[A] postponement is proper if there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts.' " *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976) (quoting *State v. Gibson*, 229 N.C. 497, 502, 50 S.E.2d 520, 524 (1948)).

In *State v. Cradle*, 281 N.C. 198, 188 S.E.2d 296, *cert. denied*, 409 U.S. 1047, 34 L. Ed. 2d 499 (1972), the defendant wished to continue the case so she could go home and elicit evidence from witnesses at home. The Court held that the trial court was correct in denying defendant's motion to continue because

> neither defendant nor her counsel revealed to the court the name of a single witness defendant allegedly had at her home which she desired to subpoena. What she [defendant] expected to prove by these witnesses must be surmised.

Id. at 208, 188 S.E.2d at 303. In making its decision, the Court also noted that " '[c]ontinuances should not be granted unless the reasons therefor are fully established. Hence, a motion for a continuance should be supported by an affidavit showing sufficient grounds.' " *Id.* (quoting *State v. Stepney*, 280 N.C. 306, 312, 185 S.E.2d 844, 848 (1972)); *see also Searles*, 304 N.C. at 155, 282 S.E.2d at 434 (holding that the trial court correctly denied defendant's motion to continue in order to have time to locate a potential material witness where "defendant's oral motion . . . , made on the date set for trial, was not supported by some form of detailed proof indicating sufficient grounds for further delay").

In the present case defendant was arrested on 28 July 1992; his first trial counsel was appointed on 29 July 1992. A year later on 30 July 1993, the Friday before the trial was to begin, the State provided defendant with the names of six potential witnesses. Defendant requested a continuance on 2 August 1993. The State had provided defendant with other discovery material months before trial. In support of the oral motion to continue, made the day the trial was to begin, defendant simply stated he had been given a list of "half a dozen witnesses, two of which live in Rocky Mount," and that he had spent the weekend trying to locate the witnesses but had not had the opportunity to interview anyone. Defense counsel also stated that he thought the witnesses "would be important for the defense in this case." However, defense counsel presented no details at trial indicating how these witnesses could in any way help defendant.

In his argument to the trial court, defense counsel did not indicate what information the witnesses may have had that could be exculpatory, or even who these witnesses were or how they were related to the case. While defendant argues in his brief to this Court that the witnesses at issue were other people in the vicinity of the crime that night, this fact was not disclosed to the trial court. Defendant also argues in his brief that these witnesses could have provided information that the victim was alive after defendant left town, that defendant was not involved in the beating, or that the victim had no money to steal. No such argument was presented to the trial judge in the pretrial hearing, and nothing in the record before this Court supports these arguments.

The trial court, in its written order denying a continuance, found that the defendant's "attorneys had ample time to adequate[ly] investigate and prepare for trial." The court also found that "[n]o credible evidence was presented which would support a finding that the failure to grant a two day continuance would likely result in a miscarriage of justice." We conclude that the trial court did not abuse its discretion in denying defendant's motion to continue, as there was no evidence presented to show how defendant "would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *State v. Covington*, 317 N.C. at 130, 343 S.E.2d at 526. In this case defendant's oral motion to continue was not "supported by an affidavit showing sufficient grounds," and the need to question these witnesses was not "fully established." *Cradle*, 281 N.C. at 208, 188 S.E.2d at 303. Additionally, defendant did not set forth some form of "detailed proof indicating sufficient grounds for further delay." *Searles*, 304 N.C. at 155, 282 S.E.2d at 434. This portion of defendant's assignment of error is without merit.

[4] Next, defendant argues that the trial court erred in denying his motion for funds for an investigator, filed on 2 August 1993. Defendant notes that he must "show a particularized need for the requested [assistance]" in order to be entitled to the funds, *State v. Artis*, 316 N.C. 507, 513, 342 S.E.2d 847, 851 (1986), and defendant argues that he made the necessary showing that he had a particularized need for the services of a private investigator based on his written motion for funds to hire an investigator, which stated:

> 2. The district attorney is bound by law to provide to the defense information and evidence which is potentially exculpatory.

N.C.G.S. § 15A-902, *Brady v. Maryland*, 373 U.S. 83[, 10 L. Ed. 2d 215] (1963).

3. On Friday, July 30, 1993, the district attorney turned over materials containing the names of several witnesses who can likely provide exculpatory evidence in this trial. The information turned over three days before trial was in the possession of the state for a number of months prior to July 30.

4. The witnesses named in these materials are geographically disbursed, and in the case of some of them, the addresses provided are no longer accurate.

5. In the absence of a continuance defense counsel must be in court selecting a jury.

6. Defense counsel are both solo practitioners and do not have the staff to conduct investigation while counsel [are] in court.

The trial court, in denying defendant's motion, found that "[b]road statements of need and that an expert could materially assist, without showing or pointing to any beneficial evidence that might have been obtained by such an expert, fails to make the requisite showing of a specific need."

An indigent defendant is entitled to the assistance of an expert in preparation of his defense when he makes a "particularized showing that (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case." *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992). "The particularized showing demanded by our cases is a flexible one and must be determined on a case-by-case basis." *Id.* at 656-57, 417 S.E.2d at 471. "The determination of whether a defendant has made an adequate showing of particularized need lies within the trial court's discretion." *State v. Rose*, 339 N.C. 172, 187, 451 S.E.2d 211, 219 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 818 (1995).

In *State v. Wilson*, 311 N.C. 117, 316 S.E.2d 46 (1984), the defendant asked for funds to hire a private investigator to interview potential witnesses who might have been essential in providing him an adequate defense. The Court held that mere hope or suspicion on the part of a defendant that evidence helpful to his defense may be found is not enough to require the appointment of a private investigator and that the defendant's allegations did not amount "to a clear showing

that specific evidence was reasonably available or necessary for a proper defense." *Id.* at 125, 316 S.E.2d at 52. The Court then concluded that the trial court properly denied the defendant's request for the appointment of a private investigator at State expense based on the bare allegations made by the defendant. *Id.*

In *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986), the defendant also requested funds for a private investigator. Defense counsel argued in part that the investigator was needed to discover "[h]ard core facts . . . that may show extreme inconsistencies [in a witness' testimony at trial], or corroborating facts or circumstances that buttress the case of the Defendant." *Id.* at 467, 346 S.E.2d at 653. This Court held that the "defendant has failed to make a threshold showing of specific necessity for the assistance of an investigator." *Id.* at 468, 346 S.E.2d at 653. The Court concluded that the defendant offered only " 'undeveloped assertions that the requested assistance would be beneficial,' " *id.* at 469, 346 S.E.2d at 654 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 324 n.1, 86 L. Ed. 2d 231, 236 n.1 (1985)), and that these assertions were not enough to require that the trial court grant defendant's motion for funds for an investigator.

We conclude that, in this case, the trial court did not abuse its discretion when it denied defendant's motion for funds for a private investigator. "The focus in determining whether the trial court erred [in denying defendant's request for expert assistance] . . . must be upon what was before the trial court at the time of the motion[]." *State v. Wilson*, 322 N.C. 117, 126, 367 S.E.2d 589, 594 (1988). Defendant failed to indicate in his motion or argument to the trial court that he would have been deprived of a fair trial without the expert assistance of a private investigator or that there is a reasonable likelihood that an investigator would have materially assisted defendant in the preparation of his case. Defendant presented no specific evidence indicating how the witnesses he mentioned in his motion may have been necessary to his defense or in what manner their testimony could possibly assist defendant. He simply stated that the witnesses could "likely provide exculpatory evidence in this trial." Thus, defendant presented only broad, "undeveloped assertions that the requested assistance would be beneficial." *Caldwell*, 472 U.S. at 324 n.1, 86 L. Ed. 2d at 236 n.1. We conclude that the trial court did not abuse its discretion when it determined that "defendant failed to make the requisite showing of a specific need for funds to hire a private investigator." This assignment of error has no merit.

Having reviewed all of defendant's assignments of error, we conclude that defendant received a fair trial free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. TRACIE ANN GREEN LAMBERT

No. 41A94

(Filed 28 July 1995)

1. **Homicide § 226 (NCI4th)— defendant as perpetrator of murder—sufficiency of evidence**

There was substantial evidence from which the jury could conclude that defendant was the one who shot and killed her husband where uncontroverted evidence showed that defendant never left her mobile home from the time she went to bed until the time the police arrived pursuant to her emergency phone call; in the interim her husband was shot in the head while in the mobile home; the victim and defendant owned several pistols, all of which the police found in the mobile home; one of the pistols was the murder weapon; and defendant made an inculpatory statement when she went to the funeral home to view her husband's body, *i.e.*, "Why did you make me do it?".

Am Jur 2d, Homicide § 435.

2. **Homicide § 244 (NCI4th)— premeditation and deliberation—sufficiency of evidence**

There was sufficient evidence of premeditation and deliberation to support defendant's conviction for first-degree murder where the evidence that the victim was shot in the back of the head while sleeping showed that the shooting was without provocation, and evidence that defendant knew the location of guns in the house, took one of the guns at night, shot her husband as he slept, replaced the gun, and took measures to leave no fingerprints or removed her fingerprints from the gun showed that defendant thought about killing her husband and carried out her intention in a cool state of blood.

Am Jur 2d, Homicide § 439.

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

3. Homicide § 393 (NCI4th)— premeditation and deliberation—effect of defendant's intoxication

There was no merit to defendant's contention that evidence of her voluntary intoxication required the trial court to instruct the jury on second-degree murder because her consumption of alcohol and cocaine negated her ability to premeditate and deliberate where officers testified that defendant was not as emotional as most people were in such situations and that they found cocaine and more than a case of empty beer cans in the bedroom where she was sleeping; there was no direct evidence of recent consumption of alcohol or drugs; evidence tended to show that defendant acted in a rational manner in her conversations with the police from the time she made the emergency phone call; and such evidence, at best, tended to show defendant's mere intoxication.

Am Jur 2d, Homicide § 448.

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

Modern status of test of criminal responsibility—state cases. 9 ALR4th 526.

4. Evidence and Witnesses § 1259 (NCI4th)— defendant's statement to police—right to silence not invoked

Admission of testimony by a deputy regarding defendant's statements that she had "blacked out" and could not remember anything and the prosecutor's subsequent cross-examination of defendant about those statements did not violate defendant's Fifth Amendment right to silence, since defendant's statements, though made while she was in custody, were not the result of police interrogation; and defendant's statement that she could not remember anything did not invoke her right to silence but instead could only be construed as her indication that she would willingly have discussed the case had she been able to recall further information.

Am Jur 2d, Criminal Law § 793; Evidence § 749.

5. Evidence and Witnesses § 173 (NCI4th)— victim's statements to others about marriage—admissibility to refute defendant's assertions

In a prosecution of defendant for the murder of her husband, testimony by two witnesses repeating statements about defend-

ant's drug use and problems in his marriage made to them by the victim shortly before his death were admissible under the state-of-mind exception to the hearsay rule and were relevant to rebut defendant's earlier testimony characterizing her marital relationship with the victim as "fine" and "excellent." N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Evidence § 667.

6. Evidence and Witnesses § 1113 (NCI4th)— inculpatory statement—admission of party opponent—admissibility

In a prosecution of defendant for the murder of her husband, the trial court did not err in admitting defendant's statement, "Honey, why did you make me do it?" while she was viewing her husband's body at the funeral home, since the statement was too ambiguous to be incriminating and was an admission by a party opponent within the purview of N.C.G.S. § 8C-1, Rule 801(d)(A); the statement was obviously relevant; and the admission, though prejudicial to defendant, was not unfairly so.

Am Jur 2d, Evidence § 760; Homicide § 337.

7. Evidence and Witnesses § 2089 (NCI4th)— defendant's demeanor at crime scene—admissibility of investigating officers' testimony

In a prosecution of defendant for the murder of her husband, the trial court did not err in allowing the testimony of the investigating officers which related to defendant's lack of emotion at the scene of the killing, since the testimony stemmed from the officers' personal experience combined with their observation of defendant, was helpful to a clear understanding of a relevant issue, and had probative value which was not outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Expert and Opinion Evidence §§ 359, 364.

8. Criminal Law § 750 (NCI4th)— reasonable doubt—instruction proper

The trial court's instruction on reasonable doubt was proper in this first-degree murder case.

Am Jur 2d, Trial §§ 1291, 1371.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Greeson, J., on

11 March 1993 in Superior Court, Cabarrus County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court on 16 March 1995.

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

Evidence for the State tended to show that on 25 November 1991 at 12:20 a.m., the Cabarrus County Sheriff's Department received an emergency phone call from defendant. The defendant, Tracie Ann Green Lambert, told the dispatcher that she was in bed asleep with her son in a back bedroom of her mobile home and had been awakened by a gunshot from the front of her home. She told the dispatcher that her husband was in the front part of the home. The dispatcher told her to stay in the back bedroom until police arrived and asked if anyone else was in the mobile home or if she had heard any other noises. She responded that her husband was alone as far as she knew and that the only other noise she had heard was the sound of the front door closing. Subsequently, the police arrived at the mobile home, and the dispatcher directed defendant to put the phone down and open the front door.

Deputy Lieutenant Tony McGuire arrived at the mobile home with three other deputies at approximately 12:30 a.m. He and Deputy Furr knocked on the front door while Deputies Clark and Mason went around to check the back door. Defendant opened the front door, and McGuire entered. McGuire asked defendant to turn on some lights and to show him where the noise originated. Defendant indicated that the noise had come from the front bedroom. Upon entering, McGuire saw the victim, Terry Lambert, lying on the left side of the bed, with his left arm outstretched. The victim had suffered a gunshot wound to the right rear side of his head. He was barely breathing and unresponsive when McGuire found him. The bedroom appeared to have been ransacked. Defendant asked about her husband's condition and McGuire informed her. Deputy Mason testified that defendant did not show a lot of emotion during this time. Deputy McGuire stated that she was "lackadaisical, distant [and] nervous," and appeared to be

under the influence of an impairing substance. The victim died a few hours later.

Deputy Steve Cook arrived at the scene at approximately 12:55 a.m. Prior to Cook's arrival, defendant told the deputies that there were three guns in the house. Upon entering the house, Cook looked at a shelf on the entertainment center where one of the guns was located. He found the gun in a holster on the shelf and saw tracks in the dust which indicated that the gun had been moved recently. His examination also revealed that the gun was a loaded, cocked, .38-caliber pistol with its safety off. Cook also found a $100.00 bill lying on top of the entertainment center, a shirt and a pair of men's pants next to the entertainment center, and the victim's wallet containing over $100.00 in currency in the pants.

Approximately one-half hour after Deputy Cook's arrival, Deputy Beaver arrived to aid Cook and videotape the crime scene. At some point during the period when Cook and Beaver were processing the crime scene, defendant was taken by another deputy to the Sheriff's Department. While videotaping, Deputy Beaver found a shell casing on the victim's bed and a bullet in the pillow where the victim's head had been resting. Subsequently, Beaver and Cook went to the back bedroom where defendant was allegedly sleeping when the gun went off and found what turned out to be a bag of cocaine under the mattress and more than two dozen beer cans under the bed. Further investigation indicated that the home had not been entered forcibly. Additionally, an examination of the back door and the .38-caliber pistol failed to reveal latent fingerprints.

Tests at the State Bureau of Investigation revealed that the bullet and the shell casing found by Deputy Beaver were fired from the .38-caliber pistol found on the dusty shelf of the entertainment center. The lab also reported that the gunshot residue test performed on defendant was negative. However, testimony by deputies revealed that after defendant was informed that she was being taken to the Sheriff's Department, she cried and wiped her face with her hands frequently. Deputy Beaver testified that the negative gunshot residue test could be explained by defendant's wringing of her hands and the use of her hands to wipe tears from her face.

On 27 November 1991, defendant was allowed to go to a local funeral home to view her husband. She was accompanied by a sheriff's deputy and a jail matron. Both testified that defendant was "pretty hysterical and crying." They also testified that while she stood

over the victim's body, she stated twice: "Honey, why did you make me do it?"

Defendant also introduced evidence at trial. Josh, defendant's four-year-old son and the victim's stepson, initially told police that at the time of the killing, he got out of bed upon hearing a shot. He walked down the hall to the bedroom where his stepfather was located and saw another man standing in that bedroom. At trial, Josh admitted that did not happen. He also admitted that he did not know the sound was a gunshot until his maternal grandparents told him. The remainder of his trial testimony corroborated his mother's story.

Defendant testified that she loved the victim, that they had an excellent marriage, and that she did not kill him. She recounted that on the night of the murder, she had fallen asleep watching television in the back bedroom. Consistent with her emergency call to police, she testified that she was awakened by the sound of a gunshot and that she heard a door close a few seconds later. She immediately called the police and waited for their arrival. Eventually, she was taken to the Sheriff's Department for a gunshot residue test. She testified that after the deputies completed the test, they released her at about 4:30 a.m., and she went to her parents' home. At approximately 7:00 p.m. that same day, the police came to her parents' home and arrested her. She stated that she had never admitted killing her husband while she stood over his coffin at the funeral home and, that while there, she actually said that she did not kill him. Defendant also testified in detail about several incidents prior to the murder which she said had occurred at the mobile home. On two separate occasions, windows had been shot out of the mobile home or the victim's truck. On one of those occasions, a pistol was stolen out of defendant's truck but was later found on their property. Each of those incidents was reported to the police.

During the State's rebuttal evidence, it introduced testimony from two of the victim's friends. Each of them testified that a few days before the murder, the victim told them that he was leaving his wife because of her alcohol and cocaine abuse. The State also introduced testimony of a day care worker who testified that defendant had alcohol on her breath on several occasions when she dropped her son off for day care in 1991.

[1] By an assignment of error, defendant argues that the trial court erred in denying her motion to dismiss for insufficiency of the State's evidence to sustain her conviction for murder. To convict a defendant

of murder, the State "must offer evidence from which it can be reasonably inferred that the deceased died by virtue of a criminal act and that the act was committed by the defendant." *State v. Furr*, 292 N.C. 711, 718, 235 S.E.2d 193, 198, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977). It is undisputed that the victim in this case died by virtue of a criminal act. The issue defendant presents by this assignment of error is whether there was substantial evidence tending to show that the criminal act was committed by defendant.

The law will not allow a conviction on evidence that merely gives rise to suspicion or conjecture that the defendant committed the crime. *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971); *see also State v. Furr*, 292 N.C. 711, 235 S.E.2d 193. However, a motion to dismiss must be denied if there is substantial evidence—direct, circumstantial, or both—that the defendant committed the crime. *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 208-09 (1978). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981). When considering a motion to dismiss, the evidence presented must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Easterling*, 300 N.C. 594, 604, 268 S.E.2d 800, 806-07 (1980). We conclude that when considering the evidence in the light most favorable to the State in the present case, there was substantial evidence from which the jury could conclude that defendant was the one who shot and killed her husband.

Defendant cites *Jones* and *Furr* as controlling on this issue. We find those cases easily distinguishable from the present case. In both of those cases, evidence of opportunity of the defendants to commit the crime was tenuous, if not altogether absent. Here, on the other hand, defendant's opportunity was conclusively established. Uncontroverted evidence showed that she never left the mobile home from the time she went to bed until the time the police arrived pursuant to her emergency phone call. In the interim, her husband was shot in the head. The victim and defendant owned several pistols, and the police found each of them in the home; one of those pistols was the murder weapon.

In addition to showing that defendant had the opportunity to commit the crime, the evidence also tended to show that she made an inculpatory statement when she went to the funeral home to view her

husband's body. At the funeral home, she went to her husband's open casket, began touching his face, and stated twice: "Honey, why did you make me do it?" Defendant, relying upon the authority of *Furr*, contends that the statement is not inculpatory. In *Furr*, the defendant said, "Well, you all know who did it and I know who did it, but nobody else will ever know but me." *Furr*, 292 N.C. at 718, 235 S.E.2d at 198. This Court concluded that the statement was not inculpatory because, while "defendant's remarks after the crime tend to show . . . that he knew who killed his wife, [they do not show] that he did so himself." *Id.* at 719, 235 S.E.2d at 198. In the present case, unlike *Furr*, defendant's statement made reference to herself—"why did you make *me* do it?" (Emphasis added.) Further, defendant's statement took place as she stood over the body of her dead husband, whom she was accused of murdering. In that context, a reasonable juror could infer that when she said "it," she was referring to the murder. The opportunity defendant had to commit the crime and the inculpatory statement she made at the funeral home carry the State's case beyond the realm of mere conjecture or speculation. Such evidence was substantial evidence adequate to support the conclusion by a reasonable mind that defendant committed the crime of murder. Therefore, this assignment of error is overruled.

[2] By another assignment of error, defendant argues that, even if there was sufficient evidence that she committed the crime, there was insufficient evidence of premeditation and deliberation to support her conviction for first-degree murder. "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. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838 (1981). Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. They usually must be proved by circumstantial evidence. *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992). Among the numerous circumstances which may be considered as tending to show premeditation and deliberation, two are particularly relevant in this case: (1) absence of provocation on the part of the victim, and (2) the defendant's conduct and statements before and after the killing. *See id.*

As we have already explained, the jury could have reasonably concluded that defendant killed her husband. Further, there was substantial evidence from which it also could have concluded that she killed him after premeditation and deliberation. The evidence tended

to show that defendant was alone in the mobile home with her son and husband when the shooting occurred. The victim was shot in the back of the head. He was found on a bed, lying on his side. The lethal bullet was discovered in the pillow where his head rested. It could reasonably be inferred that defendant shot her husband while he was sleeping and, thus, that the shooting was without provocation.

Defendant's conduct before and after the shooting also supports the inference that she shot her husband after premeditation and deliberation. She indicated to the police that she knew the location of each of the guns in the home. The murder weapon was found, loaded, with the safety off, in its unsnapped holster on a shelf in the living room. Tracks in the dust on the shelf indicated that the gun had been recently moved. From such evidence, the jury could infer that defendant had gone into the darkened living room and picked up the gun. She then walked to her husband's bedroom and shot him as he slept. After the shooting, she had to return to the same location and replace the gun. Further, no latent fingerprints were found on the gun. From that fact, the jury could infer that defendant either took steps to prevent leaving her fingerprints on the gun or that she took steps to remove them after the killing. The foregoing evidence was sufficient to permit the jury to find that defendant thought about killing her husband before she did so and that she carried out her intention in a cool state of blood. Therefore, there was substantial evidence from which the jury could reasonably conclude that defendant committed this murder after premeditation and deliberation. This assignment of error is without merit.

By another assignment of error, defendant sets forth three bases for her contention that the trial court erred by failing to instruct the jury on second-degree murder. The trial court instructed the jury only as to possible verdicts finding defendant guilty or not guilty of first-degree murder.

[3] First, defendant contends that the evidence of her voluntary intoxication required the trial court to instruct the jury on second-degree murder because her consumption of alcohol and cocaine negated her ability to premeditate and deliberate.

> A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, of his intoxication. Evidence of

> mere intoxication, however, is not enough to meet defendant's burden of production. He must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.

State v. Mash, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). Defendant cites testimony by officers who investigated the crime. In summary, they testified that she was "under the influence of an impairing substance," she was "lackadaisical" and "distant," she was not as emotional as most people were in such situations, and they found cocaine and more than a case of empty beer cans in the back bedroom. There was no direct evidence of recent consumption of alcohol or drugs. Defendant may have been "distant," but the evidence tended to show that she acted in a rational manner in her conversations with the police from the time she made the emergency phone call. Even when viewed in the light most favorable to defendant, the officers' testimony was, at best, evidence of mere intoxication. It did not tend to "show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render [her] utterly incapable of forming a deliberate and premeditated purpose to kill." *Id.* Therefore, the trial court was not required to instruct the jury regarding voluntary intoxication, and this basis for the assignment of error must fail.

Defendant's second basis for assigning error to the trial court's failure to give a second-degree murder instruction relies on the absence of several of the indicia of premeditation and deliberation frequently mentioned by this Court. Specifically, she contends there was no evidence of prior threats or assaults, lethal blows after the victim fell, or a brutal or gross-force killing. Defendant attempts to use the absence of such evidence to bolster her argument that the jury could have inferred that she was too intoxicated to premeditate and deliberate. Her argument assumes either that she would have done such things if she had been sober or that she did not do such things because she was intoxicated. This contention is without foundation.

Third, notwithstanding the circumstantial evidence tending to show premeditation and deliberation, defendant characterizes the State's evidence of premeditation and deliberation as speculative. Essentially, she contends that because the evidence of premeditation and deliberation was not clear and convincing, the jury should have

been allowed to reflect that fact by reducing its verdict to second-degree murder. Such considerations do not provide a proper basis for submitting second-degree murder for consideration by the jury.

Murder in the second degree is defined as the unlawful killing of another with malice, but without premeditation and deliberation. *State v. Fleming*, 296 N.C. 559, 562, 251 S.E.2d 430, 432 (1979). This Court reiterated the test for determining whether a second-degree murder instruction is required in *State v. Arrington*, 336 N.C. 592, 444 S.E.2d 418 (1994), when it said:

> The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Id. at 594, 444 S.E.2d at 419 (emphasis in original). In the present case, there was substantial evidence to prove each element of first-degree murder. Further, because the evidence was insufficient to require an instruction on voluntary intoxication, there was no evidence which negated the elements of first-degree murder other than defendant's denial that she committed the crime. If the jury believed that defendant committed this crime, the reasonable inferences from the evidence adduced pointed only to a killing with premeditation and deliberation—she retrieved the gun, shot her sleeping husband, returned the gun, and called the police with a contrived story. Therefore, because second-degree murder exists only in the absence of premeditation and deliberation, such an instruction was not warranted under the law or facts of this case. *Id.* This assignment of error is overruled.

[4] Defendant's next assignment of error concerns the admission of evidence about statements she made to Deputy Cook after her arrest. She contends that the admission of testimony by Deputy Cook regarding those statements and the prosecutor's subsequent cross-examination of her about those statements violated her right to silence under the Fifth Amendment to the Constitution of the United States and Article I, Section 23 of the Constitution of North Carolina.

Deputy Cook testified that on the day after defendant's arrest, one of the jail matrons called him and said that defendant had asked to speak with him. When Cook went to the jail, he was informed that defendant wished to talk to her father before speaking with Cook. Defendant spoke with her father for about fifteen minutes. When she finished her discussion with her father, she approached the officers and told them that she "blacked out" and could not remember anything. Defendant contends that her statement amounted to an assertion and exercise of her right to silence and that the trial court erred in permitting Deputy Cook to testify concerning that exercise of her right.

In *State v. Morston*, 336 N.C. 381, 445 S.E.2d 1 (1994), this Court said:

> "[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation." Therefore, the prosecution in a criminal trial may not "use . . . the fact that [the defendant] stood mute or claimed his privilege in the face of accusation."

Id. at 395-96, 445 S.E.2d at 9 (quoting *Miranda v. Arizona*, 384 U.S. 436, 468 n.37, 16 L. Ed. 2d 694, 720 n.37 (1966)) (citations omitted). Under *Miranda*, a conclusion that a defendant's right to remain silent has been violated necessarily encompasses findings that, among other things, the defendant was subject to interrogation and that she effectively invoked her right to silence. As neither of those factors are present in the instant case, defendant's argument as to Deputy Cook's testimony must fail.

First, while her statements were made when she was in custody, they were not the result of police interrogation. She initiated the contact by asking to see Deputy Cook but met with her father before speaking to Cook. When she emerged from the meeting with her father, she told police that she had "blacked out." At no time during this sequence of events did the police ask her a single question; she volunteered the fact that she could not remember anything. "In order to trigger the exclusionary rule of *Miranda*, it is necessary that the statement be the result of interrogation." *State v. Edgerton*, 328 N.C. 319, 321, 401 S.E.2d 351, 352 (1991).

Second, defendant's statement did not invoke her right to silence. In *State v. McCall*, 286 N.C. 472, 212 S.E.2d 132 (1975), the defendant responded to the questioning of an officer by saying, "You served your

warrant, you handcuffed me; that's it." *Id.* at 485, 212 S.E.2d at 140. This Court held that the defendant's response was inadmissible because it reflected his desire not to communicate with the officers and could only be construed as an invocation of his right to silence. *Id.* In the instant case, however, the fact that defendant asked for Cook in order to discuss the case with him and then told him that she could not remember anything could only be construed as her indication that she would have willingly discussed the case had she been able to recall further information. Thus, the implication here is just the opposite of the implication in *McCall*; this defendant's actions and statements indicated a desire *not to remain silent.*

Defendant also contends in support of this assignment of error that the trial court erred by allowing the State to cross-examine her about her statement. She argues that the cross-examination amounted to improper impeachment of her trial testimony with evidence of her exercise of the right to remain silent. The premise for defendant's argument is that the statement effectively invoked her right to remain silent. As we have already discussed, defendant's statement did not invoke her right to remain silent. Therefore, this argument and this assignment of error fail.

[5] By another assignment of error, defendant argues that testimony by two witnesses repeating statements made to them by the victim shortly before his death were inadmissible and irrelevant hearsay. The State responds that the testimony was offered to rebut defendant's earlier testimony characterizing her marital relationship with the victim as "fine" and "excellent."

During the State's rebuttal evidence, Terry Troutman and Jeff Turner both testified as to statements made by the victim to each of them less than two days before the murder. The prosecutor asked Turner: "[D]id [the victim] talk to you during that time about his marital relationship or any problems with his wife?" Turner replied that the victim had said: "[H]e caught the defendant on cocaine again, and he was leaving, and moving out." Troutman was asked: "[D]id he discuss any marital problems that he was having with you?" Troutman responded: "[H]e thought they was [sic] getting along all right; but, you know, he said he just wasn't getting along like it should" and "he said she was still drinking; and he believed she was still on cocaine. He didn't know for sure then."

Rule 803(3) of the North Carolina Rules of Evidence provides that "[a] statement of the declarant's then existing state of mind" is not

excluded by the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3) (1992). The victim's statements to Troutman and Turner that his marriage "wasn't getting along like it should" and that he was leaving were statements indicating his mental condition at the time they were made. Thus, the statements meet the requirements of Rule 803(3).

The fact that evidence meets the requirements for showing state of mind does not, alone, make the evidence admissible. Defendant correctly points out that the evidence must be relevant as well. This hearsay evidence was relevant and admissible during the State's rebuttal case to contradict a favorable inference for defendant raised by her own testimony. "Evidence tending to show the victim's state of mind is admissible so long as the victim's state of mind is relevant to the case at hand. . . . 'Any evidence offered to shed light upon the crime charged should be admitted by the trial court.' " *State v. Stager*, 329 N.C. 278, 314, 406 S.E.2d 876, 897 (1991) (quoting *State v. Meekins*, 326 N.C. 689, 695-96, 392 S.E.2d 346, 349 (1990)) (citation omitted). During defendant's testimony, she told the jury that her marital relationship was "fine" and "excellent." By that testimony, she implicitly indicated that she had no reason to kill the victim. Testimony about the positive state of the marital relationship opened the door to rebuttal evidence showing that defendant thought that the relationship was not "fine" or "excellent". "Discrediting a witness by proving, through other evidence, that the facts were otherwise than [s]he testified, is an obvious and customary process that needs little comment. If the challenged fact is material, the contradicting evidence is just as much substantive evidence as the testimony under attack, and no special rules are required." 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 160 (4th ed. 1993). The evidence of the victim's statement was admissible as an exception to the hearsay rule since it was relevant to refute the assertion by defendant and others who testified on her behalf that the marital relationship was fine. *See Stager*, 329 N.C. at 314-15, 406 S.E.2d at 897 (victim's statement was admissible because it tended to disprove defendant's contention that there was a normal, loving marital relationship). Therefore, this assignment of error is overruled.

[6] By another assignment of error, defendant challenges the admissibility of her statement, "Honey, why did you make me do it?" First, she contends that the statement was not admissible as an admission of a party-opponent under Rule 801. "A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . his own statement . . . ." N.C.G.S. § 8C-1, Rule 801(d)(A) (1992).

"An admission is a statement of pertinent facts which, in light of other evidence, is incriminating." *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 879-80 (1986). Defendant essentially reiterates here the same arguments she raised earlier in this case contending that this statement was too ambiguous to be incriminating. We reject these arguments for the same reasons previously given and therefore find that the statement is an "admission" which falls squarely within this rule. Second, defendant contends the statement is irrelevant. As an incriminating statement, it obviously has a tendency to prove a fact of consequence in the case and is, thus, relevant. *See* N.C.G.S. § 8C-1, Rule 401 (1992). Third, she contends that the statement is unfairly prejudicial. As an admission of guilt, this evidence is highly probative; the fact that it is also very prejudicial does not make it unfairly so. *See* N.C.G.S. § 8C-1, Rule 403 (1992). For these reasons, this assignment of error is overruled.

[7] Defendant also assigns error to the portion of Deputy McGuire's and Deputy Mason's testimony which related to her demeanor at the scene of the killing. She contends that this evidence violated Rules 401, 402, and 701 of the North Carolina Rules of Evidence.

The State first established the presence of both deputies at the mobile home shortly after the victim had been shot and the fact that they both were able to observe defendant. Deputy Mason then testified as follows:

> [Prosecutor:] Describe how she appeared to you.
>
> [Mason:] She didn't show a lot of emotions considering the nature of why we were there.
>
> . . . .
>
> [Prosecutor:] Now, based on that and the time you were with her, her knowing that her husband had just been shot in the head, was there anything about her actions that seemed out of the ordinary or inappropriate to you?
>
> [Mason:] Other than her lack of emotion, which I stated earlier, I don't recall anything.

During Deputy McGuire's testimony, he stated that he had been on "dozens" of homicide calls. He subsequently testified as follows:

> [Prosecutor:] Lieutenant, how would you compare the way [defendant] reacted to the particular situation that you all found

yourself in compared with the numerous other calls of this nature you've been on where loved ones were involved?

[McGuire:] Even though she was nervous, she wasn't near as hysterical, and she wasn't near as tearful and concerned, in my opinion, as most people are in these situations.

. . . .

[Prosecutor:] How would you describe people, normally, in these situations? Just an overall state of mind of people when they're confronted with these situations.

[McGuire:] Females are generally different than males. They're generally hysterical. They're tending to try to get to the victim. They're just generally in a state of almost shock, the ones that I've observed.

[Prosecutor:] Did you observe these characteristics with [defendant]?

[McGuire:] No, Sir.

Rule 701 controls the introduction of opinion testimony by lay witnesses as follows:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally related to the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (1992). Such "[o]pinion evidence as to the demeanor of a criminal defendant is admissible into evidence." *State v. Stager*, 329 N.C. at 321, 406 S.E.2d at 900. The foregoing opinion testimony of both witnesses related to their perceptions of defendant during the time shortly after the shooting. This testimony stemmed from their personal experience combined with their observation of defendant and was helpful to a clear understanding of a relevant issue—defendant's demeanor shortly after the crime—thus, it was admissible under Rule 701 and relevant under Rule 401. Further, the trial court did not abuse its discretion by holding that the probative value of the evidence was not outweighed by the danger of unfair prejudice. *See* N.C.G.S. § 8C-1, Rule 403. Therefore, we overrule this assignment of error.

[8] In another assignment of error, defendant contends that the trial court's instruction on reasonable doubt was erroneous as a matter of law. The trial court instructed the jury, *inter alia*:

> Now a reasonable doubt, members of the jury, means exactly what it says. It is not a mere possible, or an academic, or a forced doubt, because there are few things in human experience which are beyond a shadow of a doubt or which are beyond all doubt; nor is it a doubt suggested by the ingenuity of counsel, or even by the ingenuity of your own mind not legitimately warranted by the evidence and the testimony here in this case.
>
> Of course, your reason and your common sense would tell you that a doubt would not be reasonable if it was founded by, or suggested by, any of these types of considerations.
>
> A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or the lack of or insufficiency of that evidence as the case may be. Proof beyond a reasonable doubt is such proof that fully satisfies, or entirely convinces you of the defendant's guilt.

In *State v. Conner*, 335 N.C. 618, 636-38, 440 S.E.2d 826, 836-38 (1994), this Court approved a reasonable doubt instruction essentially identical to the one given in the instant case. For the reasons set forth in *Conner*, we overrule this assignment of error.

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

NO ERROR.

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

STATE OF NORTH CAROLINA v. PAUL L. THIBODEAUX

No. 274A94

(Filed 28 July 1995)

1. Evidence and Witnesses § 1222, 1302 (NCI4th)— defendant's confession—no impairment from alcohol—telling defendant he failed polygraph—no coercive tactic

There was no merit to defendant's contention that he was intoxicated and mentally impaired at the time he made an inculpatory statement and that officers engaged in coercive tactics by repeatedly telling defendant during interrogation that he failed the polygraph test, since officers had spoken to defendant prior to the date of his confession and noticed nothing out of the ordinary on the day he confessed; the only evidence of alcohol consumption was defendant's drinking from a beer can which was half-empty when taken from defendant; and after defendant was informed that he failed the polygraph examination, he said nothing inculpatory and continued to deny any involvement in the crime.

Am Jur 2d, Evidence §§ 742, 743.

Admissibility in evidence of confession made by accused in anticipation of, during, or following polygraph examination. 89 ALR3d 230.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs. 25 ALR4th 419.

2. Evidence and Witnesses § 2101 (NCI4th)— officers' testimony based on observations—no improper conclusion as to defendant's legal capacity to waive rights

Officers' testimony that defendant appeared sober and in control of his faculties, that he showed no signs of impairment or of being under the influence of any substance, and that he appeared to understand his rights was based on the officers' firsthand observations of defendant and did not contain an ultimate conclusion as to whether defendant did in fact have the legal capacity to waive his rights.

Am Jur 2d, Expert and Opinion Evidence §§ 209, 272.

3. Criminal Law § 479 (NCI4th)— court's failure to admonish jury before every recess—no error

Defendant was not prejudiced by the trial court's failure to instruct the jurors regarding their conduct and duties at every recess in accordance with N.C.G.S. § 15A-1236, since the judge is required only to admonish the jury at appropriate times regarding its duty and conduct; the trial court did remind the jurors of their duties on several occasions during the trial and referred them to the court's written instructions; defendant failed to object to the trial court's failure to admonish the jury; and defendant failed to show that the jurors engaged in any improper conduct or conversation or that their deliberations were tainted in any way.

Am Jur 2d, Trial § 1077.

4. Evidence and Witnesses § 294 (NCI4th)— defendant's contemplation of another crime—defendant not prejudiced by evidence

Testimony by a witness that defendant had mentioned robbing a bank to get rent money did not tend to show that defendant had actually robbed a bank or had committed any other crime or wrong, but even if it did, such testimony would have been admissible to show defendant's motive and intent to commit the crimes of robbery and murder of his landlord. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 408.

5. Evidence and Witnesses § 1715 (NCI4th)— photograph of defendant with gun—admissibility to illustrate testimony

The trial court in a homicide prosecution did not err in admitting a photograph of defendant holding a can of beer and wearing a shoulder holster containing a .357 caliber revolver, since the photograph was admissible to illustrate a witness's testimony concerning defendant's possession and control of the murder weapon.

Am Jur 2d, Evidence §§ 960 et seq.

6. Criminal Law § 113 (NCI4th)— videotape of interview—State's failure to produce—mistrial not required

The trial court did not err in refusing to strike the testimony of a State's witness and in denying defendant's motion for mistrial based on the State's failure to produce a videotaped interview of

the witness, since the tape appeared to be lost; a subsequent interview of the witness was conducted; the statement given then was consistent with the videotaped statement and was provided to defendant; and there was no bad faith on the part of the State with respect to production of the videotape. N.C.G.S. § 15A-910.

Am Jur 2d, Evidence § 979.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Johnson (E. Lynn), J., on 17 December 1993 in the Superior Court, Cumberland County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to the additional judgment imposed for conspiracy to commit robbery with a firearm was allowed 4 October 1994. Heard in the Supreme Court 12 April 1995.

Michael F. Easley, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Margaret Creasy Ciardella for defendant-appellant.

MITCHELL, Chief Justice.

Defendant, Paul L. Thibodeaux, was tried capitally upon a proper indictment for first-degree murder, robbery with a dangerous weapon, conspiracy to commit murder, and conspiracy to commit robbery with a dangerous weapon at the 29 November, 6 December, and 13 December 1993 Mixed Sessions of Superior Court, Cumberland County. The jury found defendant guilty of first-degree murder under the felony murder rule, guilty of robbery with a firearm, guilty of conspiracy to commit robbery with a firearm, and not guilty of conspiracy to commit murder. The trial court arrested judgment for the conviction of robbery with a firearm as that offense supported the first-degree murder conviction under the felony murder theory. Defendant was sentenced to life imprisonment for the first-degree murder conviction and ten years imprisonment for the conviction of conspiracy to commit robbery with a firearm, the sentences to run consecutively.

The State's evidence tended to show that on the morning of 2 July 1991, the body of Joseph Marshall was found on a dirt road off

Highway 301 south of Fayetteville. The victim had numerous gunshot wounds to the right side of his head. The victim's green Cadillac was discovered some distance away. There was blood splattered in and around the car. The car was dusted for fingerprints and the only identifiable print belonged to LaVerne Van.

The victim owned rental property. Defendant and LaVerne Van rented a house from him on Campbell Avenue in Fayetteville, for which they paid $300.00 per month. Defendant rented the house using the name Paul Van.

Ms. Van testified that she had pled guilty to second-degree murder, robbery with a dangerous weapon, and conspiracy to commit murder in connection with the killing of Joseph Marshall. She had entered into a plea bargain with the State which required her to testify truthfully at defendant's trial and her sentencing on those offenses was continued pending the trial. Ms. Van testified that she had met defendant in Florida and had come to Fayetteville with him. On the way, defendant bought a .357-caliber revolver at a pawn shop in South Carolina. In Fayetteville, defendant had gone under the name Paul Van.

Shortly before the murder, defendant told Ms. Van he had no money for the July rent and he mentioned robbing a bank. She suggested that he rob the victim, Joseph Marshall, instead. Defendant later told her that he had called Marshall and asked him to come over to the house. Defendant said he would tell Marshall that he had done some work for someone else and needed to go see that person to get paid. Defendant asked Ms. Van if she would go with him and if she would shoot Marshall. When Marshall arrived, defendant told him they needed to go and get the rent money from someone else and they walked outside together. Later, defendant told Ms. Van that he had borrowed some money from the victim.

Ms. Van and defendant then walked to a store and bought some beer. While drinking the beer, they continued to discuss robbing and killing Marshall. Defendant put a change of clothes for each of them in a bag with a bottle of water and the .357- caliber revolver. Marshall returned around 8:30 p.m. Defendant and Ms. Van left with Marshall to get the rent money. Ms. Van was riding on the right side of the back seat of the car. Defendant sat in the right front seat. Defendant directed Marshall to drive to a deserted area and they stopped on a small dirt road. Ms. Van heard a shot, jumped out of the car and began running. While running, Ms. Van heard several more shots. Ms. Van

then got in the back seat of the car and defendant told her that Marshall was dead. They drove a short distance and dumped Marshall's body out of the car. Defendant took the victim's wallet which contained $90.00. Defendant also took a ring from the victim's body.

Defendant cleaned the car and left it on the side of the road. Defendant and Ms. Van walked behind a church, where they washed the victim's blood off with water from the bottle defendant had in his bag. They changed clothes and defendant left their bloody clothes in a dumpster.

Ms. Van identified the defendant's .357-caliber revolver as the murder weapon. The revolver had her name and defendant's name burned into the handle. She also identified a picture of defendant showing him wearing a shoulder holster containing the same revolver.

Both on direct and cross-examination, Ms. Van admitted that she told the police several different stories before finally telling them the truth. Ms. Van stated that she had told the various other stories to the police at defendant's suggestion and because she was afraid of defendant. She also admitted to being arrested several months before the killing for possession of a sawed-off shotgun.

Don Smith of the Cumberland County Sheriff's Office testified that he talked to defendant on 4 July 1991. Defendant told Smith an elaborate story about various contacts he had had with the victim around the time of the killing. The next day Smith participated in a permissive search of defendant's house. The search revealed defendant's .357-caliber revolver, the picture of defendant with the revolver in a shoulder holster, and a box of cartridges. There was also one spent shell casing in an ashtray. On 8 July 1991, Smith saw defendant again when he and other officers went to defendant's house to take him for a polygraph test. Smith and another officer stayed at the house to talk to LaVerne Van. At that time she implicated defendant in the murder. Smith also testified that a videotaped interview with LaVerne Van, which had been taken on 18 November 1991, was generally consistent with her in-court testimony.

After being arrested for the murder, defendant made a statement to the police. In his statement, defendant said that he and a third person, not LaVerne Van, had killed Marshall. The other person shot Marshall, took the $90.00 from his wallet and gave defendant $45.00.

By stipulation of counsel, a ballistics report was read to the jury. Generally, the conclusion was that the bullets found in the gun which had been recovered from defendant's residence and fragments from the bullets which had killed the victim were sufficiently similar that it could be said that they would be from the "same box of cartridges or boxes of the same type and manufacture which are packaged on or about the same date."

The medical examiner testified that Joseph Marshall died as a result of four gunshot wounds to the right side of his head.

Defendant offered no evidence, but moved to dismiss the charges at the close of the State's evidence.

[1] By an assignment of error, defendant contends that the trial court erred in denying his motion to suppress his 8 July 1991 inculpatory statement. Defendant argues that the statement was not voluntary and that the trial court's findings of fact and conclusions of law are not supported by competent evidence.

A defendant's inculpatory statement must be voluntarily and understandingly made in order to be admissible. *State v. Thompson*, 287 N.C. 303, 214 S.E.2d 742 (1975). In determining whether a confession is voluntary, the court looks at the totality of the circumstances surrounding the statement. *State v. Hicks*, 333 N.C. 467, 482-83, 428 S.E.2d 167, 176 (1993). Some important factors to be considered are (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. *Id.* The State has the burden of showing by a preponderance of the evidence that the 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).

The State's evidence on *voir dire* regarding defendant's confession consisted of the testimony of Deputy Sheriffs Binder and Oakes. Binder testified that he had first talked to defendant early in July of 1991. On 8 July, between 4:00 and 5:00 p.m, Binder went to defendant's home to take him to the SBI office for a polygraph examination. Binder noticed that defendant had a beer in his hand. Defendant took a drink of the beer and Binder took it away from him, telling him that he knew he should not have the beer because he was going to take a test. It was a "tall beer" and defendant had probably drunk about half of it. Defendant exhibited no obvious impairment and seemed no different than when Binder had previously talked with him.

When defendant was transported to the SBI office, Binder stayed behind to talk to LaVerne Van. He then went to the SBI office, arriving around 6:00 or 6:30 p.m. Thirty to forty-five minutes later, defendant was returned from the testing area. Binder then had a conversation with defendant at the SBI office which lasted between forty-five minutes and an hour. During the course of that conversation, Binder was advised that defendant had failed the polygraph test and Binder told him that "[p]robably . . . a bunch of times."

During the forty-five minute to one hour interview at the SBI office, defendant said nothing that indicated he had been involved in the murder of Marshall. Defendant denied being with Marshall at the time of his death or robbing him. Defendant was then placed under arrest for the murder of Marshall and was transported to the Law Enforcement Center ("LEC"). On the way to the LEC defendant indicated he wanted to talk to Binder, and Binder told him to wait until they got there and defendant's rights were explained to him.

At the LEC, defendant was advised of his *Miranda* rights. He put his initials by each one of the questions which was asked of him and signed the form. This occurred around 8:14 p.m. At that time, defendant "showed no signs of being impaired." He appeared to Binder the same as on the previous occasion when Binder had talked to him and seemed to understand what was going on.

Oakes testified that he had previously seen and talked to defendant. On 8 July, he first saw defendant at the SBI office. Defendant appeared sober and in control of his faculties. Oakes was present at the LEC when defendant was advised of his *Miranda* rights. According to Oakes, defendant appeared to understand those rights and to know what he was doing when he signed the waiver. He did not appear to be under the influence of alcohol, drugs or any other impairing substance.

Defendant argues that the evidence showed that he was intoxicated and mentally impaired at the time he made the inculpatory statement. He contends that the officers engaged in coercive tactics in that during the course of the hour-long interrogation at the SBI office, defendant was repeatedly told that he failed the polygraph test. Therefore, under the totality of the circumstances, the trial court erred in holding that defendant's statement was voluntary. We disagree.

[2] A review of the *voir dire* testimony reveals that there was sufficient competent evidence before the trial court to support its findings which, in turn, support its conclusion that defendant's statement was voluntary. Deputy Sheriffs Binder and Oakes had spoken to defendant prior to the date of his confession and noticed nothing out of the ordinary on the day he confessed. The only evidence of alcohol consumption they saw was his drinking from a can of beer and that the beer was half-empty when taken from defendant. During the interview after defendant failed the polygraph exam, defendant said nothing inculpatory and continued to deny any involvement in the crime. Approximately four hours after he was picked up at his residence, defendant was read his *Miranda* rights at the LEC. Both deputies testified that defendant showed no signs of alcohol or drug impairment and that he appeared to understand his rights. Defendant also argues that the trial court erred in permitting Deputy Sheriffs Binder and Oakes to testify that a legal standard had been met. In support of his contention, defendant relies on this Court's holding in *State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). In *Daniels*, a *voir dire* was held to determine the defendant's ability to make a knowing waiver of his *Miranda* rights. This Court determined that a witness may "testify as to whether the defendant had the capacity to understand certain words on the *Miranda* form, . . . but he may not testify as to whether the defendant had the capacity to waive his rights." *Id.* at 263, 446 S.E.2d at 311.

In this case, the officers did not testify that a legal standard had been met. Rather, at various times they testified that defendant appeared sober and in control of his faculties, that he showed no signs of impairment or of being under the influence of any substance, and that he appeared to understand his rights. These statements were based on the officers' firsthand observations of defendant and did not contain an ultimate conclusion as to whether defendant did in fact have the legal capacity to waive his rights.

Even assuming *arguendo* that the officers made legal conclusions, however, any such error was harmless. In *State v. Patterson*, 288 N.C. 553, 220 S.E.2d 600 (1975), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1211 (1976), this Court said:

> We must presume the court based its finding on the competent evidence and ignored that which was incompetent. Where the court is the trier of facts, "in the absence of words or conduct

> indicating otherwise, the presumption is that the judge disregarded incompetent evidence." *City of Statesville v. Bowles*, 278 N.C. 497, 502, 180 S.E.2d 111, 114-15 (1971). "[T]he court's findings of fact will not be reversed unless based only on incompetent evidence." *Cogdill v. Highway Comm. and Westfeldt v. Highway Comm.*, 279 N.C. 313, 320, 182 S.E.2d 373, 377 (1971).

Id. at 566-67, 220 S.E.2d at 610. Here, quite apart from the testimony complained of, there was sufficient competent evidence before the trial court to support its findings and conclusions to the effect that defendant's waiver of rights and subsequent statement were voluntarily and understandingly made.

Finally, defendant argues this Court should hold that the failure of law enforcement officers to electronically record his custodial statements is a violation of the Due Process Clauses of the state and federal constitutions. We first find it significant to note that defendant requested that the interrogation not be recorded. In any event, defendant cites no authority for this argument, and we conclude that it is without merit.

For the foregoing reasons, this assignment of error is overruled.

[3] By another assignment of error, defendant contends that the trial court erred in failing to instruct the jurors regarding their conduct and duties during court recesses as required by N.C.G.S. § 15A-1236. Prior to the introduction of evidence, the trial court gave the jurors a set of written instructions and periodically reminded them of those instructions. When the jury was dismissed for lunch on 14 December 1993, the first day of the trial, the trial court referred to the instructions, reminding the jury of its duties. At the end of the first day, the trial court again admonished the jury concerning its duties. The trial court did not repeat the instructions when it recessed on 15 December. When the trial court recessed for the day on 16 December, it instructed the jury as follows:

> [T]he only proper place for you to deliberate about these matters is when you've reassembled as a group of twelve and I've actually instructed you to begin—renew your deliberations.
>
> I also remind you about the instructions that I've given you in writing and ask you to review those, about your conduct during the course of the trial.

The jury returned its verdict on the morning of 17 December 1993.

Defendant argues that the trial court's failure to instruct at every recess is prejudicial per se and reversible error. We disagree. The trial judge must at appropriate times admonish the jury regarding its duty and conduct. N.C.G.S. § 15A-1236 (1988). However, defendant must establish that he suffered prejudice as a result of any failure of the trial court to admonish the jury. *State v. Harris*, 315 N.C. 556, 566, 340 S.E.2d 383, 389 (1986). Furthermore, defendant must object to any failure of the trial court to give the required admonitions to the jury in order to preserve this issue for appeal. *Id.*

In this case, defendant concedes that he did not object to the trial court's failure to admonish the jury. Furthermore, defendant has failed to show that he was prejudiced. The trial court did remind the jurors of their duties on several occasions during the trial, as well as referring them to the written instructions. Defendant does not contend, and did not show, that jurors engaged in any improper conduct or conversation or that their deliberations were tainted in any way. This assignment of error is overruled.

[4] By another assignment of error, defendant contends that the trial court erred in admitting evidence regarding a prior criminal act of the defendant. Over defendant's objection, the trial court admitted the testimony of State's witness LaVerne Van that she had a conversation with defendant about their lack of money and the need to pay the rent at the first of the month. Van further testified that defendant had mentioned robbing a bank to get the money. Defendant argues that Van's testimony was inadmissible under Rule 404(b) because it was "evidence of other crimes, wrongs, or acts" to show defendant's character.

Rule 404(b) of the North Carolina Rules of Evidence provides that "evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986); *see also* 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 94 (4th ed. 1993). "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 or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1988).

Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit

them, it is admissible under Rule 404(b) so long as it also "is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried."

State v. Bagley, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986)), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

In this case, the evidence complained of did not tend to show that defendant had actually robbed a bank or had committed any other crime or wrong. That evidence only tended to show that defendant "said something about robbing a bank" while he and Ms. Van were discussing their monetary difficulties. The testimony at issue did not relate to any prior crime, wrong or act of the defendant.

Even assuming *arguendo* that the evidence did relate to a prior crime, wrong or act, we find that the testimony was admissible. Evidence of other crimes, wrongs or acts committed by a defendant is admissible for "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) (1988). Moreover, the Rule 404(b) list is neither exclusive nor exhaustive in addressing the permissible purposes for admitting evidence of other crimes. *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84.

Here, Ms. Van's testimony reflected defendant's state of mind immediately prior to the murder. The testimony was not offered to show defendant's propensity for criminal conduct, but to demonstrate his motive and intent to commit the crimes charged. In addition, evidence of other crimes committed by a defendant is admissible under Rule 404(b) if "it establishes the chain of circumstances or context of the charged crime." *State v. White*, — N.C. —, —, — S.E.2d —, —, 1995 WL 326523, at 11 (1995) (citing *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990)). In this case, the proximity of defendant's statement to the murder as well as defendant's monetary difficulties established the chain of circumstances leading up to the murder. This assignment of error is overruled.

[5] By another assignment of error, defendant contends that the trial court erred in admitting a photograph which defendant argues was irrelevant and inflammatory. Over defendant's objection, the trial court admitted State's Exhibit #18, a photograph taken by State's witness LaVerne Van of defendant holding a can of beer and wearing a shoulder holster containing a .357-caliber revolver. Ms. Van testified

that the weapon in the photograph was the murder weapon. Defendant argues that the photograph was inadmissible because it was unfairly prejudicial and this prejudice outweighed any probative value. Rule 403 of the North Carolina Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1994). Unfairly prejudicial evidence is evidence that possesses "an undue tendency to suggest a decision on an improper basis, usually an emotional one." *State v. Hennis*, 323 N.C. 279, 283, 372 S.E.2d 523, 527 (1988). The decision as to whether any evidence is more probative than unfairly prejudicial is within the discretion of the trial court. *Id.* at 285, 327 S.E.2d at 527. An abuse of discretion occurs only when the trial court's ruling is "so arbitrary that it could not have been the result of a reasoned decision." *Id.*

In this case, there was no evidence that the photograph was used solely to arouse the passions of the jury. Instead, the photograph was used to illustrate Ms. Van's testimony concerning defendant's possession and control of the murder weapon. Because the photograph had probative value and there was minimal potential for any unfair prejudice, we conclude that the trial court did not abuse its discretion. This assignment of error is overruled.

[6] By another assignment of error, defendant contends that the trial court erred in refusing to strike the testimony of State's witness LaVerne Van and in denying defendant's motion for a mistrial. On 16 March 1992, defendant filed a motion requesting that the trial court order the State to disclose all statements of its witnesses. After the direct examination of Ms. Van, defendant maintained that the State had failed to produce the transcripts or tapes of at least four taped interviews of Ms. Van, including a videotaped interview that occurred after she was arrested on 15 July 1991.

The trial court held a *voir dire* hearing in which the evidence showed that the State had interviewed Ms. Van on five separate occasions. Deputy Sheriff Don Smith testified that statements had been taken from Ms. Van on 4 July, 8 July, and 15 July 1991 and on 18 November 1992. Smith also testified that there was one additional interview of Ms. Van which was videotaped sometime between 15

July 1991 and 18 November 1992. Defendant received a copy of each of the interviews except the videotaped interview. Further testimony indicated that the tape of that interview had been lost and that no one could find it. Testimony also tended to show that the 18 November 1992 interview was conducted as a result of the lost tape and that the statement given then was consistent with the videotaped statement.

After a State's witness has testified on direct examination, and upon motion of defendant, the trial court shall "order the State to produce any statement of the witness *in the possession of the State* that relates to the subject matter as to which the witness has testified." N.C.G.S. § 15A-903(f)(2) (1988) (emphasis added). The trial court found that there was no bad faith on the part of the State with respect to the production of the videotape, and since it appeared to be lost, it was impossible for the State to comply with the rule or with the previous court order to provide Ms. Van's prior statements to defense counsel after she had testified. The trial court also indicated that defense counsel would be allowed considerable leeway to examine the appropriate witnesses as to the content or the absence of the videotape if he chose to bring those matters to the jury's attention.

N.C.G.S. § 15A-910 provides that if the trial court determines that a party has failed to comply with the statutory discovery procedures it may impose sanctions, including a mistrial. However, this section is permissive and not mandatory. The choice of which sanction to apply, if any, rests in the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion. *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). Here, the trial court did not abuse its discretion by denying defendant's motion to strike the testimony of Ms. Van or by denying his motion for mistrial. This assignment of error is without merit.

By another assignment of error, defendant contends that the trial court erred by denying his motions to dismiss and for a directed verdict due to the insufficiency of the evidence. Defendant argues that without his inadmissible inculpatory statement, the sole evidence against him was the inconsistent and extremely biased testimony of Ms. Van. Because there was no credible evidence which raises even a reasonable suspicion that defendant committed the murder, the case should have been dismissed. We disagree.

When there is substantial evidence—whether direct, circumstantial, or both—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, 368 S.E.2d 377 (1988). In the present case, we have already determined that defendant's inculpatory statement was properly admitted. Moreover, there was substantial evidence tending to show that defendant and LaVerne Van conspired to rob and murder Joseph Marshall, that defendant did in fact shoot Marshall in the head four times and kill him, and that defendant thereafter removed $90.00 from Marshall's wallet. Thus, there was substantial evidence tending to show that defendant had committed each of the crimes charged. Accordingly, the trial court did not err in denying defendant's motions to dismiss and for a directed verdict. This assignment of error is without merit.

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

NO ERROR.

STATE OF NORTH CAROLINA v. RUSSELL BRICE HINSON

No. 499A94

(Filed 28 July 1995)

1. Criminal Law § 433 (NCI4th)— closing argument—prosecutor's comments about defendant's character—comments supported by evidence

Comments made by the prosecutor in his closing argument insinuating that a witness was afraid to testify out of fear of defendant or because defendant had a propensity for violence were not grossly improper and did not require a new trial, since the evidence demonstrated that the actions of defendant were those of a mean and vengeful killer and that he had no hesitation in killing complete strangers just as long as someone "paid."

Am Jur 2d, Trial §§ 681, 682.

Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88 ALR4th 8.

2. Criminal Law § 446 (NCI4th)— jurors imagining victim as their child—prosecutor's argument not grossly improper

In a prosecution of defendant for the murder of a sixteen-year-old girl who was a stranger to him by shooting her with a crossbow and arrow, the prosecutor's argument asking the jurors to imagine the victim as their own child was not so grossly improper that it denied defendant a fair trial in light of the overwhelming evidence that defendant committed a cold, senseless, and calculated first-degree murder against the victim.

Am Jur 2d, Trial §§ 664 et seq.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3d 8.

3. Constitutional Law § 309 (NCI4th)— defendant's guilt—no admission by defense counsel in closing argument

Defendant's counsel did not render ineffective assistance by conceding defendant's guilt of murder without defendant's consent when he stated during closing argument that defendant's driver "was the engine that made everything possible. He is the tool without which [defendant] could not have even gotten out of his yard" where defense counsel maintained throughout the trial that the driver, not defendant, killed the victim, and nowhere in his argument did defense counsel concede that defendant himself committed any crime whatsoever.

Am Jur 2d, Trial §§ 490 et seq.

Adequacy of defense counsel's representation of criminal client regarding argument. 6 ALR4th 16.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Freeman, J., at the 6 December 1993 Criminal Session of Superior Court, Union County. Heard in the Supreme Court 12 May 1995.

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

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

ORR, Justice.

Defendant was indicted for the 28 December 1992 first-degree murder of Felicia Hope Houston. He was tried capitally at the 6 December 1993 Criminal Session of Superior Court, Union County, and was found guilty as charged. The jury recommended and the judge sentenced defendant to life imprisonment.

Defendant appeals to this Court asserting three assignments of error. We find no error in defendant's assignments and, accordingly, uphold defendant's conviction for murder in the first degree and sentence of life imprisonment.

Evidence presented by the State tended to show the following facts and circumstances. Felicia Houston was a sixteen-year-old high school student. During the Christmas holidays in 1992, she visited with her cousins in Monroe, North Carolina. Felicia's cousin, Cynthia Wilson, age thirteen, testified that at approximately 6:30 p.m. on 28 December 1992, Cynthia, Felicia and Cynthia's sister, Deborah, left their apartment to visit another cousin. As they walked down the sidewalk towards a parking lot, Cynthia observed a parked red truck. Cynthia testified that immediately after observing the truck, she saw a flash of light coming from it and heard a "swishing" sound. Felicia fell to the ground and began screaming that she was hurt. Cynthia momentarily hid behind a tree and observed an arrow sticking in the tree. She then went for help and a neighbor called for an ambulance. By the time Cynthia returned to the victim, a crowd had gathered, and the police had arrived. When an officer turned Felicia over, Cynthia saw an arrow protruding from Felicia's chest.

Cynthia testified that none of the three girls had any kind of weapon with them and none of them had said anything to whoever was in the red truck. Because it was dark, Cynthia could not see inside the red truck.

Padishah Poole testified that on 28 December 1992, he and about four other black males were standing outside near a tree in the area of the Wilsons' apartment complex. Poole testified that he saw a red truck drive by slowly, cruising. During the two- or three-hour period that Poole was standing in the vicinity of the apartment building, the truck drove by four or five times. Poole testified that the truck had a camper top on the back of it. Poole could not see inside the truck because the windows were tinted. As the truck approached the men, Poole heard a noise. Poole and his companions thought someone was

shooting with a silencer, so they ran to the back of the apartment building. They could still, however, see the tree from where they were standing.

Poole testified that three or four minutes later, the truck returned. He saw some girls walking towards the tree, and the truck slowed. Then Poole heard one of the girls screaming. Neither Poole nor his companions had said anything to whoever was in the truck prior to the attack on the girls.

Guy Brown testified pursuant to a plea agreement. He had been charged with accessory after the fact of first-degree murder and was sentenced to three years. The terms of the plea agreement specified that if he testified truthfully at defendant's trial, the murder charge would be dropped, and since he had already served eleven months in jail, he would be released from jail.

Brown testified that he had met defendant through defendant's brother and that both he and defendant worked in the same masonry business. On 28 December 1992, Brown first saw defendant at about 4:30 p.m. when defendant came to Brown's trailer. Defendant told Brown that he wanted him to "take him down the road to deliver a message." Defendant said that he and a friend named Chris had been cheated in a drug deal earlier. Defendant did not say what the message was. Brown, who was babysitting his children, told defendant they would have to wait until his wife got home from work so that they could take the truck she was driving, which was a red Chevrolet S-10 with a camper top on the back. Brown testified that his wife arrived home a little after 5:00 p.m. After Brown and his wife talked briefly, defendant and Brown left in Brown's truck and went to McDonald's. Once they reached McDonald's, defendant gave Brown directions to a housing project. Brown testified that he realized then that the housing project was the location in which defendant had mentioned that he and Chris had been cheated when they went to buy drugs. Brown asked defendant if the housing project was the place, and defendant replied that it was. Defendant pointed to the corner of a building where he said he and Chris had gone to buy crack and the seller had run off with $70.00 of Chris' money. Brown testified that he kept driving around the block. Defendant said he wanted to see if the drug dealers were standing outside and that he was looking for one particular "boy." Brown drove around the block some more, but when they could not find the "boy" they were looking for, they drove to a liquor store where defendant bought some liquor. It was then that

Brown noticed a crossbow on the passenger side floorboard of the truck. When defendant returned to the truck, Brown asked him whether he was going to deliver the "message" with the crossbow, and defendant said that he was. Brown testified, however, that he did not realize at the time that defendant was actually planning to shoot somebody with it.

Brown testified that the two men then drove to a Fast Fare convenience store where Brown went in and bought ice and soda. After mixing some drinks, defendant suggested that he and Brown go back to the housing project because defendant had not yet delivered his "message." By that time, it was getting dark. This time, defendant directed Brown to drive into the housing project the back way. As they drove by the apartments, defendant, who was on the passenger side, was closest to the apartments. Defendant saw an individual standing outside whom he described as "one of them." He then told Brown to drive back to the McDonald's so that they could finish their drinks.

Brown testified that he drove back to McDonald's where defendant drank some more liquor and got out to use the bathroom. Defendant then said, "Let's go ahead and get this over with." Brown drove back to the apartments. When he and defendant arrived, Brown pulled up to two males because defendant recognized one of them as a drug dealer. Brown further testified that when he stopped the truck, defendant took the crossbow from under his feet and attempted to aim it out of the open passenger window. He further testified that he yelled at the two males, who were standing some distance away. Defendant fired the crossbow, and then Brown drove away. Defendant remarked that he thought he had hit a tree and reloaded the crossbow. Brown replied that he would drive around again so that they could look for the arrow. Brown testified that he and defendant drove around and that defendant said the men would probably shoot at them. Brown replied that they probably would not be there.

When they reached the apartments again, Brown drove slowly but did not stop. Defendant asked Brown to stop; he was looking out of the truck towards the back as if someone was approaching from behind. Brown stopped and leaned over to see who it was. He had seen three girls coming over a rise and had heard them talking. Brown testified that defendant had the crossbow partially out of the passenger window and was aiming it towards them. Brown testified that he told defendant "not to shoot because they were girls," but that

defendant replied that he "didn't care," stating that "one of them was going to pay." Defendant then fired the crossbow.

Brown testified that he heard one girl scream. As he began to drive away, he heard another, different scream. Defendant said that he thought he had hit one of the girls. Brown testified that he did not try to help the girls because he and defendant were white, were in a black neighborhood, and had shot a girl. He was scared and wanted to get out of the area. Brown and defendant stopped at a gas station to use the bathroom, and defendant bought a pack of cigarettes and a bag of ice. They sat in the truck and mixed some more drinks. Brown then drove home where he and defendant continued to drink liquor and beer in an outbuilding near Brown's house until about 10:00 p.m. Brown drove defendant home in defendant's truck because defendant was too drunk to drive. Defendant's wife drove Brown back to his trailer.

Pam Brown, Brown's wife, testified that Brown told her that

> he had taken Russell down there and, um, they drove around and, um, Russell shot an arrow at a tree. He assumed that he hit a tree. And then he drove around another time, and, um, he said Russell threw the crossbow up again and, um, he shot it, and as Mitchell [Guy Brown] was driving off he heard girls screaming.

She further testified that Brown "told Russell not to shoot because there were girls at the end of the street and Russell told him that it didn't matter, that someone was going to pay."

Deborah Radisch, M.D., Associate Chief Medical Examiner of the State of North Carolina, was stipulated to be an expert forensic pathologist, and testified that she performed an autopsy on the victim's body on 30 December 1992. Dr. Radisch opined that the victim died as the result of an arrow wound to her right armpit, which had caused her to bleed to death.

Roger Coan, a detective with Monroe Public Safety, testified that he participated in the investigation into the victim's death. The investigation focused on defendant beginning on 30 December 1992, after a telephone call from a confidential informant. Coan and another officer later interviewed Brown at the jail and took a statement from him. Coan read the statement to the jury, which corroborated Brown's trial testimony in all essential respects.

Richard McCoy testified that he had known defendant for ten years and identified defendant in court. McCoy testified that on 28 December 1992, he did not go to work because there was an ice storm and the electricity was off. At about 2:00 p.m., defendant arrived at McCoy's house. At one point, McCoy and defendant went outside because defendant did not want to speak in front of McCoy's family. Defendant told McCoy that "he wanted to deliver a message" because "a nigger had shit on him in a drug deal." McCoy testified that defendant told him that he "had already jumped a nigger at the basketball court and pulled a long knife on him because of the drug ripoff." McCoy asked defendant whether he was just going to "shoot the person in the leg and scare him," to which defendant replied that he was going "to shoot a nigger through the heart." McCoy walked with defendant to his vehicle, where he saw a crossbow and arrow. Defendant took the crossbow out of his vehicle and showed McCoy where he had put oil on the shaft so that no fingerprints would remain. Defendant said that he was going to deliver his "message" in the area behind McDonald's in Monroe. McCoy refused to drive defendant.

McCoy testified that he heard about the victim's death later that night and that a few days afterward, he went to the police. He told the police that he had information which might be pertinent to the crossbow murder, and he gave defendant's name. Finally, he testified that the crossbow he was shown in court was similar to the one defendant had shown him on 28 December 1992.

The defendant presented no evidence.

I.

Defendant contends that errors made by the trial court with respect to the three issues presented on appeal entitle him to a new trial. As to each of these issues, defendant contends that both his federal and state constitutional rights to a fair trial were violated.

[1] Defendant raises as error two categories of comments made by the prosecution during the closing arguments. At the outset, we note that "[p]rosecutors are granted wide latitude in the scope of their argument." *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987), *denial of post-conviction relief rev'd*, 336 N.C. 508, 444 S.E.2d 443 (1994).

> "Counsel for each side may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together

> with the relevant law so as to present his or her side of the case. Decisions as to whether an advocate has abused this privilege must be left largely to the sound discretion of the trial court."

State v. Ward, 338 N.C. 64, 98, 449 S.E.2d 709, 728 (1994) (quoting *State v. Brown*, 320 N.C. 179, 194, 358 S.E.2d 1, 12-13, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 63 U.S.L.W. 3833 (1995).

Defendant did not object to any of the challenged comments at trial. "[O]ur appellate courts may, in the absence of an objection by the defendant, review a prosecutor's argument to determine whether the argument was so grossly improper that the trial court committed reversible error in failing to intervene *ex mero motu* to correct the error." *State v. Williams*, 317 N.C. 474, 482, 346 S.E.2d 405, 410 (1986). In such circumstances, the trial court is not required to intervene unless the arguments " 'stray so far from the bounds of propriety as to impede the defendant's right to a fair trial.' " *State v. Harris*, 308 N.C. 159, 169, 301 S.E.2d 91, 98 (1983) (quoting *State v. Davis*, 305 N.C. 400, 421, 290 S.E.2d 574, 587 (1982)). Moreover, "[o]n appeal, particular prosecutorial arguments are not viewed in an isolated vacuum." *State v. Moseley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 738 (1995). "Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred." *Id.*

During the trial, State witness McCoy was twice held in contempt for refusing to testify. Commenting on McCoy's alleged reluctance to testify, the prosecutor argued as follows:

> Why do you think Mr. McCoy when he testified was so hesitant to testify? If you recall, it took him three times. After calling him a third time he finally testified. Why do you think that was? Is it because that [sic] he was such a good friend of the defendant or was it because of his fear? His fear for his life? He didn't want to get one of these put in his chest, did he? Or right—right above the clavicle as Mr. Bowers said.
>
> Why do you think Mr. McCoy had such a difficult time testifying? Is that not significant to you? Is that not significant at—what does that say about the defendant? What does that really say? No one crosses him. No one crosses the defendant. You just don't do it.

As noted earlier, the defendant failed to object to any of the comments made by the prosecutor which are now assigned as error. The defendant, however, argues that these comments by the prosecutor insinuating that McCoy was afraid to testify out of fear of defendant or because defendant had a propensity for violence were grossly improper and require that he be given a new trial. The State contends that the prosecutor's remarks were proper since they consisted of inferences grounded in the evidence presented at trial. Even if we were to find the State's closing argument improper, after a careful review of the comments in question, we do not believe the claimed error was of such gross impropriety as to warrant intervention by the trial court *ex mero motu*.

The evidence before the jury demonstrated that the actions of defendant were those of a mean and vengeful killer and that he had no hesitation in killing complete strangers just as long as someone "pays." McCoy testified that after the murder, he had not contacted the police for several days and that he told the officer who came out to interview him that he did not want to testify. In addition, McCoy's testimony showed that defendant had planned to send his "message" for at least a day prior to the killing. He had prepared the crossbow and then sought someone other than himself to drive for him so that he would have both hands free to fire the weapon. The State's evidence also showed that defendant was cheated in a drug deal and was determined to seek revenge. The State argues that the obvious inference from this evidence is that defendant would not hesitate to exact revenge on someone he thought had wronged him. We hold that the evidence permitted such an inference.

This assignment of error is overruled.

II.

[2] Next, defendant contends that the trial court erred in permitting the prosecutor to ask jurors to imagine the victim as their own child. Specifically, defendant challenges the following comments:

> She didn't die right away, did she? She didn't die right away. She was shot at six thirty, she died the next morning at what, ten thirty. Can you imagine? What if this had been your daughter? What if this had been your child? Can you imagine anything worse?

Defendant contends that he was prejudiced because this portion of the prosecutor's argument "inject[ed] a highly emotional source of

bias into the jury's deliberations which distorted the jury's consideration of the evidence"; therefore, he is entitled to a new trial. The State argues that the prosecutor was illustrating to the jurors that the State had circumstantially proven defendant's premeditation and deliberation prior to murdering the victim by, among other factors, evidence that the killing was done in a brutal manner. *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992) (where this Court lists seven circumstances which are used to imply premeditation and deliberation, one of which is "evidence that the killing was done in a brutal manner"). Defendant bases his claim on the assertion that the State's evidence of premeditation and deliberation was weak and that the jurors would otherwise have found him guilty of second-degree murder. As we noted previously, defendant did not object to this argument at trial, so the assignment of error is subject to the gross impropriety standard.

As stated in *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895, *reh'g denied*, —— U.S. ——, 129 L. Ed. 2d 924 (1994), "[a]n argument 'asking the jurors to put themselves in place of the victims will not be condoned.' " *Id.* (quoting *United States v. Pichnarcik*, 427 F.2d 1290, 1291 (9th Cir. 1970)). We note, however, that in the case *sub judice*, counsel's argument was not as egregious as that in *McCollum*. Following the analysis in *McCollum*, if we assume *arguendo* that the challenged argument was improper, we still must determine "whether these portions of the prosecutors' closing argument denied the defendant due process." *McCollum*, 334 N.C. at 224, 433 S.E.2d at 152; *see Darden v. Wainwright*, 477 U.S. 168, 91 L. Ed. 2d 144, *reh'g denied*, 478 U.S. 1036, 92 L. Ed. 2d 774 (1986).

While the defendant limited his assignments of error to the excerpt above, "we have long held that arguments are to be evaluated in context." *State v. Larrimore*, 340 N.C. 119, 160, 456 S.E.2d 789, 811 (1995). Therefore, we should also consider the arguments preceding the challenged comments together with the challenged argument, in which the prosecutor argued:

> [Defendant's alleged intoxication] did not interrupt or prohibit his specific intent to kill Felicia Houston on December the 28th.
>
> This is a plan he had had for sometime [sic]. If not—we know he had it at two p.m., if not several days, if not weeks prior to that.

Of course, the defense will argue that's not in the evidence. You can infer facts from the evidence. You can use your common sense, you see. This is a very cruel, calculated murder.

So the last element is that the defendant acted after premeditation, however short.

And, fifth, that the defendant acted with deliberation, which means that he acted while he was in a cool state of mind. This does not mean that there has to be a totally [sic] absence of passion or emotion. If the intent to kill was formed with a fixed purpose, it is immaterial that the defendant was in a state of passion.

Now, the Judge will instruct you that premeditation, neither that nor deliberation, is usually susceptible of direct proof. In other words, you can't read the man's mind. Okay. But this may be proved by proof of circumstances from which they may be inferred, such as lack of provocation by the victim, right. What did Felicia Houston do—let's assume it was a drug dealer. It's all the same. It's still first degree murder, is it not?

What did Felicia Houston do to deserve this? Nothing. This is first degree murder. That's just the bottom line.

Well, you heard all of the medical evidence. You heard what a torturous death she had. You recall Dr. Bower testifying about each time she would breathe with that arrow still in her, given that—totally sliced and mutilated the nerves, how it was painful. So severely painful for her even to breathe. The pain she must have suffered.

She didn't die right away, did she? She didn't die right away. She was shot at six thirty, she died the next morning at what, ten thirty. Can you imagine? What if this had been your daughter? What if this had been your child? Can you imagine anything worse?

We hold that the prosecutor's comments 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." *McCollum*, 334 N.C. at 224, 433 S.E.2d at 152. 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. *Id.* Further, the testimony, as presented above, shows that defendant's intent to kill was overwhelming. Finally, the jury found as

an aggravating circumstance that the murder was part of a course of conduct in which the defendant engaged.

In short, given all of these factors, the likelihood that the jury's decision was influenced by the challenged portion of the prosecutor's closing argument is inconsequential. The evidence that defendant committed cold, senseless and calculated first-degree murder against the victim was overwhelming. Thus, the prosecutor's closing argument was not so grossly improper that it denied defendant a fair trial.

This assignment of error is overruled.

III.

[3] In defendant's final assignment of error, he contends that defense counsel rendered ineffective assistance of counsel by conceding defendant's guilt during closing argument, in violation of defendant's right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23 and 24 of the North Carolina Constitution.

> A defendant's right to counsel includes the right to the effective assistance of counsel. When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. In order to meet this burden defendant must satisfy a two part test.
>
> > *First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment.* Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984)) (alteration in original) (citations omitted).

Here, defendant specifically challenges the following comments by defense counsel:

> Mr. Brown, when you [sic] going to stand up and take responsibility, Mr. Brown? Mr. Brown wasn't a tool. He was the engine. He was the engine that made everything possible. He is the tool without which Mr. Hinson could not have even have gotten out of his yard. But Mr. Brown's going to be home for Christmas apparently.

Defendant relies 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), in support of his contention that, in making the comments noted above, defense counsel admitted defendant's guilt without his consent and, therefore, rendered ineffective assistance of counsel. Defendant argues that during closing argument, defense counsel argued, without his consent, that Mr. Brown was guilty of murder, and in doing so, he effectively conceded his own client's guilt. We disagree. In *Harbison*, the defendant's counsel told the jury that he did not "feel that [defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree." *Id.* at 178, 337 S.E.2d at 506. This Court concluded that "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent," *id.* at 180, 337 S.E.2d at 508, and arrested the defendant's judgments for murder and assault and remanded for a new trial.

We find the instant case wholly distinguishable from *Harbison*. Again, defendant has taken the challenged comments out of context. Upon review of the trial transcript, nowhere in the record did defense counsel concede that defendant himself committed any crime whatsoever. Defense counsel maintained throughout the trial that Brown, not defendant, killed the victim. Accordingly, defendant has failed to satisfy the first prong of the *Strickland* test by failing to show that his "counsel made errors so serious that [he] was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248.

This assignment of error is overruled.

In summary, defendant here was convicted by a jury after a fair trial, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. FREDDIE LEWIS CANNON

No. 442A94

(Filed 28 July 1995)

1. Homicide § 382 (NCI4th)— argument initiated by murder victim—argument quit by victim—defendant as aggressor—jury question

The trial court properly allowed the jury to determine whether defendant was the aggressor where the evidence tended to show that the victim initially went to defendant's home and began to argue with him, but immediately before she was shot she had straightened her car up to go out of the driveway and was about to leave; furthermore, the evidence also reflected that the victim was shot from the side and from behind, further supporting the inference that defendant shot at the victim only after the victim had quit the argument and was trying to leave.

Am Jur 2d, Homicide § 448.

2. Criminal Law § 497 (NCI4th)— State's exhibits taken to jury room over defendant's objection—error not prejudicial

Though the trial court erred in permitting the jury, over defendant's objection, to take State's exhibits into the jury room, including photographs from the crime scene and autopsy, a copy of defendant's confession, a witness's statement to police, and a diagram of the crime scene, defendant was not prejudiced where he failed to show that there was a reasonable possibility that, had the exhibits not been allowed in the jury room, the outcome of the trial would have been different. N.C.G.S. § 15A-1233(b)

Am Jur 2d, Trial §§ 1668, 1669, 1672, 1678, 1680.

Permitting documents or tape recordings containing confessions of guilt or incriminating admissions to be taken into jury room in criminal case. 37 ALR3d 238.

3. Criminal Law § 497 (NCI4th)— evidence allegedly favorable to defendant—denial of jury's request to review—defendant not prejudiced

The trial court did not abuse its discretion when it denied the jury's request to review the trial testimony of two witnesses which was favorable to defendant while allowing review of testi-

mony favorable to the State, since the evidence and exhibits reviewed by the jury were not inconsistent with the testimony not reviewed by the jury; nothing in the record supported defendant's contention that the trial court's decision not to allow this testimony to be reconsidered by the jury was so arbitrary that it could not have been the result of a reasoned decision; and even if the trial court did abuse its discretion, defendant failed to show how he was prejudiced by this decision.

Am Jur 2d, Trial §§ 1685, 1687, 1688.

4. Criminal Law § 747 (NCI4th)— trial court's instruction on confession—no improper expression of opinion

The evidence was sufficient to support the trial court's instruction that there was evidence tending to show that defendant confessed that he committed the crime charged where defendant stated in his confession that he pulled a gun out of his pocket, cocked it, intended to scare the victim by shooting between her and the windshield, and shot at the car three times; furthermore, the trial court did not impermissibly express an opinion in characterizing defendant's statement as a confession.

Am Jur 2d, Trial §§ 1197, 1204-1207.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Ferrell, J., at the 11 April 1994 Criminal Session of Superior Court, Mecklenburg County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 8 May 1995.

Michael F. Easley, Attorney General, by Michael S. Fox, Associate Attorney General, for the State.

Isabel Scott Day, Public Defender, by Julie Ramseur Lewis, for defendant-appellant.

PARKER, Justice.

Indicted for the first-degree murder of Virginia Nile Craine (victim) in violation of N.C.G.S. § 14-17, defendant was tried noncapitally and found guilty as charged on the theories of premeditation and deliberation and felony murder. The trial court sentenced defendant to life imprisonment.

Defendant and the victim were married on 2 November 1991. The couple began having problems in January 1993. Sometime in July 1993, defendant moved in with his friend James Buchanan. On 29 August 1993, between 6:00 and 7:00 p.m., the victim went to Buchanan's home and pulled her car into Buchanan's driveway. The victim got out of her car and began screaming at defendant about taking a refrigerator from a mobile home in which the two had lived. Buchanan, who had been sleeping in the house, was awakened by the noise and heard the victim yell at defendant to come outside. Defendant, who had been sitting in the living room, went outside. Defendant had a gun in his back pocket. The victim continued to yell at defendant, and the argument escalated. Buchanan heard the victim say she was going to kill defendant, and he heard defendant ask her to leave. The victim slapped defendant on the head two times, and defendant then pushed the victim towards her car and forced her into her car.

After being forced into her car by defendant, the victim backed up her car and deliberately ran it into defendant's car, which was also parked in the driveway. The victim then straightened her car up to start going down the driveway. When the victim's car was directed down the driveway, defendant was standing about eight feet away, on the passenger side of the victim's car. Both windows in the victim's car were rolled down. Defendant pulled his gun out of his pocket, cocked it, pointed it at the victim, and shot into the car three times. The victim was struck by three bullets, and her car rolled partway down the driveway.

On 29 August 1993 Clifton Scott was living with his mother-in-law, who was a neighbor of Buchanan's. Scott observed the original argument between defendant and the victim. Scott stopped watching the two when the victim was forced into her car by defendant. Scott returned to the window when he heard a loud crash and a gunshot. Scott then saw defendant shoot the victim two times. Scott testified that while defendant was shooting at the victim, defendant was standing at the passenger side of the car, about four or five feet away from the car, and the car was moving down the driveway.

After the shooting defendant jumped into his own car and pulled out of the driveway, pushing the victim's car out of the way with his car as he left. Defendant then drove to Tennessee, where he was arrested two days later. Defendant gave a statement to police in which he said that after the victim had "straightened her car up to go

out the driveway," he shot into the victim's car three times. Defendant stated that he intended to shoot between the victim and the windshield to scare the victim.

An autopsy revealed that the victim had suffered from three gunshot wounds. One bullet entered the back of the victim's right arm and traveled sideways through the arm and then into the victim's body. A second bullet entered the "right back chest area" and exited the left side of the chest. A third bullet entered the back of the right shoulder and exited the front of the right shoulder. The victim died from the gunshot wounds to the chest.

Additional facts will be addressed as necessary to the discussion of a particular issue.

[1] Defendant begins by arguing that the trial court, over objection, erred by instructing the jury that self-defense was unavailable to defendant if defendant was the aggressor. Defendant contends no evidence in the record supports a finding that defendant was the aggressor. We disagree.

A defendant may be deemed an aggressor if he " 'has wrongfully assaulted another or committed a battery upon him.' " *State v. Potter*, 295 N.C. 126, 144 n.2, 244 S.E.2d 397, 409 n.2 (1978) (quoting *State v. Crisp*, 170 N.C. 785, 790, 87 S.E. 511, 514 (1916)). In *State v. Watson*, 338 N.C. 168, 449 S.E.2d 694 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 569 (1995), the victim initially approached the defendant and began arguing with the defendant over a woman. The victim eventually stopped arguing with the defendant and returned to his vehicle. After the victim got into his car, the defendant approached the victim and shot him. Holding that the trial court did not err in declining to instruct that defendant had no duty to retreat, this Court stated: "Defendant, not the victim, was the aggressor. The evidence is that after the victim quit the argument and returned to his vehicle, defendant left his vehicle, walked over to the victim's car and began shooting." *Id.* at 186, 449 S.E.2d at 705; *see also State v. Freeman*, 275 N.C. 662, 669, 170 S.E.2d 461, 466 (1969) (holding that while the victim began altercation, "defendant had become *and remained* the aggressor" when he pursued the fleeing victim); *State v. Church*, 229 N.C. 718, 722, 51 S.E.2d 345, 348 (1949) (holding that while the victim started the fight, the defendant pursued it; thus, the defendant was the aggressor and not entitled to a self-defense instruction).

Just as in *Watson*, the evidence in this case permits the inference that defendant was the aggressor at the time he shot the victim; thus,

an instruction to this effect is not erroneous. While the evidence shows that the victim initially went to defendant's home and began to argue with him, the evidence also shows that immediately before the victim was shot, she had "straightened her car up to go out the driveway," and she was about to leave. The evidence also reflects that the victim was shot from the side and from behind, further supporting the inference that defendant shot at the victim only after the victim had quit the argument and was trying to leave. On the evidence before it, the trial court properly allowed the triers of fact to determine that defendant was the aggressor. *See State v. Terry*, 329 N.C. 191, 199, 404 S.E.2d 658, 663-64 (1991). Defendant's assignment of error on this issue is overruled.

[2] In defendant's second and third issues, he argues that the trial court erred in permitting the jury, over defendant's objection, to take State's exhibits 1-10, 12, 13, 15, and 16 into the jury room, in violation of N.C.G.S. § 15A-1233(b). These exhibits included photographs from the scene of the crime and the autopsy, a copy of defendant's confession, witness Buchanan's first statement to the police, and a diagram of the crime scene.

N.C.G.S. § 15A-1233(b) provides:

> Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence. If the judge permits the jury to take to the jury room requested exhibits and writings, he may have the jury take additional material or first review other evidence relating to the same issue so as not to give undue prominence to the exhibits, or writings taken to the jury room. If the judge permits an exhibit to be taken to the jury room, he must, upon request, instruct the jury not to conduct any experiments with the exhibit.

N.C.G.S. § 15A-1233(b) (1988). We hold that the trial court erred in allowing the jury to take these exhibits to the jury room without the consent of all parties. *See State v. Huffstetler*, 312 N.C. 92, 114, 322 S.E.2d 110, 124 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). We must now consider whether this error was prejudicial to defendant.

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been

committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C.G.S. § 15A-1443(a) (1988).

To begin, defendant argues that the court erred by allowing the jury to review the first written statement of witness Buchanan. The statement had been admitted but not read into evidence. Further, the first written statement was not as detailed as witness Buchanan's second statement to the police and his testimony at trial, which the jury was not allowed to review during deliberation. While the statement did not include details discussed by Buchanan during his testimony at trial, it did state that defendant and the victim were arguing, that the victim was cursing at defendant, and that defendant repeatedly asked the victim to leave. At trial both eyewitnesses testified that the victim had initiated the original confrontation, yelled at defendant, and hit him. The statement reviewed by the jury does not contradict the trial testimony on these critical points. Nothing in the statement suggests that the victim did not hit defendant or that the victim did not initiate the confrontation by arguing with and cursing at defendant.

Defendant also argues that submission of this first statement was prejudicial since the trial court denied the jury's request to review Buchanan's second, more detailed statement. In this second statement Buchanan stated, as he did at trial, that the victim threatened to kill defendant and that she hit defendant. However, this second statement had not been admitted into evidence. The trial court has no authority to permit the jury to examine or take into a jury room exhibits which have not been introduced into evidence. *See State v. Bacon*, 326 N.C. 404, 417, 390 S.E.2d 327, 334 (1990). Defendant cannot argue he was prejudiced by the trial court's failure to submit a statement that the court had no authority to allow the jury to review.

Defendant also argues that the submission of eleven photographs to the jury for review was prejudicial. Eight of the photographs were of the deceased either at the scene of the crime or at the autopsy. Some of these photographs showed the victim's wounds, and one photograph showed the victim's face at the autopsy with her eyes and mouth open. Defendant argues that allowing the jury to take these photographs into the jury room permitted the jury to concentrate on the inflammatory aspects of the photographs and was prejudicial.

The photographs in question had been previously admitted and shown to the jury to illustrate the testimony of witnesses. Under N.C.G.S. § 15A-1233(a), the trial court had the discretion to permit the jury to reexamine the pictures closely and at length in the courtroom. On the record before us, we are not persuaded that defendant has shown a reasonable possibility that had the jury not been allowed to review these photographs in the jury room, a different result would have been reached. *See Huffstetler*, 312 N.C. at 115, 322 S.E.2d at 124 (holding not prejudicial error to allow photographs to go into the jury room over defendant's objection, in part because it was within court's discretion to permit the jury to reexamine the pictures at length in the courtroom).

Defendant also argues he was prejudiced when the jury was allowed to review a diagram which had never actually been admitted into evidence. The Court agrees that it was error to submit this diagram to the jury for review for two reasons: (i) defendant did not consent to the admission, N.C.G.S. § 15A-1233(b), and (ii) the trial court did not have authority to allow the jury to review exhibits that have not been admitted into evidence, *Bacon*, 326 N.C. at 417, 390 S.E.2d at 334. However, we conclude this error was not prejudicial to defendant.

The diagram, which was used by three of the State's witnesses, illustrated where defendant's car, the victim's car, and two other cars were parked when the argument between defendant and the victim began. The diagram also showed the location of defendant's home in relation to witness Scott's home and the location of the driveway at defendant's home. Witness Scott used the diagram to explain what occurred during the incident at issue. Defendant used the diagram to reiterate where the victim and defendant were when they began fighting and to establish that only one car could get down the driveway at a time. The record reflects that the diagram itself, as submitted to the jury, did not actually depict where defendant was standing when he shot at the victim's car or where the victim's car was located when defendant shot the victim. The diagram simply illustrated the scene as it was during the initial confrontation. Defendant has not shown a reasonable possibility that based on the information contained in the diagram as submitted, the jury would have reached a different verdict if the diagram had not been submitted for review.

Finally, defendant argues he was also prejudiced by the submission of his confession, the most damaging evidence the State adduced

against defendant. Defendant contends that denying the jury the opportunity to review the favorable trial testimony given by witnesses Scott and Buchanan permitted the jury to concentrate on defendant's statement, which was devoid of details favorable to defendant.

In *State v. Bell*, 48 N.C. App. 356, 363-64, 269 S.E.2d 201, 205, *disc. rev. denied and appeal dismissed*, 301 N.C. 528, 273 S.E.2d 455 (1980), the defendant argued that the trial court committed prejudicial error when it allowed the jury, over the defendant's objection, to review three written statements that presented the evidence in the light most favorable to the State, while not allowing trial testimony which was more favorable to the defendant to be taken into the jury room. The defendant in *Bell* argued that the reason the statements that were taken to the jury room were prejudicial was that they did not fully show that the victim was the aggressor. *Id.* at 364, 269 S.E.2d at 205. The court noted that there was some evidence that the victim was the aggressor in the statements taken into the jury room. *Id.* The court also noted that the evidence against the defendant presented at trial and in the written statements at issue was substantial. *Id.* The court concluded that the defendant failed to meet his burden of showing a reasonable possibility that had the alleged error not occurred, the outcome of the trial would have been different. *Id.*

In this case, as in *Bell*, the jury was given written statements to review that defendant argues were not as favorable to defendant as certain testimony from trial that was not given to the jury to review. In the present case the evidence against defendant was substantial. Defendant's statement had been read in its entirety to the jury by a State's witness. Accordingly, we conclude defendant has not shown that there is a reasonable possibility that if defendant's confession had not been given to the jury, the outcome of the trial would have been different.

In conclusion we have determined that while the trial court erred in submitting exhibits to the jury for review over defendant's objection, defendant has failed to show that he was prejudiced by this error.

[3] In a related issue defendant argues that the trial court abused its discretion when it denied the jury's request to review the trial testimony of State's witnesses Scott and Buchanan in violation of N.C.G.S. § 15A-1233. Defendant contends the testimony not submitted to the jury for review was favorable to defendant, while the evidence and

exhibits that were submitted to the jury for its review were favorable to the State. Defendant argues the trial testimony of Scott and Buchanan tended to show that the victim was the aggressor and that defendant acted in self-defense. Specifically, defendant notes that Buchanan stated that at some point, defendant had to jump out of the way of the victim's car.

N.C.G.S. § 15A-1233(a) provides:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

The judge in this case stated that the testimony of Scott and Buchanan was "not available in writing for you to observe, and the Court in it's [sic] discretion will not require it."

"When the trial court states for the record that, in its discretion, it is allowing or denying a jury's request to review testimony, it is presumed that the trial court did so in accordance with N.C.G.S. § 15A-1233." *State v. Weddington*, 329 N.C. 202, 208, 404 S.E.2d 671, 675 (1991). Defendant does not argue that the trial court did not act in its discretion, but instead argues that the trial court abused this discretion and, in doing so, prejudiced defendant. We disagree.

To show that the trial court abused its discretion, "defendant must demonstrate that the trial court's action was 'so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* at 209, 404 S.E.2d at 676 (quoting *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985)). While Scott and Buchanan testified that the victim initiated the confrontation, their testimony also suggested that the car was moving away from defendant and down the driveway when defendant shot the victim. Buchanan did mention at trial that at some point, defendant had to jump out of the way of the victim's car, but Buchanan's testimony was conflicting and contradictory as to when and if defendant may have had to jump out of the way of the victim's car. During direct examination, Buchanan failed to mention that defendant ever had to jump out of the way of the car; during cross-

examination, Buchanan stated that defendant had to move out of the way of the car when the victim hit defendant's car; during redirect examination, Buchanan testified that defendant had to jump out of the way the "second time," not the first time, the victim moved her car. Buchanan never testified that defendant shot at the victim to avoid being hit by the car, or even that defendant shot at the victim's car as it was being driven in defendant's direction. In fact, Buchanan testified on direct examination that the car was pointed down the driveway and rolling forward, as if to leave, when defendant shot at the victim three times. Buchanan never changed or contradicted this part of his testimony. A review of the testimony reveals that the testimony taken as a whole supports the State's version of the events at issue. The evidence and exhibits reviewed by the jury were not inconsistent with the testimony not reviewed by the jury; the reviewed statements were simply not as detailed as the trial testimony.

Nothing in the record supports defendant's contention that the trial court's decision not to allow this testimony to be reconsidered by the jury was so arbitrary that it could not have been the result of a reasoned decision. The trial court did not abuse its discretion by refusing to allow the jury to review the requested trial testimony.

Moreover, assuming *arguendo* that the trial court did abuse its discretion in not allowing the jury to review this testimony, defendant has not shown how he was prejudiced by this decision. Defendant has not shown that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a). The statements in Buchanan's trial testimony that could be deemed the most helpful were Buchanan's statements that defendant jumped out of the way of the victim's car at some point in time. Buchanan's testimony pertaining to when defendant had to move out of the way of the car was contradictory and confusing, and Buchanan never actually stated that defendant shot the victim to avoid being hit. The testimony defendant argues should have also been reviewed by the jury supported the State's theory of the case and specifically indicated that defendant shot at the victim when her car was going down the driveway, away from defendant. We conclude that defendant has not shown there was a reasonable possibility that the jury would have reached a different verdict had the testimony been submitted. Defendant's assignment of error is overruled.

[4] Finally, defendant argues that the record is devoid of evidence to support the trial court's instruction that there was evidence tending

to show that defendant confessed that he committed the crime charged. Defendant also argues that the instruction was an impermissible expression of opinion on the part of the trial court. We disagree.

"A trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence." *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973). In this case the trial judge instructed the jury:

> There is evidence which tends to show that the Defendant confessed that he committed the crime charged in this case.
>
> If you find that the Defendant made that confession, then you should consider all of the circumstances under . . . which it was made, in determining whether it was a truthful confession, and the weight you will give to it.

Defendant was charged with first-degree murder. One of the theories upon which he was tried was felony murder with the underlying felony being discharging a firearm into an occupied motor vehicle.

Confession is defined as a "[v]oluntary statement made by one who is [a] defendant in [a] criminal trial at [a] time when he is not testifying in trial and by which he acknowledges certain conduct of his own constituting [a] crime for which he is on trial; a statement which, if true, discloses his guilt of that crime." *Black's Law Dictionary* 296 (6th ed. 1990).

N.C.G.S. § 14-17 defines "first-degree murder" in pertinent part as a

> murder which shall be perpetrated by . . . willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any . . . felony committed or attempted with the use of a deadly weapon.

N.C.G.S. § 14-34.1 provides that "[a]ny person who willfully or wantonly discharges or attempts to discharge[] . . . [a] firearm into any . . . vehicle . . . while it is occupied is guilty of a . . . felony." In his confession defendant stated in part: "I pulled the gun out of my pocket and cocked it. I was going to shoot into the car, between her and the windshield, just to scare her. I pointed my gun toward the car and shot 3 times."

A reasonable reading of this statement is that defendant willfully and with knowledge that the vehicle was occupied discharged his gun three times into an occupied vehicle. The evidence is uncontradicted that the victim died from gunshot wounds sustained when defendant shot into the vehicle. Thus, the murder was committed in perpetration of a felony committed with the use of a deadly weapon. Defendant admitted that he had engaged in certain conduct which constituted the crime of felony murder. His statement amounts to a "confession" to first-degree murder. *See State v. Hamilton*, 298 N.C. 238, 245, 258 S.E.2d 350, 354 (1979) (holding that defendant's statement amounted to a confession when he acknowledged that he had committed certain acts which constituted the crimes of rape and burglary). We conclude the trial court's instruction was "based upon a state of facts presented by some reasonable view of the evidence" and was not erroneous.

Defendant also argues that the trial court in this case impermissibly expressed an opinion in characterizing defendant's statement as a confession in violation of N.C.G.S. §§ 15A-1222 and -1232. Pursuant to N.C.G.S. §§ 15A-1222 and -1232, a judge may not express an opinion on a question of fact to be decided by the jury and specifically may not express an opinion as to whether a fact has been proven when instructing the jury. We conclude that the trial court's confession instruction was not an expression of opinion.

In *State v. Young*, 324 N.C. 489, 380 S.E.2d 94 (1989), the defendant argued that the trial court's instructions that evidence tended to show that defendant confessed to the crime charged amounted to an impermissible expression of opinion in violation of N.C.G.S. §§ 15A-1222 and -1232. The Court held:

> The use of the words "tending to show" or "tends to show" in reviewing the evidence does not constitute an expression of the trial court's opinion on the evidence. Nor did the trial court's statement that the evidence tended to show that the defendant had "confessed" that he "committed the crime charged" amount to an expression of opinion by the trial court, *because* evidence had been introduced which in fact tended to show that the defendant had confessed and to the *crime charged*, first[-]degree murder.

Young, 324 N.C. at 495, 380 S.E.2d at 97-98 (citations omitted).

In *Young* the Court determined that the trial court's instructions did not amount to an expression of opinion that the defendant had in fact confessed. The trial court's instructions also contained the instruction that "*if you find* that the defendant made that confession, *then* you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight which you will give it." *Id.* at 498, 380 S.E.2d at 99. This Court held that "[t]his instruction made it clear that, although there was evidence tending to show that the defendant had confessed, the trial court left it entirely for the jury to determine whether the evidence showed that the defendant in fact had confessed." *Id.* In this case the trial court included the same instruction as in *Young*, leaving it to the jury to determine whether the evidence showed that the defendant had in fact confessed.

Under *Young* defendant's argument that the trial court erred by instructing that the evidence tended to show that defendant confessed to the crime charged is without merit.

Having reviewed all defendant's assignments of error, we conclude that defendant received a fair trial free from prejudicial error.

NO ERROR.

IN THE MATTER OF MRS. DELORA DENNIS, ROUTE 2, BOX 478, BREVARD, NORTH CAROLINA 28712, AND OTHER CUSTOMERS OF HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, COMPLAINANTS V. DUKE POWER COMPANY AND HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, RESPONDENTS AND MR. THOMAS W. MCGOHEY AND OTHER CUSTOMERS OF HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, 505 CONNESTEE TRAIL, BREVARD, NORTH CAROLINA 28712, COMPLAINANTS V. DUKE POWER COMPANY AND HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, RESPONDENTS AND MRS. CARMELETTA MOSES, ROUTE 68, BOX 326, TUCKASEGEE, NORTH CAROLINA 28783, COMPLAINANT V. DUKE POWER COMPANY AND HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, RESPONDENTS AND MR. FORREST COLE, ROUTE 63, BULL PEN ROAD, CASHIERS, NORTH CAROLINA 28717, AND OTHER CUSTOMERS OF HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, COMPLAINANTS V. NANTAHALA POWER & LIGHT COMPANY AND HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, RESPONDENTS

No. 246PA94

(Filed 28 July 1995)

1. Energy § 3 (NCI4th)— electric service transferred for industrial customers—transfer not punitive

The Utilities Commission did not err in ordering the transfer of electric service to industrial plants from Haywood Electric

Membership Corporation to Duke Power where the Commission concluded, based on substantial evidence in view of the whole record, that the service provided by Haywood was inadequate and undependable. Furthermore, the Commission's reasons for transferring service were not primarily punitive where the transfer would provide relief for the entire area serviced by Haywood; the transfer to Duke could be effectuated easily because of the proximity of the industrial plants to Duke's service lines; improved electric service to the plants would benefit their numerous employees and customers; and, though the Commission recognized that the most severe remedy would be the transfer of the entire area to another supplier, it fashioned a remedy which would relieve the load placed on Haywood while it worked to improve its service to the other complaining consumers. N.C.G.S. § 62-110.2(d)(2).

Am Jur 2d, Electricity, Gas, and Steam § 14.

Special requirements of consumer as giving rise to implied contract by public utility to furnish particular amount of electricity, gas, or water. 13 ALR2d 1233.

Liability of electric power or light company to patron for interruption, failure, or inadequacy of power. 4 ALR3d 594.

Liability of electric utility to nonpatron for interruption or failure of power. 54 ALR4th 667.

2. Energy § 3 (NCI4th)— electric service transferred for industrial but not residential customers—no error

The Utilities Commission properly exercised its authority by transferring only an industrial user and respondent's largest customer rather than all complainants to Duke Power, since N.C.G.S. § 62-110.2(d)(2) allows the Commission discretion in determining its remedy, and the Commission's action was not arbitrary or capricious.

Am Jur 2d, Electricity, Gas, and Steam §§ 10-12.

3. Constitutional Law § 89 (NCI4th); Energy § 2 (NCI4th)— industrial user treated differently from residential users— no denial of equal protection

The order of the Utilities Commission transferring electric service to industrial plants from Haywood Electric Membership

Corporation to Duke Power without transferring service to all other customers did not violate the other customers' right to equal protection of the law, since, by transferring the industrial user, the Commission hoped to "relieve the load on the troubled . . . substation" and to allow Haywood "a reasonable amount of time to implement the proposed changes," and the order was therefore rationally related to the objective of restoring acceptable electric service to all complainants.

Am Jur 2d, Electricity, Gas, and Steam § 38.

4. Energy § 3 (NCI4th)— transfer of consumer from one supplier to another—economic impact—testimony properly excluded

The Utilities Commission properly excluded testimony by a witness regarding the adverse economic impact of a transfer of consumers from Haywood Electric Membership Corporation to other electric suppliers, since the economic impact of a transfer on an electric supplier is not delineated in N.C.G.S. § 62-110.2(d)(2) as a ground for consideration in determining whether a transfer to another electric supplier is authorized; it is obvious that rarely, if ever, would an electric supplier benefit economically from the loss of a customer; and such factor is therefore irrelevant to the Commission's determination of a remedy.

Am Jur 2d, Electricity, Gas, and Steam § 29.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) and N.C. R. App. P. 21(a)(2) to review a unanimous decision of the Court of Appeals, 114 N.C. App. 272, 442 S.E.2d 104 (1994), affirming in part and reversing in part an order entered 5 October 1992 by the North Carolina Utilities Commission. Heard in the Supreme Court 13 April 1995.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Sam J. Ervin, IV, for petitioner-appellant M-B Industries, Inc.

Jerry W. Amos for respondent-appellee Haywood Electric Membership Corporation.

Duke Power Company, by Steve C. Griffith, Jr., Vice Chairman and General Counsel, and William Larry Porter, Deputy General Counsel; and Kennedy Covington Lobdell & Hickman, L.L.P., by Myles E. Standish, for respondent-appellant Duke Power Company.

Hunton & Williams, by Edward S. Finley, Jr., and James L. Hunt for respondent-appellant Nantahala Power and Light Company.

Robert P. Gruber, Executive Director, Public Staff, and Antoinette R. Wike, Chief Counsel, by A.W. Turner, Jr., and Victoria O. Hauser, Staff Attorneys, for intervenor-appellant Public Staff.

North Carolina Electric Membership Corporation, by Thomas K. Austin, Associate General Counsel, for intervenor-appellee North Carolina Electric Membership Corporation.

WHICHARD, Justice.

This case arose from four complaints filed in the North Carolina Utilities Commission ("the Commission") on behalf of over nine hundred electric power consumers who were customers of respondent Haywood Electric Membership Corporation ("Haywood") in Haywood's Transylvania and Jackson County service areas. These consumers sought a transfer of their electrical service from Haywood to respondent Duke Power Company ("Duke Power") or respondent Nantahala Power and Light Company ("Nantahala").

On 30 July 1990 Delora Dennis and approximately 640 other customers of Haywood filed a complaint against Haywood alleging that they had received inadequate and undependable electric service from Haywood. They requested reassignment to Duke Power.

On 12 September 1990 Thomas W. McGohey and approximately 229 other customers of Haywood filed a complaint against Haywood alleging inadequate service. They requested reassignment to Duke Power.

In January 1991 Carmeletta Moses filed a complaint against Haywood alleging inadequate service. Though this complaint does not appear in the record, the Commission's order directing that it be served does. She requested reassignment to Duke Power.

On 20 February 1991 Forrest Cole and approximately sixty other customers of Haywood filed a complaint against Haywood alleging inadequate or inefficient service. They requested reassignment to Nantahala.

The Public Staff intervened on behalf of the complainants. *See* N.C.G.S. § 62-15(b), (g) (Supp. 1994). The North Carolina Electric

Membership Corporation ("NCEMC") also intervened. NCEMC is a generation and transmission cooperative that supplies wholesale bulk power for its twenty-seven member cooperatives, including Haywood. Carolina Power & Light intervened as an interested party.

On 18 April 1991 the Public Staff filed additional letters of complaint from Haywood's customers, including petitioner M-B Industries, Inc. ("M-B Industries"), a small manufacturing company in Rosman, North Carolina, with a work force of approximately two hundred people. Ed Morrow, president of M-B Industries, wrote its letter.

On 17 May 1991 the Commission, after a prehearing conference, filed a prehearing order that excluded the testimony of Gregory L. Booth, a witness for NCEMC, regarding the adverse economic impact on Haywood of a shift of customers from Haywood to other electric suppliers.

The Commission held public hearings on 21-22 May 1991 in Brevard and on 7-8 August 1991 in Raleigh. At these hearings forty-seven consumer witnesses testified. In its order of 5 October 1992, the Commission summarized the testimony. The witnesses complained, *inter alia*, of frequent and prolonged service outages caused by inadequate precaution against lightning and storms and by inadequate and nonuniform line-clearing procedures. Other complaints were that Haywood had responded ineffectively and arbitrarily to consumer problem reports, that it possessed inappropriate knowledge of consumer growth and usage patterns, and that there was inadequate communication and coordination between Haywood and its consulting engineer. The witnesses further complained of inadequate voltage levels and inappropriate voltage fluctuations that damaged heating equipment, water pumps, major electric appliances, and other electric equipment. They also complained of arbitrariness in Haywood's deposit procedures, credit checks, disconnection procedures, equal payment plans, and late payment assessments.

Ed Morrow described incidents of poor service at M-B Industries' two industrial manufacturing plants served by Haywood. Morrow complained of frequent outages. He identified motor losses due to dips in voltage and computer module losses due to surges. Morrow testified that M-B Industries' plants were forced to close due to power outages.

The Commission characterized the testimony from Haywood's consumers as "an unprecedented number of complaints requesting reassignment." In its order the Commission found that Morrow had testified to the difficulties M-B Industries' plants had had with Haywood's service. It found that despite numerous complaints by M-B Industries, Haywood had made only one improvement in its service, which was not optimal. The same lines and transformers installed in 1960 were still being used for M-B Industries' plants. The Commission further made specific findings detailing the respects in which Haywood's service to the other complaining consumers failed to comply with expected standards. It rejected Haywood's evidence offered to show that the service was adequate.

Based on these findings, the Commission concluded that the electric service provided by Haywood to the complainants, which included M-B Industries and others, was inadequate and undependable and that Haywood's conditions of service and regulations, as applied to complainants and others, were arbitrary and unreasonably discriminatory. After reaching these conclusions, the Commission discussed possible remedies, the most severe of which would be "a transferral of the entire service area to another supplier." The Commission adopted a remedy, however, that would permit Haywood a two-year grace period within which to implement proposed service changes. The Commission stated, "[T]he new management of Haywood should be given a reasonable amount of time to implement the proposed changes in the troubled [corporation]."

The Commission made one exception to its remedy of deferring action for two years. It ordered Haywood to cease and desist from serving M-B Industries and ordered Duke Power to begin serving M-B Industries. The order states:

> The Commission . . . concludes that the best candidate for a transferral of a portion of the Haywood service area to another supplier is the M-B Industries plants. One plant is fifty feet away from an alternative supplier (Duke), its sister plant in the same area is already served by that alternative supplier with a satisfactory level of service, and the third plant (Flame Spray) is some 200 yards from Duke's lines. No other single customer in the area affects as many employees, and people, as these plants. Transferral of the M-B Industries plants from Haywood to Duke would relieve the load on the troubled Quebec substation. Transferral of the plants would also make it clear to Haywood,

> and particularly to the Board of Directors of Haywood, the seriousness with which the Commission views the service problems that have been occurring, and the Commission's determination to press for a resolution of the service problems throughout the Haywood service areas. The plants are apparently the only industrial plants in Transylvania County served by Haywood. It [M-B Industries] pays Haywood approximately $4,000 per month for the electric service.

The Court of Appeals reversed the Commission's order requiring Haywood to cease and desist from serving M-B Industries. It reasoned:

> [I]t is apparent . . . that the punitive effect on Haywood EMC of the transfer of its . . . largest commercial ratepayer was a major determinative factor in the Commission's decision to reassign M-B Industries and served as a ground for the Commission's decision to reassign M-B Industries while leaving the similarly affected residential consumers assigned to Haywood.

In re Dennis v. Duke Power Co., 114 N.C. App. 272, 287, 442 S.E.2d 104, 113 (1994). The Court of Appeals held this basis for the Commission's order unlawful because it could not find a legislative directive in N.C.G.S. § 62-110.2(d)(2) or elsewhere that would authorize the Commission to order a reassignment of a highly valuable customer based on the Commission's intent to punish Haywood and to convey to Haywood's management that the Commission viewed the situation before it as a serious one. *Id.* at 287-88, 442 S.E.2d at 113.

The Court of Appeals further held that the nontransfer of the residential complainants was within the Commission's discretion. Based on the whole record, the Court of Appeals concluded that there was sufficient evidence to sustain the nontransfer of these complainants. *Id.* at 289, 442 S.E.2d at 114. It declined to address the Public Staff's constitutional argument on this issue, which invoked the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution, because it held that the Commission erred in transferring M-B Industries to Duke Power. *Id.* at 289-90, 442 S.E.2d at 114.

The Court of Appeals also held that the Commission erred by excluding Gregory L. Booth's proffered testimony regarding the economic impact of a transfer on Haywood. *Id.* at 295-96, 442 S.E.2d at 118.

On 28 July 1994 this Court allowed M-B Industries' petition for writ of certiorari. On 5 October 1994 we allowed Duke Power, Nantahala, and the Public Staff's joint petition for writ of certiorari.

M-B Industries, Duke Power, Nantahala, and the Public Staff argue that the Commission properly transferred electric service from Haywood to Duke Power. We agree, and accordingly we reverse the Court of Appeals on this issue. Nantahala argues that this Court now must address the constitutional argument deemed moot by the Court of Appeals as to whether the Commission erred in refusing to transfer the residential complainants from Haywood. We agree with Nantahala that because we are reversing the Court of Appeals, this issue is no longer moot, and we choose to address it. We agree with the Court of Appeals that the Commission did not err in transferring only M-B Industries, rather than all complainants, to Duke Power. We further hold that the nontransfer of the residential consumers does not violate either the Fourteenth Amendment to the United States Constitution or Article I, Section 19 of the North Carolina Constitution. M-B Industries, Duke Power, Nantahala, and the Public Staff also argue that the Commission properly excluded proffered testimony regarding the economic impact of the transfer on Haywood. We agree, and accordingly we reverse the Court of Appeals on this issue.

[1] The first issue is whether the Commission erred in ordering the transfer of the electric service to M-B Industries' plants from Haywood to Duke Power. The standard of review for decisions of the Commission is as follows:

> The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
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> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

N.C.G.S. § 62-94(b) (1989). The appellate court must "review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C.G.S. § 62-94(c). We have interpreted this statute to mean that the court must "assess whether the Commission's order is affected by errors of law, and . . . determine whether there is substantial evidence, in view of the entire record, to support the position adopted." *State ex rel. Utilities Commission v. Thornburg*, 325 N.C. 463, 472, 385 S.E.2d 451, 456 (1989).

The statute governing the Commission's power to transfer electric service from one supplier to another provides:

> The Commission shall have the authority and jurisdiction, after notice to all affected electric suppliers and after hearing, if a hearing is requested by any affected electric supplier or any other interested party, to order any electric supplier which may reasonably do so to furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, and to order such other electric supplier to cease and desist from furnishing electric service to such premises, upon finding that service to such consumer by the electric supplier which is then furnishing service, or which has the right to furnish service, to such premises, is or will be inadequate or undependable, or that the rates, conditions of service or service regulations, applied to such consumer, are unreasonably discriminatory.

N.C.G.S. § 62-110.2(d)(2) (Supp. 1994). Under this statute the Commission, upon finding that the service of an electric supplier is inadequate or undependable or unreasonably discriminatory, may order the transfer of electric service to another supplier.

Here, as the Court of Appeals correctly noted, the record shows that "the poor quality of electric service arising from the 'troubled Quebec substation' affected the area's individual residential consumers as well as the facilities at M-B Industries." *Dennis*, 114 N.C. App. at 287, 442 S.E.2d at 113. The Commission specifically stated

that Morrow had testified to the difficulties that M-B Industries, a complainant, had experienced. It concluded as a matter of law that "the electric service provided by Haywood EMC to the complainants and to the public witnesses in this proceeding is inadequate and undependable." The statute therefore allows the Commission to order the transfer of electric service of M-B Industries from Haywood to Duke Power.

It is clear from the order that it was not the Commission's sole intention to punish Haywood or to make clear to Haywood that it viewed the problems as serious ones. Viewed as a whole, the order stated several other reasons for making the transfer. The order does not evince a punitive intent; rather, the fashioning of the remedy was based on sound reasoning, aimed at producing better electric service for all complainants. The Commission stated that the transfer would provide relief for the entire area serviced by Haywood. The transfer to Duke Power could be effectuated easily because of the proximity of M-B Industries' plants to Duke Power's service lines. Further, the Commission noted that improved electric service to M-B Industries would benefit its numerous employees and customers. Finally, though the Commission recognized that the most severe remedy would be the transfer of the entire area to another supplier, it fashioned a remedy that would "relieve the load" placed on Haywood while it worked to improve its service to the other complaining consumers. That the Commission commented on the size of M-B Industries as a customer of Haywood and on the incidental implication of impressing Haywood with the seriousness with which it viewed the problems does not render the order invalid under the statute. Because the Commission concluded—based on substantial evidence in view of the whole record—that the electric service provided by Haywood to M-B Industries was inadequate and undependable, it could order the transfer under the statute, and its reasons for doing so were not primarily punitive. Accordingly, we reverse the Court of Appeals on this issue and remand the case for reinstatement of the Commission's order.

[2] The next issue is whether the Commission properly exercised its authority by transferring only M-B Industries, rather than all complainants, to Duke Power. The Court of Appeals held that N.C.G.S. § 62-110.2(d)(2) allows the Commission discretion in determining its remedy. We agree.

N.C.G.S. § 62-110.2(d)(2) grants the Commission "the authority and jurisdiction" to transfer electric service from one supplier to another upon finding either that the service to the complaining consumer is "inadequate or undependable" or that "the rates, conditions of service or service regulations, applied to such consumer, are unreasonably discriminatory." The statute does not mandate the transfer; rather, it gives the Commission the authority and jurisdiction to make the transfer after certain determinations. The language of the statute allows the Commission discretion in fashioning a remedy; therefore, we hold that the Commission may transfer only M-B Industries, rather than all complainants, as long as its action is not capricious or arbitrary. N.C.G.S. § 62-94(b)(6); *see Utilities Commission v. Coach Co.*, 261 N.C 384, 391, 134 S.E.2d 689, 695 (1964). As discussed above, one of the Commission's reasons for transferring only M-B Industries was that such a remedy would reduce Haywood's service demands, thereby facilitating its effort to improve its service to the other complainants. In addition, the Commission ordered Haywood to improve its facilities and its customer services and to file progress reports with the Commission detailing its efforts. There was nothing arbitrary or capricious in the Commission's action. We therefore affirm the Court of Appeals insofar as it affirmed the Commission's order in this regard.

[3] The Public Staff also argued to the Court of Appeals that the Commission's order violated the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. The Court of Appeals considered this issue moot in light of its holding that the Commission erred in transferring M-B Industries. Because we are reversing that holding of the Court of Appeals, we will address the issue.

The Public Staff argues that the Commission's order unreasonably discriminates against the other complainants whose electric service was found to be inadequate, undependable, or unreasonably discriminatory by failing to order a transfer of their electric service to another electric supplier. It contends that the record does not support a rational basis for treating them differently from M-B Industries. We disagree.

We assume, without deciding, that the order creates a classification, subject to equal protection scrutiny. The objective of the Commission's order was to restore acceptable electric service to all complainants. By transferring only M-B Industries, the Commission

hoped to "relieve the load on the troubled Quebec substation" and to allow Haywood "a reasonable amount of time to implement the proposed changes." We conclude that the order was rationally related to the objective of restoring acceptable electric service to all complainants. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58, 101 L. Ed. 2d 399, 409 (1988) ("Unless a statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose."); *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 336 N.C. 657, 680-81, 446 S.E.2d 332, 346 (1994) (noting that the North Carolina cases applying the state and federal Constitutions' Equal Protection Clauses use the same test as the federal courts). The order therefore does not violate the other complainants' right to equal protection of the law.

[4] The next issue is whether the Commission erred by excluding the testimony of Gregory L. Booth regarding the adverse economic impact of a transfer of consumers from Haywood to other electric suppliers. M-B Industries, Duke Power, Nantahala, and the Public Staff argue that this issue is not properly preserved for appellate review because NCEMC, which offered the testimony, made no offer of proof. *See* N.C.G.S. § 1A-1, Rule 43(c) (1990) ("In an action tried before a jury, if an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney shall order a record made of the answer the witness would have given."); *see also* N.C. R. App. P. 10(b)(1) (providing procedure for preserving questions for appellate review). We disagree.

This Court has held that a party must preserve the exclusion of evidence for appellate review by making a specific offer of proof unless the significance of the evidence is ascertainable from the record. *Currence v. Hardin*, 296 N.C. 95, 100, 249 S.E.2d 387, 390 (1978). Further, "the essential content or substance of the witness' testimony must be shown before [this Court] can ascertain whether prejudicial error occurred." *State v. Simpson*, 314 N.C 359, 370, 334 S.E.2d 53, 60 (1985); *see also Nelson v. Patrick*, 73 N.C. App. 1, 7, 326 S.E.2d 45, 49 (1985) (failure to make offer of proof prevents determination of prejudice). Here, in prefiled proffered testimony, Booth stated that he would "evaluate the financial impact which will be imposed on Haywood EMC and its remaining customers if any or all of the service area is transferred to another utility." He stated that he

would testify to his conclusion that "[t]here will be significant and irreparable harm imposed on Haywood EMC and its member/consumers and on NCEMC and its other members if any or all of the service area is transferred to another power supplier." This description of the excluded testimony is sufficiently specific for this Court to determine whether it was properly excluded and if not, whether its exclusion was prejudicial. *See State v. Bryant*, 337 N.C. 298, 310, 446 S.E.2d 71, 77 (1994) (no offer of proof, but evidence ascertainable from transcript; therefore, alleged error preserved for appellate review). We therefore consider this question properly preserved for review.

We note that Haywood on this appeal raises for the first time a constitutional argument on this issue. It contends that a state law, such as N.C.G.S. § 62-110.2, that allows the taking of an electric cooperative's consumers without consideration of the economic impact on the federally funded cooperative violates the Supremacy Clause of the United States Constitution. This constitutional issue is not preserved for appellate review because it was not raised in and addressed by the Commission, nor was it argued to the Court of Appeals. "It is a well established rule of this Court that it will not decide a constitutional question which was not raised or considered in the court below." *Johnson v. Highway Commission*, 259 N.C. 371, 373, 130 S.E.2d 544, 546 (1963). We therefore will not address this argument.

The Court of Appeals held that exclusion of this proffered testimony was error based on public policy grounds and the liberal admissibility standards for evidence in the Commission's proceedings. *Dennis*, 114 N.C. App. at 296, 442 S.E.2d at 118. M-B Industries, Duke Power, Nantahala, and the Public Staff argue, and we agree, that evidence of the economic impact on Haywood of the transfer of a customer to another electric supplier is not relevant under N.C.G.S. § 62-110.2(d)(2). N.C.G.S. § 62-110.2(d)(2) provides as grounds for transfer either that the electric service to a consumer is or will be inadequate or undependable or that the rates, conditions of service, or service regulations are unreasonably discriminatory. The economic impact of a transfer on an electric supplier is not delineated as a ground for consideration in determining whether a transfer to another electric supplier is authorized. Further, it is obvious that rarely, if ever, would an electric supplier benefit economically from the loss of a customer. Such a factor therefore is irrelevant to the Commission's determination of a remedy. *See* N.C.G.S. § 62-65(a)

(1989) ("The Commission may exclude incompetent, irrelevant, immaterial and unduly repetitious or cumulative evidence."). We hold that the Commission properly excluded Booth's testimony.

Accordingly, we affirm the Court of Appeals' decision insofar as it affirmed the Commission's transfer of only M-B Industries, rather than all residential complainants, to Duke Power. We reverse that part of the Court of Appeals' decision that reversed the Commission's order transferring electric service of M-B Industries from Haywood to Duke Power and that reversed the Commission's ruling on the exclusion of the economic impact testimony. The case is remanded to the Court of Appeals with instructions to remand to the Utilities Commission for reinstatement of the Commission's order of 5 October 1992 transferring electric service to M-B Industries from Haywood to Duke Power.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

STATE OF NORTH CAROLINA v. ERIC JOHNSON

No. 266A94

(Filed 28 July 1995)

1. Constitutional Law § 284 (NCI4th)— motion to dismiss privately retained counsel—denial—right to counsel not abridged

There was no merit to defendant's contention that the trial court's denial of his motion to dismiss an attorney privately retained by his family violated his constitutional right to counsel, including the right to waive legal representation and appear *pro se*, since defendant never requested that he be allowed to represent himself at trial; although he requested the removal of the privately retained attorney from his case, he did not express any dissatisfaction with his court-appointed attorney and at no time requested that he also be removed from defendant's case; this distinction negated the inference that defendant was electing to represent himself; and the trial court's inquiry into defendant's reasons for wishing to dismiss the privately retained attorney and as to whether there were any irreconcilable differences between them or impediments to her continued representation of defendant was sufficient.

Am Jur 2d, Criminal Law §§ 764-766.

Accused's right to represent himself in state criminal proceeding—modern cases. 98 ALR3d 13.

2. Evidence and Witnesses § 1070 (NCI4th)— flight—sufficiency of evidence to support instruction

The evidence was sufficient in this homicide prosecution to support the trial court's instruction on flight where the evidence showed that defendant shot his estranged wife in the plain view of her mother; he immediately got into his sister's car and drove away from the crime scene without rendering any assistance to the victim; he did not return to his residence immediately after the shooting; he drove the car to a trailer park, parked it between two trailers, and abandoned it with the keys inside and gasoline in the tank; police issued an all points bulletin for defendant but failed to locate him until approximately twenty-one hours after the crime was committed; at the time of his arrest defendant had been drinking alcohol; and prior to his arrest defendant's sister encouraged him to turn himself in to the police, but defendant made no response and kept drinking beer.

Am Jur 2d, Trial §§ 1333-1335.

3. Criminal Law § 535 (NCI4th)— defendant seen in shackles by jury—curative instructions—defendant not prejudiced

The trial court did not err in denying defendant's motion for a mistrial after the jurors observed him being brought through the courtroom in handcuffs and leg restraints where, prior to the opening of court, defendant was briefly seen in restraints inside the courtroom while being escorted into a room where his restraints were removed; defendant was in no way restrained or shackled during the trial itself; the trial court specifically informed the jury that defendant's conduct had presented no problems which would require any form of restraint in the courtroom; the trial court instructed the jury at least four times not to hold the fact that defendant had been restrained against him in any way; after the corrective instructions the jurors were asked if they would be influenced by what they had seen; and none of the jurors indicated that they had any problems being fair or following the trial court's instructions.

Am Jur 2nd, Trial § 1720.

Propriety and prejudicial effect of gagging, shackling, or otherwise physically restraining accused during course of state criminal trial. 90 ALR3d 17.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Stephens (Donald W.), J., at the 3 January 1994 Criminal Session of Superior Court, Vance County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 10 May 1995.

Michael F. Easley, Attorney General, by Marilyn R. Mudge, Assistant Attorney General, for the State.

J. Henry Banks for defendant-appellant.

PARKER, Justice.

Defendant was tried capitally on an indictment charging him with the first-degree murder of Jacqueline Terry Johnson (victim). The jury returned a verdict finding defendant guilty of first-degree murder. During a capital sentencing proceeding, the jury failed to find the sole aggravating circumstance submitted for its consideration, 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 3 July 1992 the victim was twenty-two years old and was living with her mother, Mary Lou Terry, and the victim's three-year-old daughter at Foster's Trailer Park in Vance County, North Carolina. She was separated from defendant, whom she had married in October 1990.

On 3 July 1992 defendant was living in a utility building behind the home of his sister, Lonnie Johnson, at 518 Hickory Street in Henderson, North Carolina. The victim visited defendant at his sister's home occasionally, and defendant was often seen at Foster's Trailer Park.

Mary Lou Terry testified that she observed defendant driving a blue car through the neighborhood several times during the afternoon of 3 July 1992. At approximately 3:00 p.m. defendant went to Mrs. Terry's door and asked for the victim. The victim was not home, and defendant left.

The victim arrived home at approximately 4:30 p.m. on 3 July 1992. She left home for the evening with her sister at approximately 6:00 p.m. Mrs. Terry remained at home all evening, babysitting her three-year-old granddaughter. At approximately 1:00 a.m. on 4 July 1992, Mrs. Terry was watching television when she noticed the lights of a car driving up to the trailer. Mrs. Terry thought that her daughter was arriving home and went to open the door for her.

Mrs. Terry's front yard was illuminated by a light on her front porch. When Mrs. Terry opened the door, she saw defendant coming across her yard shooting at the victim, who had gotten out of her car and had walked around the back to the passenger side. The victim fell facedown into the mud in the front yard of her mother's trailer. Mrs. Terry ran outside and tried to get between the victim and defendant, but defendant pushed her down on the ground.

When Mrs. Terry got up off the ground, she did not see defendant. She went over to her daughter and turned her over. She held her daughter in her arms and cleaned the mud off her face. After a few moments the victim said, "Momma, I've been shot." At that time Mrs. Terry saw defendant walk around from behind her and point a pistol at the victim's head. She looked up at defendant and said, "Eric, . . . you done shot her once. Don't shoot her no more. . . . Please don't shoot her no more." Defendant ignored Mrs. Terry and shot the victim in the head. Defendant then turned from the victim, walked to his sister's blue car, and drove away from the scene of the murder.

An autopsy of the victim's body was conducted by Dr. Deborah L. Radisch, Associate Chief Medical Examiner for the State of North Carolina. Dr. Radisch testified that the autopsy revealed entry wounds to the right eyelid and right chest. One bullet entered the victim's skull through the right eye, causing multiple fractures of the skull and tears and bruising of the victim's brain tissue. This projectile was recovered from the victim's skull after the brain was removed during the autopsy. A second bullet entered the victim's chest on her right side near her armpit. This bullet pierced the victim's right lung and tore the victim's spinal cord in half before lodging in her spine. This second bullet was also recovered during the autopsy.

Dr. Radisch testified that the victim's death resulted from these two gunshot wounds. She was unable to determine which wound was sustained first or the time interval between the shots. Dr. Radisch classified both wounds as "distant range wounds" which were most likely inflicted from a distance of two and a half to three feet.

Curtis Brame of the Vance County Sheriff's Department testified that he arrived at the murder scene at approximately 1:00 a.m. on 4 July 1992. He observed the victim's body lying in the front yard of Mrs. Terry's trailer. Mrs. Terry was extremely upset when he arrived. Mrs. Terry informed Sergeant Brame that defendant was the person who shot her daughter, and the police put out an all-points bulletin for defendant's arrest. This all-points bulletin included a description of both defendant and the car he was driving the night of the murder.

Lieutenant John Shockley arrived at the murder scene at approximately 1:30 a.m. on 4 July 1992. He took photographs of the victim's body and directed a search of the murder scene for weapons and bullets. Lieutenant Shockley arrested defendant at approximately 10:00 p.m. on 4 July 1992 near his residence at 518 Hickory Street in Henderson. Defendant, who was intoxicated at the time of his arrest, did not resist the police and agreed to talk with them.

Mrs. Terry's distress over the death of her daughter prevented Lieutenant Shockley from interviewing her in detail for several weeks after the murder. Lieutenant Shockley interviewed Mrs. Terry on 29 July 1992, at which time she made a statement implicating defendant in the murder and describing the shooting.

Defendant's evidence tended to show that the wound to the victim's head was not inflicted from close range. Dr. Page Hudson, the former Chief Medical Examiner for the State of North Carolina, testified that the lack of residue on the victim's face suggested the wound to her head was a "distant range wound" occurring at a distance of at least three to five feet.

Lonnie Johnson, defendant's sister, testified on defendant's behalf. Ms. Johnson testified that defendant was acting normal when she loaned him her car at approximately 4:30 p.m. on 3 July 1992. She did not see him again that day. She next saw defendant near his home on the morning of 4 July 1992, just prior to his arrest. Ms. Johnson testified that defendant was "not himself" at that time. Defendant had been drinking and was crying. Ms. Johnson led defendant to a nearby house and called other members of their family. Defendant appeared to be in a daze and did not respond when Ms. Johnson suggested that he go to the magistrate's office.

On cross-examination by the State, Ms. Johnson admitted that on the night of the murder, she received a telephone call from an unidentified person informing her that defendant had left her car with the

keys inside it parked between two trailers in Brookhaven Trailer Park. This telephone call caused Ms. Johnson to feel something was wrong at Foster's Trailer Park. A friend drove her by Mrs. Terry's trailer in Foster's Trailer Park, where she observed a body covered by a sheet lying in the yard. Ms. Johnson left Foster's Trailer Park and retrieved her car from Brookhaven Trailer Park. She stated that she did not know that the victim was Jacqueline Terry Johnson until she was informed of the victim's identity by Lieutenant Shockley.

Gerald Lemay also testified on behalf of defendant. Mr. Lemay lived three trailers away from the victim in Foster's Trailer Park. He testified that he returned home around midnight on the evening of 3 July or the morning of 4 July 1992 and found defendant parked in his yard. Mr. Lemay and defendant sat in the car defendant borrowed from his sister, talking and drinking beer for approximately thirty minutes. Mr. Lemay testified that although defendant had been drinking, he was acting normal. During the time the two men sat in the car, defendant did not mention the victim or threaten her in any way. Mr. Lemay left defendant in the car and went to buy beer with some other friends. When Mr. Lemay returned forty-five minutes later, he saw Mrs. Terry standing in her yard and the victim lying on the ground. Mr. Lemay testified that defendant was no longer at his trailer when he returned.

Dr. Thomas Brown, who was accepted by the court as an expert in "addiction psychiatry," testified on behalf of the defense. Dr. Brown testified that defendant had been addicted to alcohol since 1989. Dr. Brown was of the opinion that as a result of his alcohol addiction, at the time of the murder defendant was suffering from chronic and acute impairment of the ability to exercise judgment and to control his impulses. Dr. Brown testified that at the time of the murder, defendant's ability to plan was substantially impaired and defendant lacked the capacity to form the specific intent to kill.

[1] In his first assignment of error, defendant contends that the trial court erred by failing to dismiss his privately retained counsel upon defendant's stated request in open court. At trial defendant was represented by Desiree W. Crawford, an attorney privately retained by his family, and by J. Henry Banks, a court-appointed attorney. On 3 January 1994, just prior to jury selection, defendant moved the court to fire Ms. Crawford. Defendant claimed that Ms. Crawford had promised to work out a deal with the prosecutor whereby defendant would receive a "term sentence" of a number of years in prison as

punishment for this crime in return for a guilty plea. Defendant indicated a desire to dismiss Ms. Crawford because she had failed to obtain the plea and now he was facing the possibility of receiving the death penalty. Defendant told the trial court that he did not see any reason to continue to pay Ms. Crawford for her services. Defendant did not express any other dissatisfaction with Ms. Crawford's services.

The trial court questioned Ms. Crawford about defendant's complaints. Ms. Crawford informed the court that she had attempted on two occasions to work out a plea bargain arrangement for defendant whereby he would plead guilty to first-degree murder and receive a life sentence. She stated that on both occasions defendant had initially accepted the terms of the plea bargain but later refused to accept the plea when brought into court. Both Ms. Crawford and Mr. Banks testified that there were no irreconcilable differences between defendant and Ms. Crawford nor were there any impediments to the continuation of Ms. Crawford's representation of defendant. The trial court made findings that defendant had set forth no legal or factual basis for Ms. Crawford's dismissal and denied defendant's motion.

Defendant argues that this ruling forced him to retain unwanted counsel. Defendant contends that this violated his constitutional right to counsel, which includes the right to waive legal representation and appear *pro se* on his own behalf. Defendant contends that the trial court's questioning about his desire to dismiss Ms. Crawford was insufficient because the trial court did not make any findings as to whether his desire to dismiss her was made with the full understanding of his right to counsel.

Assuming *arguendo* that the trial court's denial of defendant's motion to dismiss his privately retained attorney was error, we conclude that the ruling did not violate defendant's constitutional right to counsel. A criminal defendant has a constitutional right to the assistance of counsel in his defense, which implicitly includes the right to refuse the assistance of counsel and conduct his own defense. *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975); *State v. Hutchins*, 303 N.C. 321, 337, 279 S.E.2d 788, 798-99 (1981). If a defendant desires to proceed *pro se*, he or she may not be forced to accept representation by unwanted counsel. *State v. Gerald*, 304 N.C. 511, 516, 284 S.E.2d 312, 315 (1981); *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980).

N.C.G.S. § 15A-1242 sets forth the prerequisites necessary before a defendant may waive his constitutional right to counsel and represent himself at trial as follows:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (1988).

However, in *State v. Hutchins*, 303 N.C. at 339, 279 S.E.2d at 800, this Court stated that "[g]iven the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention." In *State v. Gerald* this Court concluded that

> although the better practice when a defendant indicates problems with his counsel is for the court to inquire whether defendant wishes to conduct his own defense, it is not reversible error for the court not to do so when there has been no intimation that defendant desired to represent himself.

304 N.C. at 518, 284 S.E.2d at 317. Only if a defendant clearly expresses his desire to have counsel removed and to proceed *pro se* is the trial court obligated to make further inquiry pursuant to N.C.G.S. § 15A-1242 to determine if defendant understands the consequences of his decision and voluntarily and intelligently wishes to waive his right to the representation of counsel. *Id.* at 519, 284 S.E.2d at 317. In the absence of such an expression by defendant of a desire to proceed *pro se*, when faced with a claim of conflict between defendant and his attorney, the trial court must determine only that the defendant's present counsel is able to render competent assistance and that the nature of the conflict will not render such assistance ineffective. *State v. Thacker*, 301 N.C. at 353, 271 S.E.2d at 255.

In the instant case defendant never requested that he be allowed to represent himself at trial. Although he requested the removal of Ms. Crawford from his case, he did not express any dissatisfaction with Mr. Banks, his court-appointed attorney, and at no time requested that he also be removed from defendant's case. This distinction negates the inference that defendant was electing to represent himself in this matter. The trial court's inquiry into defendant's reasons for wishing to dismiss Ms. Crawford and as to whether there were any irreconcilable differences between them or impediments to her continued representation of defendant was sufficient.

As we have concluded that the assumed error did not rise to the level of constitutional error, the defendant has the burden of showing that 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). We conclude that defendant has failed to meet this burden, and this assignment of error is overruled.

[2] Next, defendant argues that there was insufficient evidence to support the trial court's jury instruction on flight as evidence of guilt. Defendant argues that there was no evidence presented at trial to establish what efforts were made to locate defendant the night of the murder. He claims that the evidence merely shows that he left the scene of the crime and was apprehended the next morning near his home. Relying on *State v. Thompson*, 328 N.C. 477, 402 S.E.2d 386 (1991), defendant argues that the mere evidence that he left the scene of the crime was not enough to support an instruction on flight absent some evidence that he took steps to avoid apprehension. We conclude that there was sufficient evidence to support the trial court's jury instruction on flight.

In accordance with the North Carolina Pattern Instructions, the trial court instructed the jury on flight as follows:

> Now, ladies and gentlemen, the State contends that the defendant left the scene of the Terry residence where Jacqueline Terry Johnson died, and fled. I instruct you that evidence of flight may be considered by you, together with all other facts and circumstances in this case, in determining whether the combined circumstances amount to an admission or show a consciousness of guilt on the part of the defendant. However, proof of this circumstances [sic] is not sufficient in itself to establish a defendant's guilt. Further, this circumstance has no bearing whatsoever on the question of whether or not the defendant acted with premed-

itation and deliberation; therefore, it must not be considered by you as evidence of premeditation or of deliberation.

"[A] trial court may not instruct a jury on defendant's flight unless 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.' " *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 435 (1990) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. at 490, 402 S.E.2d at 392.

The evidence in the instant case showed that defendant shot his estranged wife in the plain view of her mother. He immediately got into his sister's car and drove away from the crime scene without rendering any assistance to the victim or seeking to obtain any medical aid for her. He did not return to his residence immediately after the shooting. He drove his sister's car to Brookhaven Trailer Park, where he parked it between two trailers. He abandoned the car with the keys inside and with gasoline in the tank. Some unknown person later called defendant's sister and told her where she could find her car. From this call defendant's sister thought something had happened at Foster's Trailer Park.

When the police arrived at the scene of the murder, they secured the scene and searched the surrounding area for evidence. Mrs. Terry gave the police a description of defendant, and the police issued an all-points bulletin describing defendant and the car he was driving. The police failed to locate defendant near the area of the crime scene during the hours following the murder.

Defendant was apprehended the evening of 4 July near his home. At the time of his arrest, defendant had been drinking alcohol. Prior to his arrest, his sister encouraged defendant to turn himself in to the police, but defendant made no response and kept drinking beer.

This evidence clearly permits an inference that defendant not only left the crime scene but took some action to avoid apprehension. The evidence was sufficient to support the trial court's instruction on flight, and this assignment of error is overruled.

[3] In his final assignment of error, defendant contends the trial court erred in denying his motion for a mistrial after jurors observed him being brought through the courtroom in handcuffs and leg restraints.

The trial court conducted an extensive *voir dire* on defendant's motion. The evidence produced during the *voir dire* revealed that defendant was routinely placed in handcuffs and leg restraints when transported to the court from the jail. Several minutes before court was scheduled to begin on Monday, 10 January 1994, defendant was escorted by police officers through the courtroom and into a room in the courthouse where his handcuffs and leg restraints were removed. All the jurors were present inside the courtroom when defendant was escorted through the courtroom, and defendant was visible for a distance of approximately fifty feet. Upon questioning by the trial court, each juror indicated that he or she had seen defendant in handcuffs and leg restraints.

Defendant contends that in conjunction with the trial court's instruction on flight, the denial of his motion for a mistrial deprived him of his right to a fair trial. We reject defendant's argument for the following reasons.

N.C.G.S. § 15A-1061 provides as follows:

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

N.C.G.S. § 15A-1061 (1988). "The decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of that discretion." *State v. Boyd*, 321 N.C. 574, 579, 364 S.E.2d 118, 120 (1988). A trial judge does not abuse his discretion by polling the jurors and is entitled to consider their answers in weighing the evidence and in ruling on the motion for a mistrial. *State v. Boykin*, 78 N.C. App. 572, 574, 337 S.E.2d 678, 680 (1985).

Applying the foregoing principles, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a mistrial in this case. The trial court gave corrective instructions to the jurors about this incident and questioned them in order to determine if they were still able to give defendant a fair trial.

The trial court explained to the jury that no one accused of first-degree murder is entitled to bond and that all such defendants are subject to the same rules governing transportation to and from the

courtroom. The trial court reminded the jury that defendant had denied guilt, was presumed innocent, and was under no duty to prove his innocence. The trial court further told the jury that the defendant's conduct had not presented any problems that would require any form of restraint in the courtroom.

The trial court instructed the jury at least four times not to hold the fact that defendant had been restrained against him in any way. Jurors are presumed to follow the instructions given to them by the court. *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 (1995), *cert. denied*, —— U.S. ——, —— L. Ed. 2d —— 64 U.S.L.W. 3241 (1995); *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 602 (1993).

After the trial court gave corrective instructions to the jurors, they were then asked if they would be influenced by what they had seen such that they could no longer be fair or follow the trial court's instructions regarding defendant's rights and the State's obligations in this case. None of the jurors indicated that they had any problems being fair or following the trial court's instructions.

In *State v. Montgomery*, 291 N.C. 235, 229 S.E.2d 904 (1976), this Court determined the trial court correctly denied a defendant's motion for a mistrial when he was seen by several jurors in handcuffs while he was being transported from the jail to the courthouse. In that case the Court stated:

> It is common knowledge that bail is not obtainable in all capital cases and the officer having custody of a person charged with a serious and violent crime has the authority to handcuff him while escorting him in an open, public area.

Id. at 252, 229 S.E.2d at 914.

Although the defendant in *Montgomery* was observed in restraints by several jurors outside the courtroom, the same reasoning is applicable to the present case. In this case, prior to the opening of court on 10 January 1994, defendant was briefly seen in restraints inside the courtroom while being escorted into a room where his restraints were removed. Defendant was in no way restrained or shackled during the trial itself, and the trial court specifically informed the jury that defendant's conduct had presented no problems which would require any form of restraint in the courtroom.

On the record before us, we conclude that the trial court properly determined that there was no "conduct inside or outside of the courtroom resulting in substantial and irreparable prejudice" to defendant pursuant to N.C.G.S. § 15A-1061. The trial court did not abuse its discretion by denying defendant's motion for a mistrial, and this assignment of error is overruled.

Defendant expressly abandoned his other five assignments of error pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure.

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

NO ERROR.

HARRY M. LEETE, ALBERT SEARS BUGG, THOMAS HOLT, CLAUDE F. BURROWS, II, CECIL CRAIG ALLEN, CHARLES A. BENNETT, WILLIAM S. BUGG, JAMES E. CRENSHAW, JR., AND THE OTHER TAXPAYERS OF WARREN COUNTY v. THE COUNTY OF WARREN, A BODY POLITIC AND CORPORATE; LUCIOUS HAWKINS, CHAIRMAN OF THE BOARD OF COMMISSIONERS OF WARREN COUNTY; O.L. MEEK, WILLIAM T. SKINNER, III, JAMES BYRD AND GEORGE E. SHEARIN, MEMBERS OF THE BOARD OF COMMISSIONERS OF WARREN COUNTY; AND SUSAN W. BROWN, FINANCE OFFICER OF WARREN COUNTY

No. 308A94

(Filed 28 July 1995)

Constitutional Law § 131 (NCI4th)— county manager—severance pay—prohibited special emolument

An amount equal to six weeks pay ($5,073.12) authorized by a board of county commissioners to be paid to the county manager upon his voluntary resignation after nine years of service as county manager was a special emolument not in consideration of public service which violated Article I, Section 32 of the N.C. Constitution where the board referred to the payment as "severance pay"; the county manager had been paid all compensation due him for services rendered; there was no written contract providing for severance pay; and it is clear that the compensation was not for prior services rendered.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 258 et seq.

Justice WHICHARD dissenting.

Justices FRYE and WEBB join in this dissenting opinion.

Appeal as of right by plaintiffs pursuant to N.C.G.S. § 7A-30(1) from the unanimous decision of the Court of Appeals, 114 N.C. App. 755, 443 S.E.2d 98 (1994), reversing an order entered by Ellis (B. Craig), J., on 25 March 1993 in Superior Court, Warren County. Heard in the Supreme Court 15 March 1995.

Banzet, Banzet & Thompson, by Julius Banzet, III and Lewis A. Thompson, III, for plaintiff-appellants.

Michael B. Brough & Associates, by Michael B. Brough and Charles T. Johnson, Jr., for defendant-appellees.

ORR, Justice.

Plaintiffs instituted this action on 22 February 1993, alleging that the Warren County Board of Commissioners ("the Board") unlawfully authorized severance pay in the amount of $5,073.12 to Mr. Charles Worth upon his voluntary resignation after nine years of service as County Manager.

Plaintiffs sought and obtained a temporary restraining order on 22 February 1993, preventing the Board from making the payment to Mr. Worth. The defendants filed an answer on 22 March 1993. On 23 March 1993, plaintiffs' motion for a preliminary injunction came on for hearing which was transformed into a hearing on the merits by consent of the parties. On 25 March 1993, the trial court entered an order permanently enjoining the Board from making the payment to Mr. Worth. Defendants appealed to the North Carolina Court of Appeals, which reversed the trial court's ruling. Plaintiffs filed notice of appeal of right with this Court based upon the substantial constitutional issue raised. N.C.G.S. § 7A-30(1) (1989).

The minutes of the 1 February 1993 meeting of the Board show that during the executive session of its regular meeting, Charles Worth announced his resignation from the County Manager position effective 1 March 1993 to accept employment in the office of the newly elected representative from the First Congressional District. The Board accepted Mr. Worth's resignation. Although it is not reflected in the 1 February meeting minutes, the complaint subsequently filed in this action alleges, and the defendants admitted in

their answer, that at the same meeting, Mr. Worth requested "payment of an additional sum equal to three months salary." The Board voted unanimously to pay Mr. Worth "six weeks of severance pay" totalling $5,073.12. Returning to open session, the Board announced Mr. Worth's resignation, and the minutes of this meeting reflect that the Board's chairman then "expressed gratitude to Mr. Worth for the quality of service he has rendered to Warren County during his nine-year tenure."

Subsequently, at the mid-monthly meeting of the Board on 17 February 1993, several citizens appeared before the Board to voice opposition to the granting of severance pay to Mr. Worth. Supporters of Mr. Worth were also present, one of whom indicated that the Board may have called the payment by the wrong name and suggested that it be considered as pay to Mr. Worth for "meritorious service." During the executive session which followed the 17 February 1993 regular meeting, one member of the Board, after rethinking his position on the propriety of granting the severance pay, made a motion to rescind the motion made at the 1 February meeting to grant six weeks' "severance pay" to Mr. Worth. The motion failed for lack of a second. As a result, plaintiffs filed this action seeking to enjoin the Board's action to follow through on its decision to pay Mr. Worth the announced severance pay.

Plaintiffs contend that the proposed payment in this case constitutes an unlawful gratuity and an "illegal and wrongful depletion of public funds" on the grounds that the defendants' proposed payment of "severance pay" to Mr. Worth violates Article I, Section 32 of the North Carolina Constitution. Article I, Section 32 provides as follows: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. Const. art. I, § 32. Thus, by its definition, Section 32 precludes exclusive or separate emoluments except "in consideration of public services." *See Brumley v. Baxter*, 225 N.C. 691, 36 S.E.2d 281 (1945).

Section 32 concerning emoluments dates from 1776 deriving "originally from a section of the Virginia Declaration of Rights." *See* John V. Orth, *The North Carolina State Constitution: A Reference Guide* 74 (1993). This section's immediate predecessor, which also prohibited exclusive emoluments and privileges, was Article I, Section 7. *See* 5 N.C. Index 4th *Constitutional Law* § 133 (1990).

It is well settled that absent evidence to the contrary, it will always be presumed "that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." *Huntley v. Potter*, 255 N.C. 619, 628, 122 S.E.2d 681, 686-87 (1961); *accord, Painter v. Wake County Board of Education*, 288 N.C. 165, 178, 217 S.E.2d 650, 658 (1975). This presumption places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence. *Id.* In the case *sub judice*, the plaintiffs have met their burden.

The Legislature has vested county boards of commissioners with broad discretion to direct fiscal policy for the county, N.C.G.S. § 153A-101 (1991), and with specific authority to fix compensation for all county officers, N.C.G.S. § 153A-92 (1991). The county manager is appointed by the board of county commissioners to act as the chief administrator of county government and serves at its pleasure. N.C.G.S. § 153A-82 (1991). Mr. Worth, as a county manager, held a public office; as in other jurisdictions, in North Carolina, "a public office is not created for the benefit of the holder thereof. It is created for the purpose of carrying on the operations of government." *De Marco v. Bd. of Chosen Freeholders*, 36 N.J. Super. 382, 386, 115 A.2d 635, 637 (1955), *aff'd*, 21 N.J. 136, 121 A.2d 396 (1956). "The emoluments of office are presumed to be nothing more than an equivalent for the labor it imposes." *Id.* Thus, the right of a public officer to receive compensation can only arise out of the rendition of the public services related to his office.

In this case, however, the compensation at issue was labeled as severance pay. "Severance pay" is defined as

> [p]ayment by an employer to employee beyond his wages on termination of his employment. Such pay represents a form of compensation for the termination of the employment relation, for reasons other than the displaced employee's misconduct, *primarily to alleviate the consequent need for economic readjustment but also to recompense the employee for certain losses attributable to the dismissal.*

Black's Law Dictionary 1374 (6th ed. 1990) (emphasis added).

Plaintiffs argue that, in the instant case, Mr. Worth sought and the Board granted additional compensation in excess of the compensation for services previously rendered. Here, the defendants admitted

in their answer that all compensation due Mr. Worth under the terms of his employment had been paid. Defendants, nevertheless, contend that Mr. Worth was being permissibly compensated in consideration of previously rendered public services. The position advocated by defendants is directly contradicted by the record. The specific delineation by the Board of the $5,073.12 as "severance pay" and by their admission in their answer that Mr. Worth had been paid all compensation due him for services rendered negates any such argument.

While numerous cases over the years have interpreted Article I, Section 32, few appear to have any direct factual similarity to the case *sub judice*. The principle case on which plaintiffs rely is *Brown v. Comrs. of Richmond County*, 223 N.C. 744, 28 S.E.2d 104 (1943). In *Brown*, the plaintiff was elected in 1938 to the two-year term of office of Judge of the Recorder's Court of Richmond County. In 1939, the General Assembly passed a local act abolishing the Recorder's Court. Then in 1941, the General Assembly passed an act, chapter 11 of the Private Laws of 1941, requiring the Richmond County Board of Commissioners to pay to the plaintiff the salary that plaintiff would have earned had the General Assembly not abolished his office. The county refused, and plaintiff filed a lawsuit. The issue before this Court was whether the General Assembly could legally authorize the Richmond County Board of Commissioners to pay the plaintiff his salary accruing after the date the Recorder's Court ceased to exist. Interpreting Article I, Section 7, the predecessor to Article I, Section 32 under consideration here, this Court held that the plaintiff was not entitled to receive the payment because such compensation would amount to a constitutionally prohibited gift or gratuity of public money.

> [T]he Legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay. Nor may it lawfully authorize a municipal corporation to pay gifts or gratuities out of public funds.

Brown, 223 N.C. at 746, 28 S.E.2d at 105-06 (citations omitted). Continuing, the *Brown* court reasoned that

> [a] municipality cannot lawfully make an appropriation of public moneys except to meet a legal and enforceable claim, and can make no payment upon a claim which exists merely by reason of some moral or equitable obligation which a generous, or even a

just, individual, dealing with his own moneys, might recognize as worthy of some reward.

Id.

We find that the similarities between *Brown* and this case are compelling. In *Brown*, the plaintiff was to be compensated for duties that were not performed. Here, Mr. Worth also was to be compensated for services not performed. Defendants argue and the Court of Appeals found *Brown* distinguishable from the case at bar, reasoning that Richmond County was being directed by the General Assembly to make a payment not "in consideration of public services" because the services would never be rendered. The Court of Appeals concluded, in the case *sub judice*, that because Mr. Worth had served the County for nine years, it was permissible to compensate him for services previously rendered. As we stated earlier, the record clearly reflects that the compensation was not for prior services rendered. Mr. Worth was paid all benefits due him, including accrued annual leave in the amount of $4,227.60.

Salary, pension, insurance and similar benefits received by public employees are generally not unconstitutional exclusive emoluments and privileges. They constitute compensation in consideration of services rendered. *Harrill and Bird v. Retirement System*, 271 N.C. 357, 156 S.E.2d 702 (1967); *Insurance Company v. Johnson, Comr. of Revenue*, 257 N.C. 367, 126 S.E.2d 92 (1962); *Bridges v. City of Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942). Mr. Worth worked one month after giving notice of his resignation and received all compensation due him under the terms of his employment with the County. Any additional compensation would be compensation beyond that due for services rendered and, thus, constitutionally impermissible.

The Court of Appeals' reliance on *Brumley v. Baxter*, 225 N.C. 691, 36 S.E.2d 281, and *Hinton v. State Treasurer*, 193 N.C. 496, 137 S.E. 669 (1927), to justify the proposed appropriation in this case is misplaced. Both of those cases dealt with public funds being spent for veterans. In *Brumley*, the City of Charlotte proposed to donate valuable real property for the purpose of providing recreational facilities for persons who were then serving in the armed forces or were World War II veterans. The facilities were to be permanent and available for use for many years. In *Hinton*, the Legislature enacted a law for the purpose of making loans with favorable terms, secured by mortgages, to World War I veterans to assist them in acquiring homes. Essentially, the issue in both cases was whether such emoluments to the veterans

were for a public purpose as contemplated by Article I, Section 7 (now Section 32), if such payment were made for past services rendered. This Court held that such emoluments were for a public purpose even though they were made for previously rendered services, reasoning that

> "[s]ince the dawn of civilization the nations of the earth have always recognized an obligation to those of its citizens who bore arms in their defense. . . . Appropriate recognition of it has always served to encourage patriotism and the promotion of the public welfare." [*Hinton*, 193 N.C. at 505, 137 S.E. at 674.] "Services rendered in such a cause must necessarily be a public service." *State v. Clausen*, 113 Wash. 570[, 580, 194 P. 793, 796 (1921).]

Brumley, 225 N.C. at 696-97, 36 S.E.2d at 285.

To say that the instant case is comparable to circumstances surrounding the emoluments issue raised in *Brumley* and *Hinton* is without merit. Here, the compensation authorized was not for prior public service, nor does severance pay for a county manager resigning voluntarily to take a more lucrative position equate with providing benefits to veterans who had served this country in time of war.

Defendants next attempt to bolster their argument in favor of the proposed payment by the fact that the General Assembly has authorized severance pay to state employees under circumstances of a reduction-in-force or the closing of a State institution. *See* N.C.G.S. § 143-27.2 (1993). In this case, "severance pay" as authorized by the statute is not applicable. Here, the Legislature has not authorized the expenditure of public funds in the nature of severance pay to public employees who voluntarily resign their position, nor is this a situation in which Mr. Worth is in need of economic readjustment assistance because he left his position for an advancement opportunity. At the time Mr. Worth was appointed to his position, the Board entered no agreement with Mr. Worth for severance pay in the event he voluntarily relinquished his position. In fact, Mr. Worth had no written employment contract with Warren County. Because there was no written contract providing for severance pay or additional compensation beyond his salary for services rendered, the "severance pay" which Mr. Worth seeks is no more than a request for a gratuity, which the Board had no authority to pay. Any additional compensation to Mr. Worth would be without consideration and represents a claim which Mr. Worth could not enforce either in law or in equity.

The wisdom of prohibiting such additional compensation for a public servant official upon his voluntary resignation, absent a contract stating otherwise, is grounded in the interest of good government and founded on sound reasons of public policy. First, the public is protected by restraining those in office from taking advantage of their positions and official influence to unduly secure added compensation not contemplated and to which they were not entitled when they were selected for and accepted office. Second,

> [t]he funds of a municipality are necessarily, directly or indirectly, raised by taxation. Consequently, the expenditure of money by a municipality for private purposes does or may necessarily result in the taking of the property of individuals under the guise of taxation for other than public uses. In such a case it can make no difference that no immediate provision of taxes is made. The use of public funds for private purposes increases the burden of taxation as certainly as if a tax for a private purpose was directly levied.

Brown, 223 N.C. at 746, 28 S.E.2d at 106.

While we in no way imply that the Board's action represents anything other than an attempt to generously reward Mr. Worth for a job well done, it falls well beyond the bounds of an acceptable retirement present. Thus, for the reasons set forth in this opinion, we hold that the proposed payment of $5,073.12 to Mr. Worth upon his resignation does violate Article I, Section 32 of the North Carolina Constitution. Accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's order.

REVERSED.

Justice WHICHARD dissenting.

The majority acknowledges, but relegates to insignificance, the central and controlling facts that when the defendant-board voted to make the payment in question, the recipient had been a county employee for nine years, was still a county employee, and was scheduled to remain one for a brief period. Given these undisputed facts, the conclusion that the payment was not in consideration of public service is untenable. The defendant-board unquestionably has the authority to set the compensation of its officers. N.C.G.S. § 153A-92 (1991). That is what it has done. The payment constitutes a mere adjustment in the recipient-employee's salary—nothing more, nothing

less. The fact that it was voted near the end of his service to the county is devoid of legal or constitutional significance.

The fact that the recipient had been paid all he was due under prior board action likewise lacks legal or constitutional significance. As the Court of Appeals opinion states, "the primary inquiry under Article I, [Section] 32 is not whether the recipient has a legal or enforceable claim against the government entity granting the benefit, but rather, whether the governmental entity took such action in consideration of the recipient's public service." *Leete v. County of Warren*, 114 N.C. App. 755, 759, 443 S.E.2d 98, 101 (1994). The defendant-board was statutorily empowered to adjust the recipient's salary for the brief period of his service that remained, and that is what it has done. Its choice of terminology ("severance pay"), while perhaps politically unwise and unfortunate, does not render the payment any less in fact "in consideration of public service."

Brown v. Comrs. of Richmond County, 223 N.C. 744, 28 S.E.2d 104 (1943), on which the majority relies in part, is neither on point nor similar. There the recipient of public funds was paid the salary he would have received had the office he once held not been abolished. It is clear beyond peradventure that the recipient there performed no public service as consideration for the sum received, in that the office in which he would have performed such service was nonexistent during the period for which the sum was appropriated. By contrast, when the defendant-board voted to pay the sum at issue here, the recipient had been fulfilling the duties of his public position for nine years, was still fulfilling them, and was to continue to fulfill them for a brief period in the future. The payment thus constituted a mere adjustment, statutorily authorized and constitutionally permissible, in the salary formerly set for the recipient's service to the county.

If the defendant-board had made an appropriation to someone hired for the congressional position who at the time was not an employee of the county, such a payment would have constituted a special emolument not in consideration of public service. That is not the case, however. As a county employee, the recipient was entitled to request, and the board was empowered to grant, an adjustment in the salary paid him for his services. The conclusion that the increase in salary gives the recipient compensation without consideration is unsupported by the record and divorced from reality.

Any perceived folly in the payment is not properly this Court's concern. As the majority acknowledges, the presumption is that pub-

lic officials discharge their duties in good faith and in accord with the spirit and purpose of the law. *Painter v. Board of Education*, 288 N.C. 165, 178, 217 S.E.2d 650, 658 (1975); *Huntley v. Potter*, 255 N.C. 619, 628, 122 S.E.2d 681, 686-87 (1961). The record here contains evidence that supports this presumption, in that the chair and one member of the defendant-board expressed gratitude to the recipient "for the quality of service he had rendered to Warren County during his nine-year tenure." There is no evidence that contravenes the presumption. The payment thus is both constitutional and legal, and its wisdom or the lack thereof is properly for the voters of Warren County to determine in the electoral process. In addition to lacking constitutional or legal merit, the majority's decision constitutes an intervention, unwarranted and unwise, in matters properly left to the discretion of duly elected county officials and ultimately to the voters at whose sufferance they serve.

Judge John C. Martin's opinion for the Court of Appeals is well reasoned, well written, and correct. I would affirm it in all respects, and I therefore dissent.

Justices FRYE and WEBB join in this dissenting opinion.

DUNES SOUTH HOMEOWNERS ASSOCIATION, INC. v. FIRST FLIGHT BUILDERS, INC.

No. 3A95

(Filed 28 July 1995)

1. Housing, and Housing Authorities and Projects § 74 (NCI4th)— time-share condominium—developer not exempted from maintenance expenses

A Supplemental Declaration of Covenants and Restrictions filed by defendant time-share developer was ineffective to exempt it from paying maintenance assessments where defendant had previously executed and recorded a declaration of unit ownership, which submitted the project to Chapter 47A of the General Statutes. Defendant was thus bound under N.C.G.S. § 47A-12 to contribute pro rata toward the expenses of administration and maintenance of the common areas and, in light of the purposes behind Chapter 47A and the language of N.C.G.S.

§ 47A-12, the legislature did not intend to allow a developer, as a unit owner, to unilaterally exempt itself from the payment of its pro rata share of the maintenance expenses for the common areas.

Am Jur 2d, Condominiums and Co-operative Apartments § 34.

2. Seals § 1 (NCI4th)— condominium declaration of covenants—statute of limitations for maintenance assessments—document under seal

A Court of Appeals holding that a portion of plaintiff's claimed condominium maintenance assessment was time barred through application of the three-year statute of limitations for actions based on contract was reversed because the Declaration of Covenants constituted an instrument under seal subject to the ten-year statute of limitations contained in N.C.G.S. § 1-47(2). While technically not a deed, the Declaration did affect an interest in land, and in certain areas of the law, an instrument under seal is required. Furthermore, the terms of the declaration indicate an intent that it be an instrument under seal.

Am Jur 2d, Seals § 2.

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 117 N.C. App. 360, 451 S.E.2d 636 (1994), vacating an order granting plaintiff's motion for summary judgment entered by Watts, J., at the 27 November 1993 Civil Session of Superior Court, Dare County. Discretionary review of an additional issue allowed by the Supreme Court on 9 February 1995. Submitted on 11 May 1995 without oral argument, by motion of the parties, pursuant to Rule 30(d) of the North Carolina Rules of Appellate Procedure.

Aycock, Spence & Butler, by Charlie Aycock and Betsy Butler, for plaintiff-appellant.

Defendant-appellee did not file a brief.

Michael F. Easley, Attorney General, by Thomas R. Miller, Special Deputy Attorney General; and Blackwell M. Brogden, Jr., Chief Deputy Legal Counsel, on behalf of the North Carolina Real Estate Commission, amicus curiae.

FRYE, Justice.

Plaintiff presents two issues on this appeal: (1) whether defendant, the developer of a condominium project subject to the provisions of Chapter 47A of the North Carolina General Statutes as it existed in 1980,[1] may exempt itself from the payment of its pro rata share of maintenance assessments for units it owns; and (2) whether all or a portion of plaintiff's claim for assessments for the years 1986 through 1993 is barred by the statute of limitations. We conclude that the provisions of Chapter 47A of the General Statutes prohibit defendant from unilaterally exempting itself from the payment of its pro rata share of maintenance assessments. Furthermore, we conclude that no portion of plaintiff's claim is barred by the statute of limitations. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to Superior Court, Dare County, for reinstatement of the order granting plaintiff's motion for summary judgment.

Dunes South is a condominium development in which units are sold by time-share weeks. Defendant is the original developer of the Dunes South project and at the time of the institution of this action owned a number of units within the development, some of which had been previously conveyed by defendant and later reacquired, as well as some which had not previously been conveyed by defendant. On 7 August 1980, in accordance with Chapter 47A of the North Carolina General Statutes, defendant filed the original "Declaration of Covenants and Restrictions" (Declaration). This Declaration provided that defendant, as well as other unit owners in the development, would pay annual, per-unit maintenance assessments to plaintiff homeowners association. The Declaration further provided that it could be amended at any time with approval of two-thirds of the membership in plaintiff homeowners association. Subsequently, on 21 January 1983, defendant, as holder of two-thirds of the votes in the association, filed a "Dunes South Supplemental Declaration of Covenants and Restrictions" (Supplemental Declaration). This Supplemental Declaration purported to exempt defendant from the obligation to pay annual per-unit maintenance assessments on units

1. In 1980, Chapter 47A of the General Statutes consisted only of Article I of the current Chapter 47A. Effective 1 January 1984, Chapter 47A was amended to include two articles. All references to Chapter 47A in this opinion pertain to the version in effect in 1980. We further note that the provisions of Chapter 47C of the General Statutes, rather than Chapter 47A, apply to all condominiums created within this State after 1 October 1986. N.C.G.S. § 47C-1-102 (1987).

"remaining unsold" and instead provided that defendant would pay for any operating expenses in excess of the per-unit assessments collected from other unit owners.

On 17 February 1993, plaintiff homeowners association filed this action for money judgment and to foreclose upon a lien for unpaid maintenance assessments on Dunes South units owned by defendant. In its answer, defendant did "not admit the validity of the liens claimed against such units for unpaid assessments nor the validity of the assessment amount." Plaintiff then filed a motion for summary judgment supported by an affidavit listing seventy-six units previously conveyed and then reacquired by defendant and setting out the amount of maintenance assessments allegedly owed by defendant on these units for the years 1986 through 1993. On 24 November 1993, defendant filed a motion for leave to amend its answer to allege that at least a portion of plaintiff's claim was barred by N.C.G.S. § 1-52(1), the three-year statute of limitations for filing an action based on contract. On that same day, Mr. Gerald Friedman, president of defendant corporation, filed an affidavit stating, in pertinent part:

> 5. Pursuant to the terms of the Supplemental Declaration of Covenants and Restrictions, First Flight Builders, Inc. was only responsible for the actual operating expenses incurred by plaintiff in excess of the collections of assessments on units within Dunes South and was not responsible for paying per unit annual assessments on unit[s] owned by First Flight Builders, Inc.

On 29 November 1993, the trial court entered an order allowing defendant to amend its answer. However, on 30 November 1993, Judge Watts entered an order allowing plaintiff's motion for summary judgment, from which defendant appealed.

The Court of Appeals vacated the trial court's order, concluding that summary judgment for plaintiff was improper since the term "remaining unsold" in the Supplemental Declaration was ambiguous and therefore created a question for the jury as to whether defendant was liable to plaintiff for the maintenance assessments on units previously conveyed and then reacquired by defendant. *Dunes South Homeowners Assn. v. First Flight Builders*, 117 N.C. App. 360, 368, 451 S.E.2d 636, 640-41 (1994). In addition, the Court of Appeals held that plaintiff's claim for assessments for the years 1986 through 1990 was barred by the statute of limitations for actions based on contract, N.C.G.S. § 1-52(1) (1983). *Dunes South*, 117 N.C. App. at 366, 451 S.E.2d at 640. Judge Eagles dissented, concluding that the terms of

the Supplemental Declaration were not ambiguous and that the trial court properly granted plaintiff's motion for summary judgment as to those assessments not barred by the statute of limitations. *Id.* at 369, 451 S.E.2d at 641. Plaintiff appeals to this Court based on Judge Eagles' dissent. Additionally, plaintiff's petition for discretionary review as to an additional issue was allowed by this Court on 9 February 1995.

[1] Plaintiff first contends that the Court of Appeals erred in ignoring the provisions of Chapter 47A of the North Carolina General Statutes when it reversed the trial court's grant of summary judgment in plaintiff's favor. Plaintiff argues that under the provisions of Chapter 47A, more specifically N.C.G.S. § 47A-12, defendant developer was bound to contribute its pro rata share of the maintenance expenses for the common areas of the condominium project and was prohibited from unilaterally exempting itself from the payment of the maintenance assessments at issue in this case. Accordingly, plaintiff argues that, regardless of the language of the Supplemental Declaration, defendant is obligated to pay the maintenance assessments at issue here. We agree.

By executing and recording a declaration of unit ownership, defendant submitted its condominium project to the provisions of Chapter 47A of the General Statutes. N.C.G.S. §§ 47A-2, -4 (1976). N.C.G.S. § 47A-12 provides, in pertinent part:

> The *unit owners are bound to contribute* pro rata, in the percentages computed according to G.S. 47A-6 of this Chapter, toward the expenses of administration and of maintenance and repair of the general common areas and facilities and, in proper cases of the limited common areas and facilities, of the building and toward any other expense lawfully agreed upon. *No unit owner may exempt himself from contributing toward such expense* by waiver of the use or enjoyment of the common areas and facilities or by abandonment of the unit belonging to him.

N.C.G.S. § 47A-12 (1976) (emphasis added). A "unit owner" is defined as "a person, corporation, partnership, association, trust or other legal entity, or any combination thereof, who owns a unit within the building." N.C.G.S. § 47A-3(14) (1976). Neither the definition of "unit owner" nor the provisions of N.C.G.S. § 47A-12 makes any distinction between a developer and any other unit owner. Defendant developer, as a corporation owning several units within the condominium project, qualified as a "unit owner" under section 47A-3(14). Thus,

defendant was "bound to contribute pro rata . . . toward the expenses of administration and of maintenance and repair of the general common areas and facilities." N.C.G.S. § 47A-12. Consistent with this statutory requirement, defendant covenanted, in its original Declaration, to pay annual, per-unit maintenance assessments for each unit it owned.

The crucial issue then becomes whether defendant may, through provisions in the Supplemental Declaration, exempt itself from its statutory obligation as a unit owner to pay its pro rata share of the maintenance expenses for common areas. Having submitted the project to the provisions of Chapter 47A, defendant's obligation, as a unit owner, to contribute its pro rata share of maintenance expenses derived not only from its Declaration, but also from the provisions of N.C.G.S. § 47A-12. Section 47A-12 is but one of several sections within Chapter 47A which evidence the legislature's intent to ensure the orderly, reliable and fair government of condominium projects and to protect each owner's interest in his or her own unit as well as the common areas and facilities. For example, N.C.G.S. § 47A-6(b) protects the unit owners' interests in the common areas, providing that the ratio of the undivided interest of each unit owner in the common areas shall have a permanent character and shall not be altered except with the unanimous consent of all unit owners expressed in an amended declaration. N.C.G.S. § 47A-6(b) (1976). Likewise, we believe that the provisions of section 47A-12 are designed to protect unit owners from shouldering a disproportionate share of the maintenance expenses for common areas when other unit owners, including the developer, attempt to unilaterally exempt themselves from contributing their pro rata share of maintenance expenses.

Section 47A-12 explicitly states that each unit owner is "*bound* to contribute" pro rata toward maintenance expenses for the common areas. N.C.G.S. § 47A-12 (emphasis added). In addition, this section also addresses two methods by which an individual unit owner might attempt to unilaterally exempt itself from paying its share of maintenance expenses, providing that "[n]o unit owner may exempt himself from contributing toward such expense by waiver of the use or enjoyment of the common areas and facilities or by abandonment of the unit belonging to him." *Id.* In light of the purposes behind Chapter 47A and the language of N.C.G.S. § 47A-12, we do not believe that the legislature intended to allow a developer, as a unit owner, to unilaterally exempt itself from the payment of its pro rata share of the maintenance expenses for the common areas. This is exactly what defend-

ant attempted to do. Accordingly, we conclude that the Supplemental Declaration filed by defendant in this case was ineffective to exempt it from paying the maintenance assessments at issue here.

[2] Having determined that defendant is obligated to pay its pro rata share of the common expenses, we must now determine what, if any, portion of defendant's obligation to plaintiff is barred by the statute of limitations. Plaintiff contends that the Court of Appeals erred in applying the three-year statute of limitations for actions based on contract contained in N.C.G.S. § 1-52(1) and in holding that the portion of plaintiff's claim for assessments due prior to 17 February 1990 was time-barred. Plaintiff argues that the Declaration containing defendant's covenant to pay maintenance assessments was an instrument under seal subject to the ten-year statute of limitations contained in N.C.G.S. § 1-47(2) and, therefore, that no portion of its claim was time-barred. We agree.

N.C.G.S. § 1-47(2) provides that an action upon a sealed instrument "against the principal thereto" must be commenced within ten years. N.C.G.S. § 1-47(2) (1983). Defendant, as the party executing and filing the Declaration here, qualifies as the "principal thereto." *Id.* Furthermore, there is no dispute that the corporate seal of defendant is impressed upon the Declaration at issue here. However, " 'the seal of a corporation is not in itself conclusive of an intent to make a specialty [sealed instrument].' " *Square D Co. v. C.J. Kern Contractors*, 314 N.C. 423, 426, 334 S.E.2d 63, 65 (1985) (quoting 18 Am. Jur. 2d *Corporations* § 158, at 693 (1965)). "[T]he determination of whether an instrument is a sealed instrument . . . is a question for the court." *Id.* (citing *Security Nat'l Bank v. Educator's Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965)).

In *Square D Co.*, we considered whether the impression of a corporate seal on a construction contract would transform the contract into a specialty so that the ten-year statute of limitations under N.C.G.S. § 1-47(2) would apply. We stated that "the question to be answered in order to determine whether the corporate seal transforms the party's contract into a specialty is whether the body of the contract contains any language that indicates that the parties intended that the instrument be a specialty or whether extrinsic evidence would demonstrate such an intention." *Id.* at 428, 334 S.E.2d at 66. In concluding that the contract in that case did not evince any intention on the part of the parties to create a specialty, this Court stated that

> [t]he contract contains no language in the body which would indicate that the parties intended the contract to be a specialty. There is no language such as "I have hereunto set my hand and seal," "witness our hands and seals," or other similar phrases contained within the contract that would explicitly support plaintiff's assertion that the instrument is a specialty under seal. *See* 68 Am. Jur. 2d, Seals § 3-4 (1973). Neither is there any extrinsic evidence that would indicate the parties intended the instrument to be a specialty.

Id. In the present case, the Court of Appeals, relying upon the above-quoted language and its own decision in *Blue Cross and Blue Shield v. Odell Associates*, 61 N.C. App. 350, 362, 301 S.E.2d 459, 465 ("routine use of a corporate seal is merely to demonstrate authority to execute a document, the mere presence of a corporate seal, without more, does not convert the document into a specialty"), *disc. rev. denied*, 309 N.C. 319, 306 S.E.2d 791 (1983), determined that because the Declaration in this case contained none of the specialty language mentioned, the Declaration amounted to a simple contract, rather than an instrument under seal.

We believe that the nature of the instrument involved here distinguishes this case from *Square D Co.* and *Blue Cross and Blue Shield.* The instruments involved in both of those cases were construction contracts. Here, however, the instrument in question is the "Declaration of Covenants and Restrictions" for the Dunes South condominium project, which contains several restrictive covenants, including defendant's covenant to pay annual, per-unit maintenance assessments. A restrictive covenant constitutes an interest in land in the nature of a negative easement. *Cummings v. Dosam, Inc.*, 273 N.C. 28, 159 S.E.2d 513 (1968). While technically not a deed, the Declaration in this case did affect an interest in land and, as the Court of Appeals noted in *Blue Cross and Blue Shield*, "[i]n certain areas of the law, an instrument under seal is required, e.g., a valid conveyance of land." *Blue Cross and Blue Shield*, 61 N.C. App. at 361, 301 S.E.2d at 465. Accordingly, we conclude that the Declaration at issue here, by its very nature, evidences an intention that it constitute an instrument under seal.

Furthermore, the terms of the Declaration indicate an intent that the Declaration be an instrument under seal. In addition to defendant's corporate seal affixed to the Declaration, there was also a notary acknowledgment contained in the Declaration which stated as follows:

> This is to certify that on the 7th day of August 1980, before me personally came Gerald Friedman, with whom I am personally acquainted, who, being by me duly sworn, says that he is the President, and Nancy Friedman is the Secretary of FIRST FLIGHT BUILDERS, INC., the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said President, and that said President and Secretary subscribed their names thereto, and said common seal was affixed, all by order of the Board of Directors of said corporation, and that the said instrument is the act and deed of said corporation.

In light of the nature of the Declaration, as well as its express terms, we conclude that the Declaration constituted an instrument under seal subject to the ten-year statute of limitations contained in N.C.G.S. § 1-47(2). Accordingly, we reverse the Court of Appeals' holding that the portion of plaintiff's claim for assessments due prior to 17 February 1990 was time-barred.

For the foregoing reasons, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to Superior Court, Dare County, for reinstatement of the court's order granting plaintiff's motion for summary judgment.

REVERSED AND REMANDED.

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

FLORENCE CONCRETE PRODUCTS, INC., A SOUTH CAROLINA CORPORATION, PETITIONER v. NORTH CAROLINA LICENSING BOARD FOR GENERAL CONTRACTORS, RESPONDENT

No. 70PA94

(Filed 28 July 1995)

Contractors § 4 (NCI4th)— manufacture and installation of concrete bridge components—general contractor's license not required

Petitioner was not required to possess a general contractor's license when manufacturing and installing prestressed concrete components for DOT bridge construction projects since (1) petitioner's job does not constitute the construction of a building, structure or highway within the meaning of N.C.G.S. § 87-1 because petitioner manufactures and installs only bridge caps, beams and barrier rails, building the entire bridge takes from one week to ten days, petitioner's portion of the project amounts to approximately six to eight hours, and petitioner thus performs only a small portion of the bridge construction; (2) petitioner's work does not constitute an improvement to a highway within the meaning of § 87-1; and (3) the policy reasons behind the licensure requirement of § 87-1 do not apply because the DOT supervises and controls every step of the project in which petitioner is involved.

Am Jur 2d, Building and Construction Contracts § 131.

Who is a "contractor" within statutes requiring the licensing of, or imposing a license tax upon, a "contractor" without specifying the kinds of contractors involved. 19 ALR3d 1407.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 113 N.C. App. 270, 437 S.E.2d 877 (1994), reversing judgment on judicial review for petitioner entered 2 January 1992 by Barnette, J., in Superior Court, Wake County. Heard in the Supreme Court 9 May 1995.

Jordan, Price, Wall, Gray & Jones, by Henry W. Jones, Jr. and Jonathan P. Carr, for petitioner-appellant.

Bailey & Dixon, L.L.P., by Carson Carmichael, III, for respondent-appellee.

ORR, Justice.

Petitioner Florence Concrete is a South Carolina corporation engaged in the manufacture and installation of prestressed concrete components for highway bridges. As such, petitioner has bid on past projects with the North Carolina Department of Transportation ("DOT"), supplied prestressed concrete components for more than two hundred North Carolina bridges, and installed these components in North Carolina bridges after bidding on these projects and being awarded the contracts.

In 1990, DOT issued invitations to petitioner to bid on fourteen DOT projects to supply and place prestressed concrete bridge components in North Carolina bridges. Upon receipt of petitioner's bids, the Department of Administration Division of Purchase and Contract ("DOA") raised questions regarding licensing requirements for petitioner and other companies supplying prestressed concrete beams for these bridges. In a letter dated 6 February 1991, the State Purchasing Officer for DOA requested an opinion from respondent, the North Carolina Licensing Board for General Contractors, regarding the licensing requirements for bidders under these types of contracts. In a letter dated 13 February 1991, the secretary for respondent informed DOA that the total contract price would be the determining factor for licensing requirements. At that time, the statutory minimum was $45,000. *See* N.C.G.S. § 87-1 (1989). Thus, the secretary informed DOA that "such persons, firms or corporations bidding upon or contracting for projects costing $45,000 or more are required to be licensed general contractors."

After receiving respondent's letter, DOT disqualified petitioner and its bids on the DOT projects. In order to continue to bid on bridge projects, petitioner obtained a general contractor's license; however, this action was taken "under protest" because of the increased liability and insurance costs involved with being a general contractor. Prior to this time, petitioner had not received notice from any North Carolina department or agency that a general contractor's license was required for bidding on or performing its bridge work.

On 9 April 1991, petitioner sought a declaratory ruling from respondent requesting a ruling that petitioner did not need a general contractor's license to bid on DOT projects because, under these facts, petitioner did not meet the definition of a general contractor under N.C.G.S. § 87-1 and the case law interpreting this section. Respondent failed to issue a ruling within sixty days, which, under

then-existing N.C.G.S. § 150B-17 (recodified as N.C.G.S. § 150B-4), was tantamount to a denial of the request on its merits.

Petitioner filed a verified petition for judicial review in Superior Court, Wake County. On 2 January 1992, Judge Barnette entered a judgment containing findings of fact which tend to show the following:

The bidding procedure regarding these contracts with DOT, which petitioner has followed in the past and is expected to follow in the future, begins when DOT issues invitations for bids. Petitioner then returns its bid to DOT, and DOT opens the bids and tabulates the results. Thereafter, DOT mails a notice of intent to award the contract to the lowest responsible bidder. DOA then issues purchase orders with regard to the contract. As found by the trial court,

> In the past, all purchase orders issued by DOA have required, in one form or another, that:
>
> > Beams, caps, & rails to be delivered by truck, unloaded & put in place by supplier, . . .
> >
> > Delivery will be made from Sumter, SC within 45 consecutive calendar days after receipt of order.
> >
> > All necessary trucks, cranes, operators, labor & other equipment & material necessary for complete job to be furnished by Beam manufacturer.

The duties petitioner performs pursuant to these purchase orders have not changed in the past and are not expected to change in the future.

After petitioner receives a signed purchase order from DOA, it begins fabricating the concrete bridge components in its South Carolina plant. At this time, petitioner provides a DOT inspector with an office in its plant, and the inspector supervises the manufacture of the concrete components. When the bridge components are completed, the DOT inspector inspects the completed bridge components for project specifications and stamps the components indicating such approval before they are shipped out of petitioner's plant to the project in North Carolina.

After fabrication of the concrete components is completed and these components are inspected and approved, petitioner holds the components in its plant in South Carolina until the North Carolina

Division of Bridge Maintenance ("DOM"), a division of DOT, requests delivery to North Carolina. Before DOM requests delivery of these concrete components, DOM's maintenance crews excavate the site for the bridge pilings by removing any existing bridge. The DOM crews then drive the pilings into place. Thereafter, DOM notifies petitioner to proceed with delivery and installation of the bridge caps, bridge beams, and barrier rails, pursuant to the purchase order.

Petitioner then proceeds to the project site where it installs the bridge caps and the first span of bridge components, consisting of eight to twelve concrete slabs. DOM controls and supervises this process. After petitioner completes this step, DOM crews, under DOM supervision, backfill the approach of the first span. Thereafter, petitioner places mats, which are owned and supplied by the State, on the approach and first span and then moves its crane to begin span two, if necessary. After the span or spans are in place, petitioner installs its barrier rails. Once the barrier rails are installed, petitioner's work is completed, and petitioner removes its equipment from the project site. State crews then complete all backfilling, wing wall installation, and pavement preparation. The pavement is placed by either DOM crews or other subcontractors. The entire project takes from one week to ten days to complete, and petitioner's portion of the project amounts to approximately six to eight hours.

Based on these findings, the trial court concluded that petitioner "does not meet the definition of a general contractor set forth in G.S. § 87-1 and does not require a North Carolina general contractor's license to bid and perform the work on behalf of the North Carolina Department of Transportation" and reversed respondent's "decision." Respondent appealed to the Court of Appeals, and on 4 January 1994, the Court of Appeals reversed the trial court's decision. Pursuant to N.C.G.S. § 7A-31, petitioner filed a petition for discretionary review with this Court, which was allowed 7 April 1994.

The sole issue before us is whether, under the facts of this case, petitioner is a "general contractor" as defined by N.C.G.S. § 87-1 and is therefore required to obtain a general contractor's license to perform its contracts with DOT. For the reasons stated below, we conclude that petitioner is not a general contractor, and we therefore reverse the decision of the Court of Appeals.

N.C.G.S. § 87-1 states in pertinent part:

> [A]ny person or firm or corporation who for a fixed price, commission, fee, or wage, undertakes to bid upon or to construct or

> who undertakes to superintend or manage, on his own behalf or for any person, firm, or corporation that is not licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more . . . shall be deemed to be a "general contractor" engaged in the business of general contracting in the State of North Carolina.

N.C.G.S. § 87-1 (1994). When an entity falls under this statutory definition, it must be licensed as a general contractor. *See Baker Construction Co. v. Phillips*, 333 N.C. 441, 426 S.E.2d 679 (1993).

Based on our holding in *Vogel v. Reed Supply Co.*, 277 N.C. 119, 177 S.E.2d 273 (1970), and the specific facts of the present case, we conclude that petitioner is not a general contractor as defined under N.C.G.S. § 87-1. In *Vogel*, the issue presented was whether a subcontractor, Reed Supply Company, was a general contractor as defined by N.C.G.S. § 87-1. Under the facts of *Vogel*, Reed Supply Company undertook "to furnish labor and materials in excess of $20,000.00[, the statutory minimum at that time,] to construct integral parts of a large building complex." *Id.* at 131-32, 177 S.E.2d at 281. Specifically, Reed Supply Company was required to

> "furnish and erect exterior and interior wall panels, wood floor system subfloor, roof sheathing, bridging, trusses. Furnish and install windows, doors, base, shoe, soffit trim, plywood closures, masonite siding and louvers. Furnish only roofing and felt. Furnish and install shelving, door locks, door knockers. Furnish and complete painting. Furnish only entrance door frame."

Id. at 132, 177 S.E.2d at 281. "A few minor items, including painting of the interior ceilings, were specifically excluded from the subcontract." *Id.*

In determining whether Reed Supply Company qualified as a general contractor under N.C.G.S. § 87-1, we reviewed the language of the statute as follows:

> It is apparent, and we think significant, that Reed did not undertake to construct a *building* or *structure*. Completion of the above items leaves much to be done before a *building* or a *structure* results. . . . A *building* is defined as "an edifice . . . a structure"; and a *structure* is defined as "that which is built or constructed; an edifice or building of any kind." Black's Law

> Dictionary, 4th Ed. Rev. 1968; *Brown v. Sikes*, 188 S.C. 288, 198 S.E. 854 (1938). So when the words *building* and *structure* are strictly construed, in context with the remainder of G.S. 87-1, they do not embrace parts or segments of a building or structure.

Id.

Similarly under the facts in the present case, petitioner does not undertake to bid upon or construct "any building, highway, . . . or structure." Petitioner constructs and installs prestressed concrete components for highway bridges. Specifically, under its contracts with DOT, petitioner only undertakes to construct and install bridge caps, bridge beams, and barrier rails. Building the entire bridge takes from one week to ten days, and petitioner's portion of the project amounts to approximately six to eight hours. According to the facts as found by the trial court, either DOM crews or other subcontractors complete the rest of the bridge, which includes backfilling, wing wall installation, pavement preparation, and paving. Thus, installation of petitioner's prestressed components leaves much to be done before a bridge results. Under our holding in *Vogel*, therefore, petitioner's job of manufacturing and installing these prestressed concrete components does not constitute the construction of a "building," "structure," or "highway" under the statute.

In determining that petitioner qualified as a general contractor under N.C.G.S. § 87-1, however, the Court of Appeals stated,

> the work performed by Florence Concrete involved the manufacture of prestressed concrete components for highway bridges. This constitutes an *improvement* to a *highway* and is thus the type of work referred to in G.S. § 87-1. Furthermore, all Florence Concrete's contracted work appears to exceed the statutory $30,000 limit. Under these circumstances, we hold Florence Concrete is required to possess a general contractor's license when performing DOT bridge construction projects if the cost of the undertaking exceeds the statutory minimum.

Florence Concrete v. N.C. Licensing Bd. for Gen. Contractors, 113 N.C. App. 270, 274, 437 S.E.2d 877, 880 (1994).

Again, based on our holding in *Vogel* and the underlying policy reasons behind the licensure requirement, we disagree with the holding of the Court of Appeals. In *Vogel*, we stated that the purpose behind N.C.G.S. § 87-1 is to protect the public from incompetent

builders. *Vogel*, 277 N.C. at 130, 177 S.E.2d at 280. Further, we defined an "improvement" under the statute as follows:

> The term "improvement" does not have a definite and fixed meaning. *Cities Service Gas Co. v. Christian*, 340 P.2d 929 (Okl. 1959). . . . The word is sometimes used to refer to any enhancement in value, particularly in relation to non-structural changes to land. *Mazel v. Bain*, 272 Ala. 640, 133 So. 2d 44 (1961). But where, as here, it is used in context with the words *building* and *structure*, its meaning is otherwise. As used here it connotes the performance of construction work and presupposes the prior existence of some structure to be improved. . . . The construction in this case "started from scratch." There was no existing building or structure to be improved, and in our view the term "improvement" as used in G.S. 87-1 has no application to the facts in this case.

Id. at 132-33, 177 S.E.2d at 281-82. Based on the conclusion that Reed Supply Company did not construct a structure, building, or improvement under the statute and "examining the statute in light of its purpose," we held that Reed Supply Company was not a "general contractor" as defined by N.C.G.S. § 87-1 and was therefore not required to be licensed. *Id.* at 133, 177 S.E.2d at 282.

Similarly, in the present case, petitioner's contracts with DOT do not involve an improvement to a preexisting structure. Petitioner only contracts with DOT to build replacement bridges, and prior to petitioner installing its prestressed concrete components, DOM's maintenance crews remove any existing bridge. Thus, because the term "improvement" presupposes the existence of some structure to be improved, the fact that any previously existing bridge is removed before petitioner begins installation of its components leads us to conclude that, as in *Vogel*, this term does not apply in the present case. Further, because petitioner contracts with DOT to perform only a small portion of the highway bridge construction, which does not include the backfilling, wing wall installation, and especially the paving, we disagree with the Court of Appeals' classification of petitioner's work as an improvement to a "highway."

Additionally, the policy reasons behind the licensure requirement of N.C.G.S. § 87-1 do not apply to require licensure of petitioner under the facts in the present case. DOT supervises and controls every step of the project in which petitioner is involved. In fact, a DOT inspector

even inspects the manufacture of the prestressed concrete components in petitioner's plant and approves them for use in North Carolina bridges. Once on the construction site, DOM supervises and controls petitioner's installation of bridge caps and components.

N.C.G.S. § 87-1 requires licensure of general contractors in order to protect the public from incompetent builders. Where, as here, the public is protected by a State agency which has been delegated the authority to supervise the construction and maintenance of highways and highway bridges, the protection of the public does not require licensure of a subcontractor like petitioner who contracts to perform a small portion of the replacement bridge construction and whose work is closely supervised by the State agency. Thus, we hold that under the specific facts of this case, petitioner is not a general contractor as defined under N.C.G.S. § 87-1 and therefore is not required to be licensed as such. We note, however, that our holding here today does not necessarily extend to the private sector where a State agency is not required to oversee construction and where the safety of the public would be at issue.

For the foregoing reasons, we reverse the decision of the Court of Appeals.

REVERSED.

STATE OF NORTH CAROLINA v. PRENTISS QUICK

No. 459A94

(Filed 28 July 1995)

Jury § 257 (NCI4th)— sexual offenses—black defendant and white victim—peremptory challenges of two blacks—no prima facie case of racial discrimination

The prosecutor's peremptory excusal of two of four black jurors in a case involving sexual offenses against a white woman by a black man is insufficient, standing alone, to establish a *prima facie* case of racial discrimination and require the prosecutor to come forward with race-neutral reasons.

Am Jur 2d, Jury § 244.

Justice FRYE dissenting.

Justice WEBB joins in this dissenting opinion.

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

Appeal by the State pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 116 N.C. App. 362, 448 S.E.2d 149 (1994), remanding this case to the Superior Court, Guilford County, for a hearing to determine if the prosecutor could articulate race-neutral reasons for his peremptory challenges. The Court of Appeals found no error as to the only other assignment of error before it on appeal. Heard in the Supreme Court on 12 May 1995.

Michael F. Easley, Attorney General, by John F. Maddrey, Assistant Attorney General, for the State-appellant.

Charles W. Wannamaker III, Assistant Public Defender, for defendant-appellee.

MITCHELL, Chief Justice.

The defendant was tried at the 11 January 1993 Criminal Session of Superior Court, Guilford County, upon proper indictments for first-degree rape, two counts of robbery with a dangerous weapon, two counts of first-degree kidnapping, and two counts of first-degree sexual offense. The State's evidence tended to show that on 22 August 1992, the victims, Robert and Judy Bechtold, left a High Point restaurant around 11:15 p.m. to drive home in their van. Two black males approached the Bechtolds as they walked toward their van in a nearby parking lot. Each man held a knife, and they forced the Bechtolds into the van. The two men also got into the van and forced Mr. Bechtold to drive to a secluded location. Various items of jewelry and other personal property were taken from the Bechtolds.

Defendant forced Mrs. Bechtold out of the van at knifepoint and took her to a grassy area. Defendant forced her to engage in sexual intercourse, fellatio, and cunnilingus with him before they returned to the other assailant and Mr. Bechtold. Mrs. Bechtold was then sexually assaulted by the other assailant. Defendant and the other assailant then took a cellular bag telephone from the van and abandoned the victims.

Defendant was observed the following day with a bag telephone by police. The police subsequently determined that the phone belonged to the victims. Defendant was arrested and gave an inculpatory statement which was introduced into evidence.

The jury rendered verdicts finding defendant guilty of each of the charged offenses. Judge Albright entered judgments on 15 January 1993 imposing three consecutive life sentences for the first-degree rape and the two first-degree sexual offenses. Judge Albright also entered judgments imposing consecutive forty-year prison sentences for each of the other four convictions.

Defendant appealed his convictions and sentences to the Court of Appeals. The Court of Appeals held that the trial court had erred in concluding that defendant had failed to make a *prima facie* case of purposeful racial discrimination by the prosecutor in jury selection and remanded this case to the Superior Court, Guilford County, for a determination as to whether the prosecutor could articulate race-neutral reasons for his peremptory challenges of two black jurors. Judge (now Justice) Orr dissented from the decision of the majority in the Court of Appeals, and the State appealed to this Court as a matter of right pursuant to N.C.G.S. § 7A-30(2).

The State argues that the Court of Appeals erred in concluding that defendant had established a *prima facie* case of purposeful racial discrimination. At trial, the racial composition of the original twelve prospective jurors called to the jury box was three black females, one black male, five white females, and three white males. When the prosecutor completed his questioning of the original panel, he peremptorily challenged a black female juror and the lone black male juror. Defendant objected to the peremptory challenges of the two black jurors, and the trial court heard arguments in chambers. Defendant contended that the State could not excuse a black member of the *venire* without giving a basis for the excusal other than race. The trial court held that defendant had failed to make a *prima facie* case that the prosecutor's peremptory challenges were based on race or motivated by racial considerations. The trial court also noted that the State had accepted two of the four black jurors from the original panel of twelve.

In *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), the Supreme Court of the United States held that the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from peremptorily challenging jurors solely on the basis of race. *Id.* at 89,

90 L. Ed. 2d at 83. Article I, Section 26 of the North Carolina Constitution also prohibits the exercise of peremptory challenges solely on the basis of race. *State v. Glenn*, 333 N.C. 296, 301, 425 S.E.2d 688, 692 (1993).

A defendant alleging racial discrimination in jury selection has the burden of making a *prima facie* showing that the prosecutor exercised peremptory challenges on the basis of race; otherwise, the prosecutor need not come forward with race-neutral explanations for his excusals. *See id.* at 302, 425 S.E.2d at 692. *Batson* established a test for determining whether a defendant has established a *prima facie* case of purposeful racial discrimination:

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96, 90 L. Ed. 2d at 87-88 (citations omitted). Both the test set forth in *Batson* and the underlying reasoning of that case were later substantially modified, however, by the opinion of the Supreme Court of the United States in *Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991), which rejected the first part of the *Batson* test quoted above and held that a white defendant has standing to assert an equal protection claim when a prosecutor uses peremptory challenges to exclude black potential jurors solely by reason of their race. *See State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991). Therefore, to make out a *prima facie* case of discrimination, a defendant need only show that the relevant circumstances raise an inference that the prosecutor used peremptory challenges to remove potential jurors solely because of their race. *Id.*

Once a defendant has made a *prima facie* case, the burden of production shifts to the prosecutor to come forward with race-neutral explanations for the peremptory challenges. *Purkett v. Elem*, —— U.S. ——, ——, 131 L. Ed. 2d 834, 839 (1995). However, the law "does not demand [a race-neutral] explanation that is persuasive, or even

plausible. 'At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' " *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 360, 114 L. Ed. 2d 395, 406 (1991)).

The issue raised by this appeal is whether the prosecutor's peremptory excusal of two of four black jurors in this case involving sexual offenses against a white woman by a black man is sufficient, standing alone, to establish a *prima facie* case of racial discrimination and require the prosecutor to come forward with race-neutral explanations. We conclude that these facts are not sufficient to establish such a *prima facie* case.

The instant case is very similar to our recent case of *State v. Ross*, 338 N.C. 280, 449 S.E.2d 556 (1994). That case also involved a black defendant and a white victim. In *Ross*, the prosecutor used his only peremptory challenge against a black juror. As in the instant case, the defendant in *Ross* essentially argued that the mere fact that a prosecutor exercises peremptory challenges solely against black jurors is sufficient to establish a *prima facie* case of purposeful racial discrimination. We rejected that argument in *Ross*.

In reaching our holding in the present case, we note that defendant is a black man, and two black venirepersons were excused by the prosecutor. Our holding also takes into account the fact that peremptory challenges can be used for discriminatory purposes by those who are of a mind to discriminate. However, "it is not unconstitutional, without more, to strike one or more blacks from the jury." *Batson*, 476 U.S. at 101, 90 L. Ed. 2d at 91 (White, J., concurring). Therefore, we must look to "the several factors which may be relevant in determining whether a defendant has raised an inference of discrimination." *Ross*, 338 N.C. at 285, 449 S.E.2d at 561. Those factors include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors. *Id.*

Nowhere in the record in this case are there statements or questions by the prosecutor which give rise to an inference of racial dis-

crimination. Additionally, the prosecutor used only two of his peremptory challenges. The mere fact that he used them against two black venirepersons in this case does not establish a pattern of strikes or show a disproportionate number of peremptory challenges against black jurors. Further, the State's acceptance rate of blacks was fifty percent because the prosecutor accepted two of the four blacks from the original panel of twelve. The jury eventually seated was composed of the two black jurors accepted by the State and ten white jurors. It is also worth noting that the black female juror excused by the prosecutor had been the victim of a recent crime. The prosecutor also challenged, and the trial court excused for cause, two white jurors who had been the victims of past crimes.

The only circumstance arguably tending to establish discriminatory intent in this case is the fact that the victims were white and the defendant was black. Likewise, in *Ross*, the victim was white and the defendant was black. *See id.* at 282, 449 S.E.2d at 559. The only distinctions between this case and *Ross* are that two black jurors were excused in this case, instead of one, and that the crimes charged involved sexual offenses, not murder. These facts do not sufficiently distinguish the instant case from *Ross* to permit us to reach a different conclusion than we reached in that case. Defendant's otherwise bare allegation of racial discrimination based solely on the prosecutor's use of peremptory challenges against two black jurors did not establish a *prima facie* case of purposeful racial discrimination. The trial court correctly concluded that defendant had failed to establish such a *prima facie* case. Therefore, the Court of Appeals erred in that part of its decision remanding this case to the Superior Court, Guilford County, for a hearing to determine whether the prosecutor's reasons for exercising his peremptory challenges were race-neutral; the remainder of the decision of the Court of Appeals, concluding that the judgments of the trial court were otherwise without error, was correct. Accordingly, we reverse that part of the decision of the Court of Appeals and remand this case to that court in order that the judgments entered against the defendant in the Superior Court, Guilford County, be reinstated.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

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

Justice FRYE dissenting.

Drawing lines is not easy—in life or in law. Nevertheless, sometimes the line has to be drawn. In *State v. Ross*, 338 N.C. 280, 449 S.E.2d 556 (1994), the prosecutor used his only peremptory challenge against a black juror. Although defendant was black and the victim white, we held that no prima facie case of purposeful racial discrimination had been shown, and the trial court did not err in failing to require the prosecutor to give a race-neutral explanation for the peremptory challenge. I joined in that decision.

Ross involved murder. In this case, defendant is charged with, among other crimes, rape and first-degree sexual offense. In *Ross*, the prosecutor challenged one of three black jurors peremptorily. Here, the prosecutor challenged two of four black jurors peremptorily. Although there were many more white than black jurors in the panel here, no white jurors were challenged peremptorily. Where is the line to be drawn? Would the removal of the third black juror be enough to require the prosecutor to give race-neutral reasons for exercising peremptory challenges?

The fact that a prima facie case has been established does not mean that jury selection cannot continue. The establishment of a prima facie case simply shifts the burden to the prosecutor to give a race-neutral explanation for the peremptory challenges. *See Purkett v. Elem*, —- U.S. —-, —-, 131 L. Ed. 2d 834, 839 (1995). As the majority recognizes, the prosecutor's race-neutral explanation does not have to be persuasive or even plausible. *See id.* But he must state a reason for the record, and that reason may be challenged by defendant. *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991); *State v. Green*, 324 N.C. 238, 240, 376 S.E.2d 727, 728 (1989).

As the United States Supreme Court noted in *Batson*, "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' " *Batson v. Kentucky*, 476 U.S. 79, 96, 90 L. Ed. 2d 69, 87 (1986). Thus, under *Batson*, defendant can rely on the following facts and circumstances in this case to raise an inference that the prosecutor used peremptory challenges to exclude one or more veniremen from the jury on account of race: (1) a black defendant was charged with rape of a white woman, (2) the jurors challenged peremptorily were of the same race as defendant, (3) no jurors of the race of the victim were peremptorily challenged, and (4) the overwhelming majority of the jurors left on the jury were of the same race as the victim.

I would hold that the trial court erred by ruling that defendant failed to make out a prima facie case of racial discrimination. I would thus affirm the Court of Appeals by remanding this case to the trial court for a hearing on the *Batson* issue. At that hearing, the trial court should determine whether the prosecutor's articulable reasons for peremptory challenges are race-neutral. Defendant will then be given the opportunity to provide additional evidence to rebut the State's contentions. *State v. Green*, 324 N.C. 238, 376 S.E.2d 727. If defendant can establish purposeful racial discrimination, he is entitled to a new trial. If not, the trial court should order commitment to issue in accordance with the judgment entered by the trial court on 15 July 1993.

Justice WEBB joins in this dissenting opinion.

MICHAEL T. HAAS AND WYNN MARTIN HAAS v. JAMES S. WARREN AND WARREN AND PERRY, ATTORNEYS AT LAW

No. 571PA93

(Filed 28 July 1995)

1. Attorneys at Law § 45 (NCI4th)— foreclosure—advertisement of Franklin County land in Wake County newspaper—standard of care

Plaintiffs' evidence in this legal malpractice action, presented primarily through the testimony of defendants, was sufficient to establish the applicable standard of care of attorneys in defendants' legal community for publishing notices of sale in foreclosure proceedings where it tended to show that defendant attorney and defendant law firm attempted to save money in a foreclosure proceeding by advertising the sale of land in Franklin County in a Wake County newspaper, *The Wake Weekly*, rather than in *The Franklin Times*; it was the practice of defendant law firm, and the established practice in defendants' legal community, to advertise foreclosure notices for land located in Franklin County in *The Franklin Times*; neither defendant law firm nor any other firms in defendants' legal community had deviated from this practice prior to plaintiffs' foreclosure proceeding; an attorney must look to case law and the General Statutes to determine whether a course of action complied with the requirements of the law; and an associate of defendant law firm explained the proce-

dure utilized by attorneys in researching a specific issue in the General Statutes.

Am Jur 2d, Attorneys at Law § 199.

Liability of attorney for negligence in connection with investigation or certification of title to real estate. 59 ALR3d 1176.

2. Attorneys at Law § 48 (NCI4th)— foreclosure—advertisement of Franklin County land in Wake County newspaper—statutory violation—legal malpractice—sufficiency of evidence

Plaintiffs' evidence was sufficient for the jury on the issue of whether defendants breached the standard of care for attorneys in defendants' legal community for publishing notices of sale in foreclosure proceedings where it tended to show that defendants attempted to save money in plaintiffs' foreclosure proceeding by advertising the sale of land in Franklin County in a Wake County newspaper, *The Wake Weekly*, rather than in *The Franklin Times*; *The Wake Weekly* did not comply with N.C.G.S. § 1-597 for purposes of publishing the notice of sale for land located in Franklin County; an associate in defendant law firm researched the question of the legality of publishing notice in *The Wake Weekly* by looking in the General Statutes but did not discover N.C.G.S. § 1-597 although it was properly indexed therein; and publication in *The Franklin Times* was in compliance with the standard practice of the community and with statutory requirements.

Am Jur 2d, Attorneys at Law §§ 202, 216.

Liability of attorney for negligence in connection with investigation or certification of title to real estate. 59 ALR3d 1176.

Justice LAKE 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. 574, 436 S.E.2d 259 (1993), affirming a directed verdict for defendants entered by Jenkins, J., on 30 September 1991 in Superior Court, Wake County. Heard in the Supreme Court 9 January 1995.

Everett Gaskins Hancock & Stevens, by E.D. Gaskins, Jr., Hugh Stevens, and Katherine R. White, for plaintiff-appellants.

Bailey & Dixon, by Patricia P. Kerner, for defendant-appellees.

FRYE, Justice.

The primary issue presented on this appeal is whether plaintiffs' evidence was sufficient to take the case to the jury on the issue of whether defendants breached the standard of care owed plaintiffs. We conclude that it was; therefore, we reverse the decision of the Court of Appeals and remand this case for further proceedings.

This legal malpractice action had its genesis in an abortive effort by defendant Warren and his law firm to save money in a foreclosure proceeding by advertising the sale of land located in Franklin County in a Wake County newspaper. Warren, trustee for plaintiffs under a deed of trust, was asked by plaintiffs to begin foreclosure proceedings; accordingly, his firm placed the advertisement for the foreclosure sale. Following the sale, the adequacy of this advertisement was challenged in a lawsuit brought by the debtors under the note secured by the deed of trust. Defendants and plaintiffs agreed to a settlement of that lawsuit by consenting to set aside the sale and conduct a new sale. After publishing the legal notice again, this time in *The Franklin Times*, defendants conducted a second foreclosure sale, which went unchallenged by the debtors. Plaintiffs, purchasers at both foreclosure sales, were required to pay a higher price at the subsequent sale and incurred additional expenses due to the initial aborted sale. Accordingly, plaintiffs commenced this action against defendants based on legal malpractice in the handling of the foreclosure.

Plaintiffs' evidence tended to show that Warren, as trustee, and his law firm took the admittedly unusual step of publishing the notice of sale in *The Wake Weekly* to avoid the high advertising costs of *The Franklin Times*; that defendants had always advertised foreclosure notices for land located in Franklin County in *The Franklin Times* and that this was also the accepted practice among other attorneys in the community; and that an associate in the firm researched the propriety of publishing the notice in *The Wake Weekly* but did not find and was unaware of N.C.G.S. § 1-597, which provides that a legal notice which is required to be advertised in a newspaper "shall be of no force and effect unless it shall be published in a newspaper with a general circulation to actual paid subscribers which newspaper at the time of such publication, advertisement or notice, shall have been

admitted to the United States mails as second class matter in the county or political subdivision where [the land in question is situated]." N.C.G.S. § 1-597 (1983). The trial court took judicial notice of the fact that *The Wake Weekly* did not comply with N.C.G.S. § 1-597 for purposes of publishing the notice of sale for land located in Franklin County.

At the close of plaintiffs' evidence, the trial court granted defendants' motion for directed verdict. The Court of Appeals affirmed, concluding that plaintiffs had failed to produce evidence establishing the standard of care for attorneys in the same or similar community and thus had failed to establish that defendants' actions violated this standard. The court further concluded that plaintiffs had failed to produce evidence that a competent attorney would have found or been aware of N.C.G.S. § 1-597. *Haas v. Warren*, 112 N.C. App. 574, 436 S.E.2d 259 (1993). We allowed plaintiffs' petition for discretionary review, and for the reasons stated herein, we now reverse the decision of the Court of Appeals.

In order to show negligence in a legal malpractice action, the plaintiff must first prove by the greater weight of the evidence that the attorney breached the duties owed to his client, *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954), and then show that this negligence proximately caused damage to the plaintiff, *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355 (1985). The duties promulgated by *Hodges* are:

> Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

Hodges, 239 N.C. at 519, 80 S.E.2d at 145-46.

In *Rorrer v. Cooke*, we elaborated on the standard of care applicable to attorneys, stating:

> The third prong of *Hodges* requires an attorney to represent his client with such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. The standard is

> that of members of the profession in the same or similar locality under similar circumstances.

Rorrer, 313 N.C. at 356, 329 S.E.2d at 366.

Under *Rorrer* and *Hodges*, plaintiffs were required in this case to show that defendants failed to exercise reasonable and ordinary care and diligence in the use of their skill and in the application of their knowledge to represent plaintiffs in the foreclosure proceedings. Plaintiffs were required to show that defendants, in conducting the foreclosure, failed to live up to the standard of care of members of the legal profession in their legal community or in a similar locality under similar circumstances.

In the instant case, the trial judge removed these issues from the jury's consideration by directing a verdict for defendants. In reviewing the grant of directed verdict for defendants, we must consider the evidence in the light most favorable to plaintiffs, as the nonmoving party. *West v. Slick*, 313 N.C. 33, 40-41, 326 S.E.2d 601, 606 (1985). We may affirm the directed verdict for defendants only if, as a matter of law, a recovery cannot be had by plaintiffs upon any view of the facts which the evidence reasonably tends to establish. *Id.* at 40, 326 S.E.2d at 606. All of the evidence that supports the plaintiffs' claim must be taken as true and considered in the light most favorable to the plaintiffs, giving them the benefit of every reasonable inference that may legitimately be drawn therefrom, and with contradictions, conflicts, and inconsistencies being resolved in their favor. *Braswell v. Braswell*, 330 N.C. 363, 367, 410 S.E.2d 897, 899 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992).

[1] We believe that plaintiffs' evidence, viewed in the light most favorable to them, does establish the standard of care of attorneys in defendants' legal community in conducting foreclosure proceedings, specifically the publishing of notices of sale. Further, this evidence was sufficient to permit the jury to determine whether defendants breached this standard of care.

When viewed in the light most favorable to plaintiffs, plaintiffs' evidence, presented primarily through the testimony of defendants, established that no other attorneys in defendants' legal community published notices of sale for land located in Franklin County in a Wake County newspaper, such as *The Wake Weekly*. Likewise, it had been the practice of defendant law firm to publish such notices in *The Franklin Times*, not *The Wake Weekly*. Defendants' stated motivation

for departing from this established practice was a desire to save money in the foreclosure proceedings.

At trial, an associate in defendant law firm testified:

Q So it's correct to say that you had, you had never published a notice of foreclosure sale on a Franklin County foreclosure in the Wake Weekly until you undertook to do it on Mr. Haas' foreclosure, is that correct?

A Yes, with the proviso that it was at the first of the foreclosures, first actually of three. That's where I got confused.

Q No other attorney in the firm had had a foreclosure in Franklin County published in the Wake Weekly prior to that time, had they, prior to the first?

A Prior to, prior to the first appearance, that's correct.

Q All right, why did you decide to publish—would you tell the jury how you decided to publish the notice in the Wake Weekly?

A Okay, we had been concerned with the publication rates charged by the Franklin Times. By our calculation the rates for the Franklin Times were approximately two and a half times the rates charged by the Wake Weekly. We researched the applicable law carefully to determine that in effect the Franklin Times was not our sole avenue for publication. Let me back up. The problem with the expense—we were not paying the expense. The expense was ultimately being borne by the party who acquired the property at foreclosure, since the bidding would include an amount of money necessary to pay all the costs we had incurred as trustee. So, in essence, our, our goal frankly was to lower substantially the cost incurred by the parties acquiring properties at foreclosure.

Defendant Warren then testified to the following:

Q Now you talked to some attorneys in the area also, didn't you?

A I did.

Q And you inquired of them, among other things, what their practice was with respect to the publication of notice for Franklin County foreclosure, didn't you?

A I discussed it with other attorneys over a period of time. This is something I wanted to do for quite a few years. Again, other than Charles Davis, I can't even recall who I might have discussed it with. I certainly wasn't discussing it just for Franklin County.

Q Now at the point in time these discussions occurred, your firm had never placed such an ad in the Wake Weekly, is that right?

A That would be correct.

Q You inquired of these other attorneys about their practice in that respect, didn't you?

A Yes.

Q And they told you that their practice was to, to publish ads for Franklin County foreclosures in the Franklin Times, didn't they?

A Yes.

Q And were you aware of anyone who made a practice of publishing notices of sale for Franklin County foreclosures in the Wake Weekly while not also publishing [them] in the Franklin Times?

A No.

Q So you were aware when you did this, that this is something that was not done, not generally done in the legal community where you practiced, weren't you?

A That's correct.

Warren further testified that an attorney is bound to follow the North Carolina General Statutes when conducting a foreclosure. The associate in the firm also testified that he knew he must look to the General Statutes and North Carolina case law to find the law governing foreclosures. Warren stated that he was so concerned about departing from the established practice in defendants' legal community of advertising in *The Franklin Times* that he had the associate research the matter twice in search of the applicable law on the subject. Warren realized that he was doing something others did not do and wanted to be sure that he was not in error.

The associate's testimony further established the method utilized by attorneys to research and find the law applicable to a given subject area. When asked at trial what issue he was researching, the associ-

ate stated that he was looking for what it means for a newspaper to be qualified for legal advertising. He testified that in order to answer this question, he turned to the North Carolina General Statutes. Because there were twenty-three volumes of the General Statutes, the associate turned his attention to the index of statutes in order to find the specific topic he was researching. The associate testified that he could not recall whether he looked in the index under the term "legal advertising" and that he did not discover section 1-597. A review of the index, which was introduced into evidence, shows that the term "Legal Advertising" is listed in the index and is cross-referenced to the term "Advertisements." Under the "Advertisements" heading is the subheading "Legal advertising." Within this subheading is the topic "Requisites for newspaper publication," under which N.C.G.S. § 1-597 is referenced.

We believe that the testimony of Warren and the associate in his firm, when taken in the light most favorable to the plaintiffs, established the applicable standard of care in defendants' legal community. The testimony established that it was the practice of defendant law firm, and the established practice in defendants' legal community, to advertise foreclosure notices for land located in Franklin County in *The Franklin Times*. Neither defendant law firm nor any other firms in defendants' legal community had deviated from this practice prior to plaintiffs' foreclosure proceedings. The testimony further established that an attorney must look to case law and the General Statutes to determine whether a course of action complied with requisite statutory and case law requirements. Specifically, in this case, the associate acknowledged uncertainty as to the correctness of publishing notice of foreclosure in *The Wake Weekly*, and that he was required to adequately research the question.

In addition, the associate's testimony explained to the jurors the procedure utilized by attorneys in researching a specific issue in the General Statutes, informing them that an attorney must look to the index of the General Statutes in order to find statutes on a specific subject such as legal advertising. We are satisfied that this evidence established the standard of care by which defendants' actions in representing plaintiffs during the foreclosure proceeding could be measured.

[2] We likewise are convinced that plaintiffs' evidence was sufficient to take the case to the jury on the issue of defendants' breach of this standard of care. As noted earlier, the associate did not find N.C.G.S.

§ 1-597, which is properly indexed in the index to the General Statutes. Further, it was clear from the evidence that publication in *The Franklin Times* was in compliance with the standard practice of the community and in compliance with the statutory requirements. There also was evidence that publication in *The Wake Weekly* was not in compliance with the statutory requirements.

Accordingly, defendants embarked upon a course of action, publishing the notice of sale in *The Wake Weekly* rather than *The Franklin Times*, without discovering and complying with this statute dealing with the requirements for legal advertising. Plaintiffs' evidence was sufficient to allow the jury to determine whether defendants' failure to find a pertinent, properly indexed statute under the facts of this case constituted a breach of the standard of care of other "members of the profession in the same or similar locality under similar circumstances." *Rorrer*, 313 N.C. at 356, 329 S.E.2d at 366. Consequently, the Court of Appeals erred in affirming the trial court's directed verdict for defendants.

For the foregoing reasons, the decision of the Court of Appeals, which affirmed the trial court's directed verdict for defendants, is reversed. This matter is remanded to that court for further remand to the Superior Court, Wake County, for further proceedings consistent with this decision.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA v. EGBERT FRANCIS, JR.

No. 471A94

(Filed 28 July 1995)

1. Appeal and Error § 155 (NCI4th)— murder—instructions on aiding and abetting and acting in concert—objection at trial different from argument on appeal—reviewed as plain error

A first-degree murder defendant's contentions as to instructions on aiding and abetting and acting in concert were reviewed

under the plain error standard where defendant did not object at trial on the ground upon which he asserts error on appeal.

Am Jur 2d, Trial § 1464.

2. Criminal Law § 792 (NCI4th)— murder—acting in concert—aiding and abetting—instructions

Although the trial court in a first-degree murder prosecution could have been more precise in denominating an acting in concert instruction as such and could have been more explicit in informing the jurors when it was moving from the portions of its instructions relating to acting in concert to those relating to aiding and abetting, and even when it is assumed that the trial court erred when it inserted the words "acting in concert" in its final mandate on aiding and abetting, there was no plain error because the instructions closely tracked the pattern instructions and the evidence supporting defendant's guilt on either theory was overwhelming.

Am Jur 2d, Trial §§ 1255, 1256.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing consecutive sentences of imprisonment for life entered by Brooks, J., on 13 May 1994 in Superior Court, Wake County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court on 9 May 1995.

Michael F. Easley, Attorney General, by Wm. Dennis Worley, Associate Attorney General, for the State.

George E. Kelly, III, for defendant-appellant.

MITCHELL, Chief Justice.

Defendant, Egbert Francis, Jr., was tried noncapitally on proper indictments charging him with two counts of first-degree murder. The State's evidence tended to show that on 19 November 1991, two bodies were found in the bushes near Wake Medical Center in Raleigh. The victims, Ssuraj Ibrahim and Corede Sondunke, had each been shot in the head but with different caliber guns. Blood tracks showed that their bodies had been dragged from a nearby road to the bushes. The police found a slip of paper with defendant's address in one of the victim's pockets. The police eventually went to the defendant's address with a search warrant and found several firearms and a large amount of ammunition.

The police were informed that a black sport-utility vehicle had been observed near the crime scene. Subsequent investigations led them to a burned-out black Nissan Pathfinder in Virginia. The Pathfinder was registered to Andrew Robinson. Robinson initially denied any involvement when questioned by the police, but he later confessed. He testified at trial that the two victims were drug couriers from New York who routinely brought drugs to defendant. Defendant would then give some of the drugs to Robinson for sale. Once the drugs were sold, defendant and Robinson would give the couriers part of the proceeds of the sales. The couriers would then return to New York and give the money to a man named Sal.

Robinson testified that a few days before the murders, Ibrahim and Sondunke, who were couriers for Sal, came to Raleigh to collect money for drugs previously delivered. Defendant had spent some of the money and could not pay them. On a prior occasion when defendant could not pay Sal, defendant's hand had been broken. On the night of the murders, defendant and Robinson left the couriers at defendant's house and went to a party. When they left the party, they drove back toward defendant's house. During that drive, defendant asked Robinson if he would help defendant kill the two couriers. Defendant explained that he was afraid that if the couriers returned to New York without the money, either defendant or his mother would be killed. Robinson agreed to help defendant.

When they arrived at defendant's house, defendant went inside while Robinson waited in the Nissan. Defendant emerged from the house with two guns. He gave one of them to Robinson and went back inside to get the two couriers. The four men then drove until they ended up in a secluded area behind Wake Medical Center. Defendant and Robinson had previously agreed that defendant would signal Robinson by tapping him on the shoulder. On defendant's signal, defendant shot Sondunke in the head, and Robinson shot Ibrahim in the head. They then dragged the bodies out of the car and left them in the bushes, where they were eventually found. Before they left, defendant went back to the bushes and shot one of the victims again to make sure that he was dead.

The jury found defendant guilty of both counts of first-degree murder. The trial court entered judgments imposing consecutive life sentences.

Defendant's only assignment of error concerns the instructions relating to the murder of Ssuraj Ibrahim. He does not assign error to

his conviction, judgment or sentence for the murder of Corede Sondunke. The trial court instructed the jury that it could convict defendant of first-degree murder based either on the theory of acting in concert with or on the theory of aiding and abetting Andrew Robinson. Defendant argues that the trial court's instructions on acting in concert and aiding and abetting were erroneous in several respects. He contends that the trial court gave its instructions concerning the Ibrahim killing in a manner that intermingled the theories of acting in concert and aiding and abetting. He says that the form of the instructions led to confusion of the jurors and resulted in a verdict of first-degree murder based on an altogether novel theory, to wit: "guilty of aiding and abetting by acting in concert."

[1] As an initial issue, we must address the standard of review to be applied on appeal. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure sets forth the procedures for preserving instructional errors for appeal.

> 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 for his objection*; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on the request of any party, out of the presence of the jury.

N.C. R. App. P. 10(b)(2) (emphasis added).

In the charge conference, the State requested instructions on acting in concert and aiding and abetting according to North Carolina Pattern Instructions 202.10 and 202.20A, respectively. Defendant objected to the instructions on the ground that the jury would be instructed on these theories only with reference to the victim Ibrahim and not with reference to the victim Sondunke. The trial court indicated that based on the evidence, the theories applied only to the murder of Ibrahim. Defense counsel then responded: "That's my concern. I don't want the jury to hear the Court indicate whether it applies or not." The trial court noted the objection, and the charge conference continued.

At the conclusion of the charge conference, the challenged instructions were given to the jury. The jury was sent out of the courtroom when the instructions were completed, and the trial court asked the defendant if he had any requests for changes in the instructions.

Defense counsel replied: "Your honor, I have nothing different from what I raised before. . . . [I] [o]bject to the instructions on acting in concert as to each charge and instruction. I object to having instructions on aiding and abetting with regard to each charge. These are the same objections I made before. I'm just for the record raising them again at this time."

Although defendant objected to the instructions, he did not object on the ground upon which he now asserts error. His objection was based on the ground that the trial court should not indicate that the jury could find from the evidence at trial the theories of acting in concert and aiding and abetting applied to one murder but not the other. This is a markedly different ground than that forming the basis for the assignment of error presented to this Court. As noted above, defendant now objects to the form of the trial court's instructions on the theories at issue. He does not contend that the challenged instructions were not warranted by the evidence. Indeed, he cannot. There was plenary evidence to support each instruction. In *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983), we said that "[t]he purpose of Rule 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial." *Id.* at 660, 300 S.E.2d at 378. In the present case, any problem with the form of the trial court's instructions could have been cured easily by an objection from defendant on the ground upon which he now contends that the trial court erred. As the objections at trial in no way supported the defendant's assignment of error on appeal, we conclude that defendant did not preserve this error for appellate review pursuant to Rule 10(b)(2). *See State v. Allen*, 339 N.C. 545, 554-55, 453 S.E.2d 150, 154-55 (1995) (spirit and purpose of Rule 10(b)(2) were not met when defense counsel failed to object, as that failure denied the trial court the opportunity to cure perceived errors in the instruction). Therefore, this assignment of error must be reviewed under the plain error standard. *Odom*, 307 N.C. 655, 300 S.E.2d 375.

[2] The trial court first instructed the jury as to acting in concert and immediately followed with an instruction on aiding and abetting. These instructions were virtually identical to the North Carolina Pattern Instructions. *See* N.C.P.I.—Crim. 202.10 (1993); *see also* N.C.P.I—Crim. 202.20A (1989). The trial court correctly instructed the jury concerning acting in concert when it stated in part: "If two or more persons act together, with a common purpose to commit the

crime, each of them is held responsible for the acts of the other done in the commission of the crime." *See State v. Taylor*, 337 N.C. 597, 608, 447 S.E.2d 360, 367 (1994). The trial court also correctly instructed the jurors on the law as to aiding and abetting when it told them that they had to find three things in order to convict defendant of first-degree murder on that theory: (1) that the crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the crime by the other person. *See generally Allen*, 339 N.C. 545, 453 S.E.2d 150.

Defendant does not challenge the above instructions as being improper statements of the substantive law. First, he argues that the trial court failed to clearly denominate its acting in concert instruction as such by prefacing the instruction with a clear statement that it was instructing on acting in concert. Second, he says that the trial court failed to delineate for the jury where the acting in concert instruction ended and the aiding and abetting instruction began. Finally, defendant contends that the above errors were exacerbated by the trial court's later instruction concerning aiding and abetting in its final mandate:

> So, I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, Andrew Robinson, Jr. committed the crime of first-degree murder of the victim Ssuraj Ibrahim, and that the defendant knowingly advised, instigated, encouraged, procured, or aided, or *acting in concert with* Mr. Robinson to commit the crime, and that in so doing, the defendant's actions or statements caused or contributed to the commission of the crime by Mr. Robinson, it would be your duty to return a verdict of first-degree murder.

(Emphasis added.) Defendant contends that the addition of the emphasized language, coupled with the trial court's failure to clearly inform the jury where the instruction on acting in concert ended and the instruction on aiding and abetting began, resulted in his conviction on the theory of aiding and abetting by substituting acting in concert for the second requirement of aiding and abetting.

We concede that the trial court could have been more precise in denominating the acting in concert instruction as such. Further, the trial court could have been more explicit in informing the jurors when it was moving from the portions of its instructions relating to acting

in concert to those relating to aiding and abetting. However, even when we assume *arguendo* that the trial court erred when it inserted the words "acting in concert" in its final mandate on aiding and abetting, any such error was harmless.

The general rule is that "a charge must be construed 'as a whole in the same connected way in which it was given.' When thus considered, 'if it fairly and correctly presents the law, it will afford no ground for reversing the judgment, even if an isolated expression should be found technically inaccurate.' " *State v. Tomblin*, 276 N.C. 273, 276, 171 S.E.2d 901, 903 (1970) (quoting *State v. Valley*, 187 N.C. 571, 572, 122 S.E. 373, 374 (1924)). We are convinced that the aforementioned imperfections could not have led the jurors to give the trial court's instructions the convoluted construction urged by defendant. As noted previously, the instructions closely tracked the pattern instructions. Additionally, the evidence which supported defendant's guilt on either theory was overwhelming. Considering the instructions as a whole, we conclude that they fairly and correctly presented the law. Therefore, defendant has failed to show that "absent the [alleged] 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). Consequently, he has failed to show plain error, and this assignment of error must be overruled.

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

No error.

CYDNEE C. SIMS v. DAN GERNANDT, DAN GERNANDT D/B/A/ DAN'S FOREIGN CAR REPAIR

No. 514A94

(Filed 28 July 1995)

Torts § 31 (NCI4th)— release signed by plaintiff—claim in existence at time of signing—release as bar to action

A release signed by plaintiff effectively barred her claim that defendant fraudulently concealed damages to her car where plaintiff took her car to defendant for repairs to the clutch; when she picked it up, she noticed a peculiar odor and a stain on the carpet near the gas pedal; defendant refunded the $30 fee paid by

plaintiff; plaintiff signed a document whereby she agreed to "relinquish [defendant] of any responsibility whatsoever, of any kind for my [car]"; and any responsibility of defendant to plaintiff was already in existence at the time plaintiff signed the document and was, therefore, released by that document.

Am Jur 2d, Release §§ 29 et seq.

Justice PARKER concurs in the result.

Justice FRYE dissenting.

Justices LAKE and ORR join in this dissenting opinion.

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals, 116 N.C. App. 299, 447 S.E.2d 455 (1994), affirming an order allowing defendant's motion for summary judgment entered by Manson, J., on 21 June 1993 in District Court, Durham County. Heard in the Supreme Court 10 May 1995.

McGill & Noble, by Christa A. McGill, for plaintiff-appellant.

Browne, Flebotte, Wilson & Horn, P.L.L.C., by Daniel R. Flebotte, for defendant-appellee.

MITCHELL, Chief Justice.

Plaintiff's complaint and forecast of evidence indicate that she took her car to defendant's repair shop to have the clutch cable tightened. When she returned for her car, she noticed a peculiar odor and a stain on the carpet near the gas pedal. Defendant agreed to refund the $30.00 fee paid by plaintiff. Defendant then presented plaintiff with a one-sentence release, which plaintiff signed.

Plaintiff alleges she later discovered that her gas line had been damaged while her car was being worked on by defendant, and the damage caused a gasoline leak that resulted in the carpet stain and odor. Plaintiff then brought this action against defendant claiming that defendant fraudulently concealed the damage to her car. Plaintiff admits that she did not read the document that defendant gave her to sign, but she contends that she did not know she was signing a "release." The document signed by plaintiff was as follows: "I Cydnee C. Sims [plaintiff's signature] agree to relinquish Dan Gernandt of any responsibility whatsoever, of any kind for my 85 Honda-Civic &

hereby receive a refund in full of $30.00 for welding of vehicle pedal." Plaintiff states in her affidavit that she believed she was signing a receipt for the $30.00 refund.

Defendant moved for summary judgment, relying on the release. After a hearing, the trial court granted defendant's motion and plaintiff appealed. The Court of Appeals, with Judge Wynn dissenting, affirmed the order of the trial court. Plaintiff now appeals to this Court from Judge Wynn's dissent below.

The sole issue presented on this appeal is whether the plaintiff's release effectively bars her claim. Plaintiff argues that the basis of her claim arose subsequent to her signing of the release and is therefore not barred by the release. Plaintiff relies on *Travis v. Knob Creek, Inc.*, 321 N.C. 279, 362 S.E.2d 277 (1987), *reh'g denied*, 321 N.C. 481, 364 S.E.2d 672 (1988), where this Court stated:

> "A release ordinarily operates on the matters expressed therein which are already in existence at the time of the giving of the release. Accordingly, demands originating at the time a release is given or subsequently, and *demands subsequently maturing or accruing, are not as a rule discharged by the release unless expressly embraced therein or falling within the fair import of the terms employed.*"

Id. at 282, 362 S.E.2d at 279 (quoting 76 C.J.S. *Release* § 53 (1952)) (alteration in original).

In *Travis*, the plaintiff was employed by defendant Knob Creek from 1977 until the company was bought by defendant Ethan Allen in 1979. When plaintiff learned that the company was going to be sold, he negotiated and signed a ten-year employment contract with Knob Creek to ensure his continued employment by Ethan Allen. Shortly thereafter, Ethan Allen asked the plaintiff to sign a release which released and discharged Knob Creek "from all *claims, demands, actions, causes of action*, on account of, connected with, or growing out of any matter or thing whatsoever." *Id.* at 281, 362 S.E.2d at 278 (emphasis added). Five years later, Ethan Allen fired the plaintiff, and he sued for breach of his employment contract. Defendants argued that the release barred the plaintiff's claim. This Court stated that because "[t]he release did not specifically include future claims or existing non-asserted rights" and "did not contain any language implying that such claims or rights were being released," the release did not bar plaintiff's claim. *Id.* at 283, 362 S.E.2d at 279.

This case is distinguishable from *Travis*. In *Travis*, plaintiff had an ongoing relationship with Knob Creek. He signed the release prior to the expiration of his ten-year employment contract. Moreover, at the time plaintiff signed the release, he did not have a claim for relief and had not asserted a legal right to continue working for Knob Creek. Knob Creek's obligations had not yet fully matured or accrued. Here, by contrast, when plaintiff smelled the odor and saw the stain on the carpet of her car, she was aware that something was wrong with the car. Her claim against defendant had accrued. After some discussion, the parties agreed that defendant would refund the $30.00 fee plaintiff had paid, and plaintiff signed a release. At the time of signing the release, there was no continuing relationship between the parties, and any obligation of defendant to plaintiff had matured.

We conclude that the document in this case is effective as a release of plaintiff's claim against defendant. The document clearly and unambiguously informs the reader that it is a release by the signatory of "any responsibility [of defendant] whatsoever, of any kind for my 85 Honda-Civic." Any responsibility of defendant to plaintiff was already in existence at the time plaintiff signed the document and was therefore released by that document.

Summary judgment for defendant was properly granted by the trial court, and the decision of the Court of Appeals affirming that judgment is affirmed.

AFFIRMED.

Justice PARKER concurs in the result.

Justice FRYE dissenting.

The majority concludes that the trial court did not err in granting defendant's motion for summary judgment as to the plaintiff's claim, holding that the document in this case is effective as a release of plaintiff's claim against defendant. I believe that the forecast of evidence in this case, viewed properly, presented a question of fact for the jury as to whether defendant fraudulently induced plaintiff to sign the release. Thus, defendant, as the moving party, was not entitled to judgment as a matter of law.

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 of showing that no questions of material fact remain to be resolved. *Id.*

Without unnecessary duplication, the forecast of evidence, taken in the light most favorable to plaintiff, the non-moving party, shows that after defendant had serviced plaintiff's Honda automobile, plaintiff returned the automobile to defendant when she noticed a peculiar odor and carpet stains. Defendant inspected the automobile and did not disclose to plaintiff that her automobile's fuel line had been damaged. Instead, defendant told plaintiff that the odor was probably residual smell from the welding. Defendant assured plaintiff that the odor would dissipate and denied knowledge of the origin of the stains. Relying on defendant's assessment of the problem, plaintiff obtained an estimate for shampooing the carpet.

Thereafter, plaintiff telephoned defendant and asked him for a contribution towards having the carpet shampooed. Defendant became very upset during the conversation and agreed to refund plaintiff's $30.00 payment as his contribution. Plaintiff and defendant agreed that plaintiff would sign a "receipt" for the $30.00 refund. Defendant refused to meet with plaintiff that day, claiming that he was too busy at work. Therefore, they agreed to meet the following week.

However, almost immediately following their telephone conversation, defendant unexpectedly appeared at plaintiff's work place at a time when plaintiff was very busy with customers. Defendant gave plaintiff $30.00 and presented a document for plaintiff's signature. Defendant never revealed that the document was anything other than a receipt for his contribution towards having the carpet shampooed as they had agreed during their prior telephone conversation.

When neither the odor nor the stains dissipated, plaintiff took her automobile to a Honda dealership. The mechanic there informed plaintiff that the fuel line had been damaged to the point of leakage by a welding device near the clutch cable. The mechanic found the damage to be readily apparent. The mechanic informed plaintiff that the automobile was in a very dangerous condition and that she was extremely lucky that there had been no explosion.

The majority holds that the "receipt" signed by plaintiff is effective as a release of plaintiff's claim against defendant. However, a release procured by fraud or misrepresentation is invalid. *Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E.2d 718 (1981). Indeed, the principle is often stated, in broad and sweeping language, that fraud destroys the validity of everything into which it enters, and that it vitiates the most solemn contracts, documents, and even judgments. *See generally* 37 Am. Jur. 2d *Fraud and Deceit* § 8 (1968). A pleading setting up fraud must allege the facts relied upon to constitute fraud, and that the alleged false representation was made with intent to deceive plaintiff, or must allege facts from which such intent can be legitimately inferred. *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E.2d 881 (1957).

I believe that the allegations of the complaint, and the materials presented to and considered by the trial court on the motion for summary judgment, are sufficient to permit a legitimate inference of intent to deceive. Considering the evidence in the light most favorable to plaintiff, as we are bound to do, I conclude that the forecast of evidence presents a genuine issue of material fact as to whether defendant fraudulently induced plaintiff to sign the release. Accordingly, I would hold that the trial court erred in granting defendant's motion for summary judgment and the Court of Appeals, therefore, erred in affirming the trial court.

I am authorized to state that Justice LAKE and Justice ORR join in this dissenting opinion.

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

No. 115PA94

(Filed 28 July 1995)

1. Courts § 75 (NCI4th)— review of agency decision—award of attorney fees—jurisdiction—order overruled by second judge

When petitioner petitioned the superior court for review of a final agency decision, this gave the superior court jurisdiction under N.C.G.S. § 136-134.1 to determine the whole case, including the taxing of costs. Therefore, a superior court judge had juris-

diciton to interpret N.C.G.S. § 6-19.1 pertaining to the taxing of costs, and it was error for another superior judge to overrule his order taxing attorney fees against the State agency.

Am Jur 2d, Administrative Law §§ 15, 16, 25, 116-152, 183, 277, 313, 383, 403, 414-431, 634; Certiorari § 23.

2. Courts § 85 (NCI4th)— superior court judge overruled by another—error

One superior court judge had jurisdiction to decide whether to impose sanctions against the State pursuant to N.C.G.S. § 1A-1, Rule 11, and he could not be overruled by another superior court judge.

Am Jur 2d, Administrative Law § 383; Judges § 35.

3. Execution and Enforcement of Judgments § 1 (NCI4th)— execution against State—error by trial court

The trial court erred in allowing execution against the State, since the Judicial Branch does not have the power to impose an execution against the Executive Branch.

Am Jur 2d, Constitutional Law §§ 325, 638; Executions and Enforcement of Judgments §§ 13, 202, 491; Exemptions § 304; United States § 111.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 113 N.C. App. 483, 439 S.E.2d 245 (1994), reversing an order entered 4 December 1992 by Bowen (Wiley F.), J., in Superior Court, Wake County. Heard in the Supreme Court 12 January 1995.

This appeal brings to the Court a question as to the propriety of a superior court judge's striking orders issued by another superior court judge. On 24 April 1990, the Department of Transportation (DOT) revoked a permit of Able Outdoor, Inc. (Able), for a sign on Interstate Highway 26 in Buncombe County. DOT contended Able had cut trees in front of the sign. The Secretary of Transportation affirmed the order.

Able then petitioned the Superior Court, Wake County, for review pursuant to N.C.G.S. § 136-134.1. While the matter was pending in superior court, DOT reinstated the permit on 7 December 1990. Judge Narley L. Cashwell then awarded the petitioner attorney's fees in the amount of $8,978.75. DOT appealed this award, which appeal was dis-

missed by the Court of Appeals because there had not been a final judgment in the case. Judge Farmer then dismissed the case without prejudice, which both parties agree was a final disposition of the case. On 22 October 1992, the Wake County Clerk of Superior Court issued an execution against DOT seeking payment on the order allowing attorney's fees.

On 19 November 1992, Judge Cashwell entered an order in aid of execution requiring DOT to appear in Superior Court, Wake County, to answer regarding property in its possession which could satisfy the execution.

DOT then made a motion pursuant to N.C.G.S. § 1A-1, Rule 60(b)(4) and (6) for relief from the order granting attorney's fees, the execution, and the order in aid of execution. Judge Wiley F. Bowen granted the motion, concluding that Judge Cashwell did not have jurisdiction to enter the orders. The Court of Appeals reversed.

We allowed discretionary review.

Wilson & Waller, P.A., by Betty S. Waller and Brian E. Upchurch, for petitioner-appellee.

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

WEBB, Justice.

The first question we face in this appeal is whether Judge Cashwell had jurisdiction to interpret N.C.G.S. § 6-19.1 or N.C.G.S. § 1A-1, Rule 11 as to the award of attorney's fees. If he had jurisdiction to do so, it was error for Judge Bowen to strike this award. One superior court judge may not overrule another. *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972); *Huffaker v. Holley*, 111 N.C. App. 914, 433 S.E.2d 474 (1993); *Madry v. Madry*, 106 N.C. App. 34, 415 S.E.2d 74 (1992). If Judge Cashwell did not have jurisdiction to act under these sections of the statutes, his order was a nullity and Judge Bowen could strike it.

The superior court gained jurisdiction of this case when Able petitioned for review of the final agency decision pursuant to N.C.G.S. § 136-134.1. N.C.G.S. § 6-19.1 provides in pertinent part:

> In any civil action . . . brought by the State or brought by a party who is contesting State action pursuant to N.C.G.S. § 150A-43 [now N.C.G.S. § 150B-43] or *any other appropriate*

provisions of law, unless the prevailing party is the State, the court may, in its discretion, *allow the prevailing party to recover reasonable attorney's fees* to be taxed as court costs against the appropriate agency if:

(1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

The party shall petition for the attorney's fees *within 30 days following final disposition of the case.* The petition shall be supported by an affidavit setting forth the basis for the request.

N.C.G.S. § 6-19.1 (1986) (emphasis added).

[1] The respondent Secretary of Transportation argues that N.C.G.S. § 136-134.1 does not provide for attorney's fees against the State. He says "[a]n attorney fee proceeding under Section 6-19.1 is a completely separate proceeding from a judicial review proceeding under Section 136-134.1. Consequently, jurisdiction under Section 136-134.1 does not automatically confer jurisdiction under Section 6-19.1." He argues further that N.C.G.S. § 6-19.1 waives sovereign immunity and must be strictly construed. *Construction Co. v. Department of Administration,* 3 N.C. App. 551, 165 S.E.2d 338 (1969). The respondent says N.C.G.S. § 6-19.1 requires that a petition for attorney's fees must be filed within thirty days following the final disposition of the case, and unless this is done, the superior court does not have jurisdiction to pass on the question of attorney's fees. The respondent contends, based on this argument, that Judge Cashwell did not have jurisdiction to award attorney's fees pursuant to N.C.G.S. § 6-19.1 and Judge Bowen could strike this order.

We do not agree with respondent's interpretation. When Able petitioned the superior court for review, this gave the superior court jurisdiction under N.C.G.S. § 136-134.1. The statute provides for a *de novo* hearing. We believe this gave the court jurisdiction to determine the whole case including the taxing of costs. N.C.G.S. § 6-19.1 provides for attorney's fees to be taxed as costs in some instances. The court had jurisdiction to interpret this section. We do not believe the General Assembly intended that N.C.G.S. § 6-19.1 would provide for a separate proceeding in which the court does not have jurisdiction until certain prerequisites are met. Judge Cashwell may have erred by allowing attorney's fees, but we do not have to decide that question in

this case. He had jurisdiction to interpret N.C.G.S. § 6-19.1, and it was error for another superior court judge to overrule his order.

[2] By the same token, Judge Cashwell had jurisdiction to decide whether to impose sanctions under N.C.G.S. § 1A-1, Rule 11. N.C.G.S. § 1A-1, Rule 1 provides in part that the Rules of Civil Procedure "shall govern the procedure in the superior and district courts . . . in all actions and proceedings of a civil nature except when a differing procedure is prescribed." N.C.G.S. § 1A-1, Rule 1 (1990). N.C.G.S. § 1A-1, Rule 11 provides in part: "If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose . . . an appropriate sanction, which may include . . . a reasonable attorney's fee." N.C.G.S. § 1A-1, Rule 11 (1990). Judge Cashwell found that certain acts of the respondent "were not well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and caused unnecessary delay and increased cost of litigation." He imposed sanctions based on this finding.

This is a proceeding of a civil nature. The State has consented to be sued by N.C.G.S. § 136-134.1. The Rules of Civil Procedure apply to this case. There is no reason why Rule 11 should be excluded from the rules to be applied. Again, we need not determine whether the action of Judge Cashwell was erroneous in basing his order on a violation of Rule 11. He had jurisdiction to interpret the rule, and the State did not appeal from the order.

The respondent argues that Rule 11 has no express language which allows the granting of attorney's fees against the State. He says that absent such an express grant of authority, our doctrine of sovereign immunity does not allow sanctions against the State. This argument misses the point. The respondent may be correct in his argument that Rule 11 does not provide for sanctions against the State. That does not mean, however, that Judge Cashwell did not have jurisdiction to decide this question. When he decided it, he could not be overruled by another superior court judge.

The respondent argues further that because N.C.G.S. § 6-19.1 provides for the allowance of attorney's fees, there is no authority for Rule 11 sanctions. Again, this is not a jurisdictional question. It is a legal question, which Judge Cashwell had jurisdiction to determine.

The respondent argues further that Judge Bowen properly struck the order imposing sanctions under Rule 60(b)(6), which allows a

court to grant relief from an order for "[a]ny other reason justifying relief from the operation of the judgment." N.C.G.S. § 1A-1, Rule 60(b)(6) (1990). The extraordinary circumstance upon which Judge Bowen relied in striking the sanctions imposed pursuant to Rule 11 was that N.C.G.S. § 6-19.1 more specifically addressed the situation in this case. This is not a sufficient reason for one superior court judge to overrule another.

[3] We hold, however, that the Court of Appeals erred in affirming Judge Cashwell's orders allowing execution against the State. In *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), we held that when the State enters into a valid contract, it waives its sovereign immunity so that it may be sued for breach of the contract. We also held that if a plaintiff is successful in establishing his claim, he cannot obtain execution to enforce the judgment. We said, "[t]he judiciary will have performed its function to the limit of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties." *Id.* at 321, 222 S.E.2d at 424. Pursuant to *Smith*, we do not believe the Judicial Branch of our State government has the power to enforce an execution against the Executive Branch. *See Garner v. Worth*, 122 N.C. 250, 29 S.E. 364 (1898).

Able argues that N.C.G.S. § 7A-103 and N.C.G.S. § 1-313 authorize the clerk to issue orders for execution, and N.C.G.S. § 1-353 authorizes superior court judges to issue orders in aid of execution. It says the orders issued in this case were issued pursuant to these sections of the statutes and are valid. These sections were in effect when *Smith* was decided. We did not hold then that they provided for execution against the State and we decline to do so now.

For the reasons stated in this opinion, we affirm the holding of the Court of Appeals that it was error to strike Judge Cashwell's order awarding attorney's fees. We reverse that part of the decision of the Court of Appeals which holds the petitioner may have execution against the State, and remand to that court for further remand to the Superior Court, Wake County, for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

STATE OF NORTH CAROLINA v. TIASEER JANIL RAMBERT

No. 482PA94

(Filed 28 July 1995)

1. Assault and Battery § 80 (NCI4th); Constitutional Law § 177 (NCI4th)— discharging firearm into occupied vehicle—three shots—three convictions—no double jeopardy violation

The conviction and sentencing of defendant for three counts of discharging a firearm into occupied property did not violate double jeopardy principles, although the three indictments were identical and did not describe in detail the specific events or evidence that would be used to prove each count, where the evidence showed that defendant fired three shots from one pistol into the victim's occupied automobile within a short period of time; each act was distinct in time and required that defendant employ his thought process each time he fired his weapon; each shot struck the vehicle in a different place; and defendant was thus not charged three times with the same offense for the same act.

Am Jur 2d, Assault and Battery §§ 90, 91; Criminal Law § 277.

2. Weapons and Firearms § 24 (NCI4th)— going armed to terror of people—indictment insufficient for felony—remand for resentencing as misdemeanor

While the Court of Appeals was correct in reversing defendant's felony conviction for the common law offense of going armed to the terror of the people because the allegations of the indictment were insufficient to elevate the misdemeanor charge to a felony, the Court of Appeals erred by failing to instruct the trial court, upon remand, to enter judgment on the conviction as a misdemeanor.

Am Jur 2d, Weapons and Firearms § 29.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 116 N.C. App. 89, 446 S.E.2d

599 (1994), setting aside judgments entered upon defendant's convictions of three counts of discharging a firearm into occupied property and one count of going armed to the terror of the people by Brannon, J., at the 26 July 1993 Criminal Session of Superior Court, Onslow County, and remanding for resentencing. Heard in the Supreme Court 14 April 1995.

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

David L. Best for defendant-appellee.

FRYE, Justice.

On 29 July 1993, defendant was convicted of going armed to the terror of the people, assault with a deadly weapon, and three counts of discharging a firearm into occupied property. The trial court sentenced defendant to three years' imprisonment for going armed to the terror of the people, which the court treated as a Class H felony, and to a concurrent term of two years' imprisonment for assault with a deadly weapon, which was not appealed to this Court. The trial court consolidated the three convictions of discharging a firearm into occupied property and sentenced defendant to seven years for this offense; this sentence was to run consecutive to the previous sentences.

Defendant appealed to the Court of Appeals, arguing that evidence that he fired three shots from one gun into occupied property within a short period of time would support a conviction and sentence on only one count, not three counts, of discharging a firearm into occupied property and, furthermore, that by convicting and sentencing him for three counts, the trial court violated double jeopardy principles. Defendant also contended that the trial court erred in elevating the common law misdemeanor of going armed to the terror of the people to a Class H felony. The Court of Appeals agreed with defendant on both issues. As such, that court reversed defendant's Class H felony conviction for going armed to the terror of the people and reversed defendant's separate convictions for discharging a firearm into occupied property. The case was remanded for resentencing.

The State's petition for discretionary review was granted by this Court to review two issues. First, the State contends that the Court of Appeals erred in concluding that defendant could be convicted of and

sentenced for only one count of discharging a firearm into occupied property. Second, while the State concedes that the Court of Appeals did not err in reversing defendant's conviction of a Class H felony for going armed to the terror of the people, the State asserts that the Court of Appeals erred in not remanding this case for the entry of judgment on the offense as a misdemeanor. We agree.

[1] The first issue before this Court is whether, under the facts of this case, it is a violation of double jeopardy principles to convict and sentence defendant for three counts of discharging a firearm into occupied property in violation of N.C.G.S. § 14-34.1. Both the North Carolina and the United States Constitutions provide that no person may be twice put in jeopardy of life or limb for the same offense. U.S. Const. amend. V; N.C. Const. art. I, § 19.[1] The constitutional guaranties against double jeopardy consist of three separate protections, including the protection against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865 (1989); *see generally State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986); *State v. Murray*, 310 N.C. 541, 313 S.E.2d 523 (1984), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988).

As the Court of Appeals stated in *State v. Lewis*, 32 N.C. App. 298, 301, 231 S.E.2d 693, 694 (1977), "[f]or a plea of former jeopardy to be good it must be grounded on the 'same offense' *both in law and in fact*." (Emphasis added.) As such, when a court is determining whether a second indictment places the defendant in double jeopardy, the court must examine the law under which the charges are being brought and the facts underlying each count.

The State indicted defendant, in three separate indictments, on three counts of violating N.C.G.S. § 14-34.1. The elements of this offense are (1) willfully and wantonly discharging (2) a firearm (3) into property (4) while it is occupied. *State v. Jones*, 104 N.C. App. 251, 409 S.E.2d 322 (1991). Each indictment charged that defendant

> unlawfully, willfully and feloniously discharge[d] a firearm, to wit: a handgun, into a 1984 Honda Civic . . . , a vehicle owned by

1. The North Carolina Constitution does not have a Double Jeopardy Clause, but the protection against double jeopardy has been considered an integral part of the Law of the Land Clause. *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972). Also, the United States Supreme Court has held that the Double Jeopardy Clause of the United States Constitution is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707 (1969).

> John L. Dillahunt and located at the New River Piggly Wiggly store parking lot in Jacksonville, North Carolina, while it was actually occupied by John L. Dillahunt.

These indictments were identical and did not describe in detail the specific events or evidence that would be used to prove each count. However, N.C.G.S. § 15A-924 does not require that an indictment contain any information beyond the specific facts that support the elements of the crime. N.C.G.S. § 15A-924(a)(5) (1989) (requiring that criminal pleadings contain a "plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting each element of a criminal offense"). In interpreting this statute, we have stated that indictments need only allege the ultimate facts constituting each element of the criminal offense. *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977). Because a very detailed account is not necessary for legally sufficient indictments, examination of the indictments is not always dispositive on the issue of double jeopardy.

Examination of the facts underlying each charge, however, more accurately illustrates whether defendant has been placed in double jeopardy. In this case, the evidence clearly shows that defendant was not charged three times with the same offense for the same act but was charged for three separate and distinct acts.

The State's evidence at trial tended to show the following facts. On 25 May 1992, John Dillahunt was sitting in his Honda Civic automobile which was parked in the parking lot of the Piggly Wiggly store in the New River Shopping Center in Jacksonville, North Carolina. Defendant, with whom Dillahunt previously had a number of verbal altercations, was riding in an automobile that pulled into a parking space next to the space where Dillahunt's automobile was parked. Defendant and Dillahunt exchanged a few words until defendant produced a gun. After seeing the gun, Dillahunt ducked down in his automobile, and a bullet entered the front windshield of the vehicle. Dillahunt then drove forward, and another bullet struck the passenger door of his vehicle. At this time, Dillahunt and defendant were approximately ten yards apart. Defendant pursued Dillahunt and fired a third shot, which lodged in the rear bumper of Dillahunt's automobile. Additional shots were fired during the chase that ensued, but none of these shots struck Dillahunt's vehicle.

As the trial court properly noted, defendant's actions were three distinct and, therefore, separate events. Each shot, fired from a pis-

tol, as opposed to a machine gun or other automatic weapon, required that defendant employ his thought processes each time he fired the weapon. Each act was distinct in time, and each bullet hit the vehicle in a different place. This decision is consistent with prior case law. *See State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977) (holding that the defendant was not placed in double jeopardy where he was convicted and sentenced on two counts of assault after he fired one shot at two police officers).

Having examined the indictments and the underlying facts of each conviction, we conclude that defendant's conviction and sentencing on three counts of discharging a firearm into occupied property did not violate double jeopardy principles.

[2] The second issue before this Court concerns the Court of Appeals' reversal of defendant's felony conviction for going armed to the terror of the people on the grounds that the charge was improperly elevated to a felony. Upon reversing the trial court's felony conviction, the Court of Appeals remanded the case to the trial court without specific instructions. The State agrees that the allegations of the indictment were insufficient to elevate to a felony the common law misdemeanor of going armed to the terror of the people. However, the State contends that the Court of Appeals erred by failing to instruct the trial court, upon remand, to enter judgment on the conviction as a misdemeanor. We agree. *See State v. Glidden*, 317 N.C. 557, 346 S.E.2d 470 (1986) (case remanded to the Court of Appeals for further remand for entry of judgment and resentencing as a misdemeanor where defendant's felony conviction was vacated because the offense was improperly elevated to a felony).

For the foregoing reasons, we reverse the Court of Appeals on the issue of defendant's three convictions for discharging a firearm into occupied property and remand to that court for remand to the trial court for reinstatement of the judgments. On the issue of the charge of going armed to the terror of the people, we remand this case to the Court of Appeals for further remand to the trial court for judgment and sentencing on that offense as a misdemeanor.

REVERSED AND REMANDED.

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

CLARENCE EDWARD SWICEGOOD, JR. v. CAROL INMAN COOPER

No. 137A94

(Filed 28 July 1995)

Automobiles and Other Vehicles § 440 (NCI4th)— driver's speeding and safe movement violations—sufficient evidence of negligent entrustment

Defendant's evidence was sufficient to require submission to the jury of an issue of plaintiff's negligent entrustment of his automobile to his twenty-five-year-old son where it tended to show that, during a six-year period, the son had been convicted of six speeding violations, three safe movement violations, and had his license suspended for sixty days for accumulating more than twelve driving license points; he also received a prayer for judgment continued for two other violations; and plaintiff admitted that he was aware that his son had received two tickets, one of which was for a safe movement violation. The jury should determine whether plaintiff, as the father of the driver, knew or should have known the record and propensity of his son to be a reckless driver.

Am Jur 2d, Automobiles and Highway Traffic §§ 588, 643, 645, 984, 1028, 1029; Contribution § 65; Damages § 749; Negligence §§ 207, 329-340, 1268, 1442, 1774; Parent and Child § 139.

Comment Note.—Who is "owner" within statute making owner responsible for injury or death inflicted by operator of automobile. 74 ALR3d 739.

Negligent entrustment of motor vehicle to unlicensed driver. 55 ALR4th 1100.

Chief Justice MITCHELL dissenting.

Justice PARKER joins in this dissenting opinion.

Appeal by the defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 113 N.C. App. 802, 440 S.E.2d 573 (1994), finding no error in a judgment for the plaintiff entered by Hamilton, J., on 20 January 1993 in District Court, Wake County. Heard in the Supreme Court 16 February 1995.

SWICEGOOD v. COOPER

[341 N.C. 178 (1995)]

This is an action for damage to personal property which occurred in an automobile accident. The evidence showed there was a collision between the plaintiff's automobile, being driven by his son Reggie Swicegood, and the defendant's van which she was driving. The plaintiff had given his son permission to drive the automobile on this occasion. Reggie Swicegood also drove the vehicle on several previous occasions.

The plaintiff made a motion *in limine* prior to trial to prohibit introducing evidence of negligent entrustment. At a hearing on this motion, the defendant tendered Reggie Swicegood's driving record, which showed that between 1986 and 1991 he was convicted of six speeding violations, three safe movement violations, and had his license suspended for sixty days for accumulating more than twelve driving license points. In 1986, he was convicted of driving sixty miles per hour in a fifty-five mile per hour zone and forty miles per hour in a thirty mile per hour zone. In 1987, he was convicted of a safe movement violation. In 1988, he was convicted of driving over thirty-five miles per hour in a thirty-five mile per hour zone and two safe movement violations. In 1989, he was convicted of driving fifty miles per hour in a thirty-five mile per hour zone, seventy-five miles per hour in a sixty-five mile per hour zone, and forty-six miles per hour in a thirty-five mile per hour zone. He also received a prayer for judgment continued for two other violations between 1984 and 1986.

The defendant also tendered the plaintiff's testimony that he was only aware that his son had received two tickets in the previous ten years, one of which was for a 1988 safe movement violation. The court allowed the motion *in limine* and refused to submit to the jury an issue of contributory negligence based on negligent entrustment.

The jury found the defendant negligent and awarded the plaintiff $8,000 in damages. The defendant appealed to the Court of Appeals which found no error. Judge Cozort dissented.

The defendant appealed to this Court.

Tantum & Hamrick, by John E. Tantum and William B.L. Little, for plaintiff-appellee.

Law Office of Robert E. Ruegger, by Robert E. Ruegger, for defendant-appellant.

WEBB, JUSTICE.

The question posed by this appeal is whether the defendant's evidence supported submitting to the jury an issue of contributory negligence based on negligent entrustment. Negligent entrustment occurs when the owner of an automobile "entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver" who is "likely to cause injury to others in its use." *Heath v. Kirkman*, 240 N.C. 303, 307, 82 S.E.2d 104, 107 (1954); *Bogen v. Bogen*, 220 N.C. 648, 650, 18 S.E.2d 162, 163 (1942). As a result of his own negligence, the owner is liable for any resulting injury or damage proximately caused by the borrower's negligence. *Roberts v. Hill*, 240 N.C. 373, 82 S.E.2d 373 (1954).

The plaintiff contends, and the Court of Appeals agreed, that as a matter of law the traffic violations of the plaintiff's son cannot support a conclusion that he is an incompetent or reckless driver likely to cause injury to others. We disagree.

In *Dinkins v. Booe*, 252 N.C. 731, 114 S.E.2d 672 (1960), we held that the issue of negligent entrustment was correctly submitted to the jury where the evidence showed that the owner of the automobile knew that the driver had a "very serious" automobile accident a few years earlier, had another accident two years later, and had a conviction for driving without a license from several years before. The owner denied having any prior knowledge that the driver had been convicted of operating an automobile on the wrong side of the highway in the "very serious" automobile accident.

In *Boyd v. L.G. DeWitt Trucking Co.*, 103 N.C. App. 396, 405 S.E.2d 914, *disc. rev. denied*, 330 N.C. 193, 412 S.E.2d 53 (1991), the court found that the evidence supported submitting to the jury the issue of negligent entrustment and the issue of whether the negligent entrustment was willful or wanton. The evidence showed that during the twenty years that the driver worked for the defendant trucking company, he received two convictions for driving under the influence of alcohol, three convictions for reckless driving, and six convictions for speeding. The company claimed that it was responsible only for knowing the driver's record for the three years preceding the accident, pursuant to the Federal Motor Carrier Safe Regulations. In the preceding three years, the driver had been convicted of speeding, failure to stop for a siren and reckless driving, and driving while intoxicated and failure to stop for a siren. The court noted that the number

and severity of the driver's offenses supported the jury's finding that the company's negligence was willful or wanton.

In light of the foregoing cases, we conclude that the evidence in this case supported submitting the issue of contributory negligence based on negligent entrustment to the jury. While the driver in this case does not have convictions for reckless driving or convictions that involve the use of alcohol, his convictions nonetheless indicate that a jury should determine whether he is a reckless or incompetent driver likely to cause injury to others. In the span of six years, this driver accumulated three safe movement violations and six speeding convictions. The plaintiff contends that having only one conviction for speeding over sixty miles per hour mitigates the effect of the other five, which are convictions for speeding fifty miles per hour or below. We are not persuaded by this argument. Speed limits exist to ensure the safety of the driving public. *See State v. Ward*, 258 N.C. 330, 128 S.E.2d 673 (1962). They are set according to the conditions of the road. N.C.G.S. § 20-141 (1993). Whether a driver exceeds the limit by fifteen miles per hour in a thirty-five mile per hour zone or a fifty mile per hour zone, he endangers those around him.

The plaintiff also contends that the defendant did not present evidence that would allow a jury to conclude that the plaintiff either knew or should have known that his son was an incompetent or reckless driver. We again disagree. The owner in this case is the driver's father. The father admitted that he knew of two of the traffic convictions, one of which was a safe movement violation. As the father of the driver, who was twenty-five years of age at the time of this accident, the jury should determine whether the plaintiff knew or should have known the record and propensity of his son to be a reckless driver.

We conclude that the defendant's evidence supported submitting the issue of contributory negligence to the jury.

For the reasons stated in this opinion, we reverse the decision of the Court of Appeals and remand the case to that court with instructions to remand to the District Court, Wake County, for proceedings consistent with this opinion.

REVERSED AND REMANDED.

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

Chief Justice MITCHELL dissenting.

For the reasons fully discussed in the majority opinion filed in the Court of Appeals, the traffic violations established in this case will not support a conclusion that the plaintiff's son was so likely to cause harm to others that entrusting a motor vehicle to him amounted to negligent entrustment. Accordingly, I respectfully dissent from the opinion of the majority of this Court reversing the decision of the Court of Appeals.

Justice PARKER joins in this dissenting opinion.

JACKSON COUNTY, BY AND THROUGH THE CHILD SUPPORT ENFORCEMENT AGENCY, EX REL. DORIS SMOKER v. OWEN SMOKER, JR.

No. 394PA94

(Filed 28 July 1995)

Indians § 7 (NCI4th)— Cherokee Indian child—AFDC payments and child support—retention of tribal court jurisdiction—district court jurisdiction—infringement on tribal sovereignty

It would be an infringement on tribal sovereignty for a district court to take jurisdiction of a county's action to recover reimbursement of AFDC payments made to Cherokee Indian children and for an order for future support to be paid by defendant where a claim for support of the children was filed by the mother in the tribal court and the tribal court has retained jurisdiction of that claim. Although the claim of plaintiff county may be separate from any claim of the mother, the claim is still based on defendant's duty to support his children, and the tribal court is available for actions to collect AFDC payments.

Am Jur 2d, Indians § 63.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 115 N.C. App. 400, 445 S.E.2d 408 (1994), reversing an order entered on 15 September 1992 out of the county and out of session by Davis (Danny E.), J., dismissing the

case for lack of subject matter jurisdiction. Heard in the Supreme Court 14 April 1995.

The defendant, his ex-wife, and their three children were all members of the Eastern Band of Cherokee Indians ("the Eastern Band") residing on the Eastern Band's Reservation located in western North Carolina. Following separation, the Indian wife filed suit for custody and support in the Court of Indian Offenses of the Eastern Band of Cherokee Indians ("the Tribal Court") on 17 May 1991. In a judgment dated 25 November 1991, the Tribal Court awarded custody of the children to the wife. It also awarded the home to the wife with no support to be paid by the defendant father. The father, who under the judgment retained a vested interest in the home as equity, assigned all his title and equity in the house to the mother.

Following the mother's assignment of her rights to the Jackson County Department of Social Services ("the County") pursuant to N.C.G.S. § 110-137, the County filed suit in District Court, Jackson County, on 14 January 1992 against the defendant for reimbursement of Aid to Families with Dependent Children ("AFDC") funds in the amount of $5,967 and for issuance of an order that future child support be paid by the defendant. The district court dismissed the County's complaint on grounds that the district court and the Tribal Court had concurrent jurisdiction but that the Tribal Court had previously exercised jurisdiction over the defendant, mother, and children; that the Tribal Court's jurisdiction was continuing; that the claim of the County was a subrogation of the mother's claim; and that the Tribal Court remained the proper forum for child support matters. The County appealed from this order. The Court of Appeals reversed the District Court's decision, and we granted discretionary review.

Michael F. Easley, Attorney General, by T. Byron Smith, Assistant Attorney General, and Elizabeth J. Weese and Gerald K. Robbins, Associate Attorneys General, for plaintiff-appellee.

Haire & Bridgers, P.A., by Ben Oshel Bridgers, and Gary E. Kirby for defendant-appellant.

WEBB, JUSTICE.

This case brings to the Court a question as to the jurisdiction of the District Court, Jackson County, when the Tribal Court has assumed jurisdiction of the subject matter. The issues involved in this case were thoroughly discussed in *Jackson Co. v. Swayney*, 319 N.C.

52, 352 S.E.2d 413, *reh'g denied*, 319 N.C. 412, 354 S.E.2d 713, *cert. denied*, 484 U.S. 826, 98 L. Ed. 2d 54 (1987). In that case, we held that the District Court of Jackson County did not have jurisdiction to determine the paternity of a child because this is of special interest to tribal governance. We also held in *Swayney* that the district court had concurrent jurisdiction with the Tribal Court for actions to recover for AFDC payments. We held that the tribe's interest in self government is not significantly affected by this concurrent jurisdiction.

The only distinction between the action in *Swayney* to recover for AFDC payments and the action in this case is that in *Swayney*, no prior action for the same claim had been filed in the Tribal Court. In this case, a claim for child support had been filed in the Tribal Court, and that court had retained jurisdiction. The question posed by this appeal is whether it is an infringement on tribal sovereignty for a district court to take jurisdiction of a case the subject of which had been retained by the Tribal Court. We hold that it is an unlawful infringement.

The Cherokee Indians have an interest in making their own laws and enforcing them. *Williams v. Lee*, 358 U.S. 217, 3 L. Ed. 2d 251 (1959). This interest would be undermined if the Tribal Court were deprived of jurisdiction of a case after it had assumed it. We hold that it would have been an unlawful infringement on the Cherokee tribe had the district court taken jurisdiction of this case.

The plaintiff argues that it is subrogated to the claim Mrs. Smoker had for support, N.C.G.S. § 110-137 (1991), and that it is the real party in interest. *Settle v. Beasley*, 309 N.C. 616, 308 S.E.2d 288 (1983). This being so, says the plaintiff, its claim is separate from any claim Mrs. Smoker may have, and it does not infringe on the governance of the tribe for the State to pursue its claim independently of Mrs. Smoker's claim. The claim of the plaintiff may be separate from any claim of Mrs. Smoker, but the claim is based on the defendant's duty to support his children. The Tribal Court has retained jurisdiction over claims based on this duty, and the plaintiff must litigate in the Tribal Court.

The plaintiff also argues that if we should hold the district court is without jurisdiction, there will not be an adequate forum for the recovery of AFDC payments. It argues at length that the Tribal Court is not an adequate forum and that if it cannot use the district court to recover for AFDC payments, the AFDC program may be lost. The record does not support this argument. The Tribal Court is available

for actions to collect AFDC payments. There is nothing in the record to show there has been any difficulty in recovering for AFDC payments in the Tribal Court. We cannot presume that the Tribal Court will not properly enforce the law.

For the reasons stated in this opinion, we reverse the Court of Appeals and remand to that court for further remand to the District Court, Jackson County, for the reinstatement of its order.

REVERSED AND REMANDED.

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

DANA M. CROSSMAN v. VAN DOLAN MOORE; AND VAN DOLAN MOORE, II, INDIVIDUALLY

No. 327PA94

(Filed 28 July 1995)

Limitations, Repose, and Laches § 150 (NCI4th)— amendment to complaint—party added—relation back

The trial court correctly denied plaintiff's motion that an amendment to a complaint arising from an automobile accident relate back to the time of the filing of the complaint. N.C.G.S. § 1A-1, Rule 15(c) does not apply to the naming of a new party-defendant to the action. It speaks of claims and nowhere mentions parties; the original claim cannot give the notice required by the rule of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the claim is filed. The holding in *Ring Drug Co. v. Carolina Medicorp Enterprises*, 96 N.C. App. 277, is overruled and the rationale of *Stevens v. Nimocks*, 82 N.C. App. 350, *Callicut v. Motor Co.*, 14 N.C. 736 and *Teague v. Motor Co.*, 14 N.C. App. 210, is not approved so far as it is inconsistent with this opinion.

Am Jur 2d, Limitation of Actions §§ 232-235.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 115 N.C. App. 372, 444 S.E.2d 630 (1994), affirming an order of the superior court by Ferrell, J., at

the 28 June 1993 Civil Session of Superior Court, Mecklenburg County. Heard in the Supreme Court 12 April 1995.

This is an action for personal injury arising from an automobile accident that occurred on 25 January 1989. This action was commenced on 24 January 1992. The original defendants were Van Dolan Moore and Dolan Moore Company, Inc. The plaintiff has taken a dismissal as to Dolan Moore Company, Inc., and it is not involved in this appeal.

Van Dolan Moore moved for summary judgment based partly on the fact that he was not the driver of the vehicle but that his son Van Dolan Moore, II was the driver at the time of the accident. The plaintiff moved to amend the complaint to make Van Dolan Moore, II a party-defendant. She also moved that the court enter an order that the amendment relate back to the filing of the complaint.

The superior court allowed the motion for summary judgment by Van Dolan Moore, allowed the motion by the plaintiff to add Van Dolan Moore, II as a defendant, and denied the motion by the plaintiff that the amendment relate back to the time of the filing of the complaint. The plaintiff appealed from the denial of her motion that the amendment relate back to the time of the filing of the complaint. The Court of Appeals affirmed.

We allowed discretionary review.

Wishart, Norris, Henninger & Pittman, P.A., by William H. Elam and June K. Allison, for plaintiff-appellant.

Kennedy Covington Lobdell & Hickman, L.L.P., by F. Fincher Jarrell, for defendant-appellee.

WEBB, JUSTICE.

We note first that the refusal of the court to order the relation back of the amendment making Van Dolan Moore, II a party in effect determines the case because defendant Van Dolan Moore, II may plead the statute of limitations. The order is appealable. N.C.G.S. § 1-277 (1983); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E.2d 797 (1976).

This case brings to the Court a question as to the interpretation of N.C.G.S. § 1A-1, Rule 15(c), which provides:

> (c) *Relation back of amendments.*—A claim asserted in an amended pleading is deemed to have been interposed at the time

> the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C.G.S. § 1A-1, Rule 15(c) (1990).

Unlike the other sections of the Rule and the rules in general, subsection (c) is not based on the federal counterpart. Rather, it is drawn from the New York Civil Practice Law and Rules, Rule 203(e). N.C.G.S. § 1A-1, Rule 15(c), cmt.

We believe the resolution of this case may be had by discerning the plain meaning of the language of the rule. Nowhere in the rule is there a mention of parties. It speaks of claims and allows the relation back of claims if the original claim gives notice of the transactions or occurrences to be proved pursuant to the amended pleading. When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur. As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed. We hold that this rule does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party.

We believe the interpretation we give to this section is consistent with the interpretation given a similar statute in New York. *See Brock v. Bua*, 83 A.D.2d 61, 443 N.Y.S.2d 407 (1981). We recognize that other jurisdictions follow a different rule than the one we enunciate today. *Schiavone v. Fortune*, 477 U.S. 21, 91 L. Ed. 2d 18 (1986). We note, however, that the language of our rule differs substantively from those rules. *See* Fed. R. Civ. P. 15(c).

The Court of Appeals has faced the issue presented by this case in *Stevens v. Nimocks*, 82 N.C. App. 350, 346 S.E.2d 180, *cert. denied*, 318 N.C. 511, 349 S.E.2d 873 (1986), *reconsideration denied*, 318 N.C. 702, 351 S.E.2d 760 (1987), *Calicutt v. Motor Co.*, 37 N.C. App. 210, 245 S.E.2d 558 (1978), and *Teague v. Motor Co.*, 14 N.C. App. 736, 189 S.E.2d 671 (1972). In each of these cases, the Court of Appeals refused to allow an amendment adding a party to relate back to the filing of the complaint, although it did not use the rationale we apply in this case. In *Ring Drug Co. v. Carolina Medicorp Enterprises*, 96 N.C. App. 277, 385 S.E.2d 801 (1989), the Court of Appeals allowed an

amendment naming a new party to relate back to the filing of the complaint. We overrule the holding in *Ring*, and do not approve of the rationale of the other three cases so far as they are inconsistent with the reasoning of this opinion.

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

AFFIRMED.

STATE OF NORTH CAROLINA, EX REL. ALFRED WEST, JR. v. LINDA G. WEST

No. 395PA94

(Filed 28 July 1995)

Indians § 7 (NCI4th)— Cherokee Indian child—current child support—tribal court decision—district court jurisdiction—infringement on tribal sovereignty

The district court properly declined to exercise jurisdiction of an action by the State, which provided AFDC benefits, seeking current support from the mother for a child living on the Cherokee Indian Reservation where a tribal court had relieved the mother of any obligation to support the child and retained jurisdiction of the child support issue.

Am Jur 2d, Indians § 63.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 115 N.C. App. 496, 445 S.E.2d 416 (1994), reversing an order entered 30 September 1992 in District Court, Swain County, by Davis (Danny E.), J., dismissing this case for lack of subject matter jurisdiction. Heard in the Supreme Court 14 April 1995.

Michael F. Easley, Attorney General, by T. Byron Smith, Assistant Attorney General, and Elizabeth J. Weese and Gerald K. Robbins, Associate Attorneys General, for plaintiff-appellee.

Haire & Bridgers, P.A., by Ben Oshel Bridgers, and Graham Duls for defendant-appellant.

PER CURIAM.

Alfred West, a member of the Eastern Band of Cherokee Indians, and Linda West, a non-Indian, both reside on the Eastern Band's Reservation in western North Carolina. They entered into a separation agreement that gave custody of their minor child, who is also a member of the Eastern Band of Cherokee Indians, to Alfred West. The Wests agreed to share child support obligations. Alfred West filed for Aid to Families with Dependent Children and received such benefits until he became eligible for social security disability benefits for himself and the child.

On 17 May 1991, Linda West filed an action in the Court of Indian Offenses of the Eastern Band of Cherokee Indians ("the Tribal Court") seeking custody of the child. She later elected to proceed only on the issue of visitation rights. Alfred West answered the complaint and counterclaimed in the Tribal Court for reasonable child support.

On 26 August 1991, the North Carolina Child Support Enforcement Agency ("the State") filed an action in the District Court Division of the General Court of Justice of the State of North Carolina seeking child support and reimbursement from Linda West for past public assistance paid to Alfred West. On 4 November 1991, Linda West answered the complaint and moved for a dismissal of the State's action pending the outcome of the action in Tribal Court.

On 17 December 1991, the Tribal Court entered judgment granting an absolute divorce to the parties, awarding Alfred West custody of the child, denying Linda West visitation rights, and relieving Linda West of any obligation to support the child. On 28 January 1992, Linda West again moved for dismissal of the action in District Court, or transfer of that action to the Tribal Court, or that full faith and credit be given to the judgment entered in the Tribal Court. The District Court entered two separate orders, one addressing current support and one addressing reimbursement for past public assistance. Thereafter, the District Court entered another order granting a new trial on the issue of current child support.

On 19 August 1992, Linda West moved for dismissal of the State's District Court action for current child support, or for transfer of the action to Tribal Court, or for the order of the Tribal Court to be given full faith and credit by the District Court. The District Court entered an order on 30 September 1992, corrected on 10 December 1992, dis-

missing the action for current child support on the grounds that the State and Tribal Courts had concurrent jurisdiction over the subject matter, that the Tribal Court had exercised jurisdiction first, and that the Tribal Court continued to exercise jurisdiction. The Court of Appeals reversed the decision of the District Court and remanded for further proceedings.

For reasons set forth in our decision in *Jackson Co. ex rel. Smoker v. Smoker*, 341 N.C. 182, 459 S.E.2d 789, we reverse the decision of the Court of Appeals and remand to that court for further remand to the District Court, Swain County, for the reinstatement of its order.

REVERSED AND REMANDED.

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

SHIRLEY A. SIDNEY v. CYRIL A. ALLEN, M.D., RALEIGH MEDICAL ASSOCIATES, AND WAKE COUNTY HOSPITAL SYSTEM, INC.

No. 211A94

(Filed 28 July 1995)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 114 N.C. App. 138, 441 S.E.2d 561 (1994), affirming the order and judgment entered by Hight, J., in Superior Court, Wake County, on 10 March 1993. Heard in the Supreme Court 21 June 1995.

Carol M. Schiller for plaintiff-appellant.

Young Moore Henderson & Alvis P.A., by David P. Sousa, for defendant-appellees Cyril A. Allen, M.D., and Raleigh Medical Associates.

Smith Helms Mulliss & Moore, L.L.P., by Samuel O. Southern and Alex J. Hagan, for defendant-appellee Wake County Hospital System, Inc.

PER CURIAM.

AFFIRMED.

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

[341 N.C. 191 (1995)]

REBA C. ELLIOT, GUARDIAN FOR BOBBY G. CASSTEVENS, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT

No. 466A94

(Filed 28 July 1995)

Appeal by petitioner 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. 613, 446 S.E.2d 809 (1994), affirming an order entered by Long, J., on 30 December 1992 in Superior Court, Stokes County. Heard in the Supreme Court 20 June 1995.

Legal Aid Society of Northwest North Carolina, Inc., by Joseph P. Henry and Cynthia Fenimore, for petitioner-appellant.

Michael F. Easley, Attorney General, by Claud R. Whitener, III, and Belinda A. Smith, Assistant Attorneys General, for respondent-appellee.

PER CURIAM.

AFFIRMED.

SEXTON v. FLAHERTY

[341 N.C. 192 (1995)]

BILLY PAGE SEXTON, ADMINISTRATOR FOR WILMA J. SEXTON v. DAVID H. FLAHERTY, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES AND MARY DEYAMPERT, DIRECTOR, DIVISION OF SOCIAL SERVICES, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES IN THEIR OFFICIAL CAPACITIES

No. 472A94

(Filed 28 July 1995)

On appeal pursuant to N.C.G.S. § 7A-30 and on discretionary review pursuant to N.C.G.S. § 7A-31(a) of a decision by a divided panel of the Court of Appeals, 115 N.C. App. 613, 446 S.E.2d 809 (1994), affirming a judgment entered by McLelland, J., on 3 May 1993 in Superior Court, Alamance County. Heard in the Supreme Court 20 June 1995.

Legal Services of the Blue Ridge, Inc., by Charlotte Gail Blake, for petitioner-appellant.

Michael F. Easley, Attorney General, by Belinda A. Smith, Assistant Attorney General, for respondents-appellees.

PER CURIAM.

AFFIRMED.

BARNES v. HUMANA OF NORTH CAROLINA

[341 N.C. 193 (1995)]

JAMES R. BARNES v. HUMANA OF NORTH CAROLINA, INC. d/b/a HUMANA HOSPITAL—GREENSBORO and JOE DOE(S)

No. 452PA94

(Filed 28 July 1995)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished opinion of the Court of Appeals, 115 N.C. App. 728, 446 S.E.2d 891 (1994), which affirmed a summary judgment for defendant entered by Long, J., on 7 May 1993 in Superior Court, Guilford County. Heard in the Supreme Court 20 June 1995.

Mary K. Nicholson for plaintiff-appellant.

Adams Kleemeir Hagan Hannah & Fouts, by Clinton Eudy, Jr., Joseph W. Moss, and Edward L. Bleynat, Jr., for defendant-appellee Humana Hospital.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. TONEY McEACHERN

No. 416PA94

(Filed 28 July 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. 569, 446 S.E.2d 889 (1994), affirming the judgments and commitments entered upon defendant's convictions of first-degree rape and incest by Wright, J., at the 1 March 1993 Criminal Session of Superior Court, Robeson County. Heard in the Supreme Court 20 June 1995.

Michael F. Easley, Attorney General, by D. Sigsbee Miller, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, and Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

RAINTREE REALTY AND CONSTRUCTION, INC., (SUBSTITUTE) TRUSTEE v. FRANK W. KASEY AND ZELDA KASEY

No. 517PA94

(Filed 28 July 1995)

On discretionary review, pursuant to N.C.G.S. § 7A-31, of an opinion of the Court of Appeals, 116 N.C. App. 340, 447 S.E.2d 823 (1994), affirming the order entered 20 April 1993 by Hyatt, J., in Superior Court, Buncombe County. Heard in the Supreme Court on 21 June 1995.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Albert L. Sneed, Jr., for petitioner-appellee.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Dorothy K. Woodward; Leonard & Biggers, by William T. Biggers, for respondent-appellants Giles and Bren N. Wright.

PER CURIAM.

AFFIRMED.

IN RE LAMM

[341 N.C. 196 (1995)]

IN RE: ANNE M. LAMM, RESPONDENT

No. 539A94

(Filed 28 July 1995)

Appeal by respondent pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 116 N.C. App. 382, 448 S.E.2d 125 (1994), affirming an order entered by Kirby, J., on 17 June 1993 in Superior Court, Gaston County. On 9 February 1995, this Court allowed discretionary review of additional issues. Heard in the Supreme Court 21 June 1995.

Carolin Bakewell for petitioner-appellee The North Carolina State Bar.

George Daly, P.A., by George Daly, for respondent-appellant.

PER CURIAM.

AFFIRMED.

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

EPPS v. NATIONWIDE MUTUAL INS. CO.

[341 N.C. 197 (1995)]

CHARLES E. EPPS v. NATIONWIDE MUTUAL INSURANCE COMPANY; ATLANTIC CASUALTY INSURANCE COMPANY AND INTEGON INSURANCE COMPANY

No. 584A94

(Filed 28 July 1995)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals in an unpublished opinion, 117 N.C. App. 139, 450 S.E.2d 358 (1994), reversing and remanding the order of the trial court entered by Cashwell, J., on 29 September 1993 in Superior Court, Harnett County, granting defendants' motions for summary judgment. Heard in the Supreme Court 20 June 1995.

Bryan, Jones, Johnson & Snow, by Cecil B. Jones, for plaintiff-appellee.

Law Office of Robert E. Ruegger, by Robert E. Ruegger, for defendant-appellant Integon Insurance Company; Law Offices of Walter L. Horton, Jr., by Walter L. Horton, Jr., and Donna McLamb Lynch, for defendant-appellant Atlantic Casualty Insurance Company; and *Anderson, Broadfoot, Johnson, Pittman, Lawrence and Butler, by Lee B. Johnson, for defendant-appellant Nationwide Mutual Insurance Company.*

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. CHARLIE MASON ALSTON

No. 416A92

(Filed 8 September 1995)

1. Jury § 141 (NCI4th)— first-degree murder—capital trial—jury selection—questions about parole eligibility —denied

There was no error in a first-degree murder capital trial where defendant's motion to permit *voir dire* of potential jurors regarding their beliefs about parole eligibility was denied. Information regarding parole eligibility is not relevant to the issues at trial and is not a proper matter for the jury to consider in a capital sentencing proceeding. The argument that *Simmons v. South Carolina*, 129 L. Ed. 2d 133 requires that North Carolina juries be informed as to the length of time a defendant must serve before becoming eligible for parole has been consistently rejected by the North Carolina Supreme Court.

Am Jur 2d, Jury §§ 189-192, 199.

2. Jury § 235 (NCI4th)— first-degree murder—capital trial—jury selection—death qualification

There was no error in a first-degree murder prosecution in which the death penalty was sought in the denial of defendant's motion to prohibit death-qualification questioning.

Am Jur 2d, Jury § 279.

3. Jury § 262 (NCI4th)— first-degree murder—capital trial—jury selection—peremptory challenges—jurors ambivalent about death penalty

There was no error in a first-degree murder prosecution in which the death penalty was sought in the use of peremptory challenges to remove prospective jurors who were not excludable for cause but who wavered in their ability to impose the death penalty.

Am Jur 2d, Criminal Law § 685.

4. Jury § 227 (NCI4th)— first-degree murder—capital trial—jury selection—challenges for cause— jurors ambivalent about or opposed to death penalty

There was no abuse of discretion in a first-degree murder prosecution in which the death penalty was sought in removing

for cause a prospective juror whose responses indicated with unmistakable clarity that his bias against the death penalty would substantially impair his ability to perform his duties as a juror, and to remove two prospective jurors who indicated that they were opposed to the death penalty, who stated at times that their views on their death penalty would substantially impair their ability to follow the law, who vacillated at other times when asked whether they could set aside their beliefs and vote for the death penalty, and who were not able to state clearly their willingness to temporarily set aside their own beliefs in deference to the rule of law.

Am Jur 2d, Jury §§ 228-233.

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

5. Jury § 150 (NCI4th)— first-degree murder—capital trial—excusal for cause—no rehabilitation

There was no error in a first-degree murder trial in which capital punishment was sought in the trial court's refusal to afford defendant the opportunity to rehabilitate 15 prospective jurors excused for cause pursuant to *Witherspoon v. Illinois*, 391 U.S. 510. Two were dismissed for reasons other than their views on capital punishment and the remaining 13 clearly and unequivocally stated that they were opposed to the death penalty and that their opposition to the death penalty would cause them to vote against its imposition under any circumstances. Defendant did not request an opportunity to rehabilitate any of the prospective jurors and only once took exception to a prospective juror's excusal; also, there was no showing that further questioning would have produced different answers.

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 § 251 (NCI4th)— first-degree murder—peremptory challenges—Batson challenge

There was no error in a first-degree murder prosecution in which the death penalty was sought in the State's use of peremp-

tory challenges to exclude nine African American jurors. Defendant neither objected nor sought to establish a *prima facie* case of racial discrimination and his failure to object precludes him from raising the issue on appeal.

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.

7. Criminal Law § 756 (NCI4th); Jury § 139 (NCI4th)— first-degree murder—jury selection—prosecutor's definition of reasonable doubt—no error

There was no error in a first-degree murder prosecution in which the death penalty was sought where defendant contended that the prosecutor misstated the definition of reasonable doubt during *voir dire* by stating that a reasonable doubt is one that is real and substantial and one which gives the jury substantial misgivings about the State's case. The North Carolina Supreme Court has consistently found no error in the use of the terms "substantial doubt" or "substantial misgivings" in a jury instruction defining reasonable doubt if the instruction as a whole properly conveys the concept of reasonable doubt. Furthermore, any misstatement was cured by the trial court's subsequent correct jury instruction.

Am Jur 2d, Trial §§ 1374-1380.

8. Criminal Law § 76 (NCI4th)— first-degree murder—change of venue—publicity—denied

There was no abuse of discretion in a first-degree murder prosecution in the trial court's denial of defendant's pretrial motion for a change of venue or a special venire based upon extensive publicity and coverage by the media where the trial court properly sustained the State's objection to the only evidence produced in support of defendant's motion, the testimony of a private investigator who had conducted a survey but who indicated that he had no formal training in statistics, that he had not determined the validity of the statistical sample, and that he could not say that a fair representation of the community was sur-

veyed, and who produced five newspaper articles, only two of which related to the present case and those were factual, informative, and noninflammatory in nature. Furthermore, defendant neither referred to the *voir dire* of the jurors who served nor argued that a juror objectionable to him sat on the jury and a review of the record reveals no basis upon which to conclude that any juror based his or her decision upon pretrial information rather than 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.

9. Evidence and Witnesses § 339 (NCI4th)— first-degree murder—prior assaults on victim—admissible to show malice, intent, premeditation and deliberation

The trial court did not abuse its discretion in a first-degree murder prosecution in the admission of testimony tending to show that defendant had previously assaulted the victim. The evidence tends to establish malice, intent, premeditation and deliberation, elements of first-degree murder, and tends to establish the defendant's ill will toward the victim, and thus is relevant to an issue other that defendant's character. Although defendant argues that the danger of unfair prejudice substantially outweighed the probative value of the disputed evidence, the exclusion of evidence under N.C.G.S. § 8C-1, Rule 403 is a matter generally left to the sound discretion of the trial court and abuse will be found only where the trial court's ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Homicide §§ 310, 311.

10. Evidence and Witnesses § 959 (NCI4th)— first-degree murder—statements by victim—afraid of defendant—state of mind exception to hearsay rule

The trial court did not err in a first-degree murder prosecution in admitting hearsay statements by the victim that she was afraid of the defendant. The conversations between the victim and the five witnesses related directly to the victim's fear of defendant and were properly admitted pursuant to the state of mind exception to the hearsay rule to show the nature of the victim's relationship with the defendant and the impact of defend-

ant's behavior on the victim's state of mind prior to her murder. The trial court carefully weighed the probative value of the testimony against its prejudicial effect and defendant has not demonstrated any abuse of discretion. N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Evidence §§ 666, 667.

Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declarant's mental, emotional, or physical condition. 75 ALR Fed 170.

11. Evidence and Witnesses § 601 (NCI4th)— first-degree murder—letter by victim—authentication

The trial court did not err in a first-degree murder prosecution by admitting into evidence a letter purportedly written by the victim where the victim's mother testified that she was familiar with her daughter's handwriting, that the letter was written in her daughter's handwriting, and that she recognized the signature as that of her daughter. There was sufficient evidence of authenticity. N.C.G.S. § 8C-1, Rule 901(a).

Am Jur 2d, Evidence §§ 1381-1390.

12. Evidence and Witnesses § 959 (NCI4th)— first-degree murder—letter—hearsay—victim's fear

The trial court did not err in a first-degree murder prosecution by admitting a letter from the victim where defendant contended that the letter was erroneously admitted under the residual exception to the hearsay rule, but the letter was admissible under the state-of-mind exception to show the status of the victim's relationship with defendant. N.C.G.S. § 8C-1, Rule 803(c).

Am Jur 2d, Evidence §§ 666, 667.

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.

13. Evidence and Witnesses § 3126 (NCI4th)— first-degree murder—corroborating witness—hearsay

The trial court did not err in a first-degree murder prosecution by admitting the testimony of one of the investigating officers, Deputy Williams, who testified concerning prior consistent

statements made by earlier witnesses where the prosecutor announced that the questioned testimony was being offered solely for the purpose of corroborating the earlier testimony. The fact that the testimony would otherwise be inadmissible hearsay will not prevent its admission for purposes of corroboration.

Am Jur 2d, Witnesses §§ 1001-1005, 1011-1026.

14. Evidence and Witnesses § 2908 (NCI4th)— first-degree murder—corroborating witness—hearsay—door opened

There was no error in a first-degree murder prosecution where the trial court admitted testimony by a detective regarding a statement made by the victim's mother concerning the victim's fear of defendant. Defendant concedes that the question was properly allowed for the purpose of showing that the statement was made, but asserts that the form of the question exceeded the scope for which the nonhearsay purpose allowed admission. The defendant opened the door to the introduction of any incompetent or irrelevant hearsay contained in the question by creating an inference during cross-examination that the victim was not afraid of the defendant.

Am Jur 2d, Witnesses §§ 737-742.

15. Evidence and Witnesses § 755 (NCI4th)— first-degree murder—defendant's prior assault conviction—court files—no prejudice

There was no prejudice in a first-degree murder prosecution where the trial court admitted court files relating to defendant's prior conviction for assault. The files were admitted for the nonhearsay purpose of showing motive, intent and plan and witnesses testified that defendant broke into the victim's home and attacked her, that the victim prosecuted the defendant for the assault and trespass, that the defendant harassed and threatened the victim, and that the victim believed that the defendant was going to kill her. The files added little, if anything, to the State's case.

Am Jur 2d, Evidence §§ 408-410.

16. Evidence and Witnesses § 320 (NCI4th)— first-degree murder—drug use subsequent to crime—admitted for identification

There was no error in a first-degree murder prosecution where the trial court admitted evidence that defendant had

bought forty to forty-five dollars' worth of crack cocaine with quarters, dimes and nickels where the victim's mother had testified that the victim worked at a restaurant and received a large quantity of change from tips, that the victim had over one hundred dollars in quarters in a jar in her bedroom the night before her death, and that the jar was empty when she found the victim. The testimony was strong circumstantial evidence tending to show that defendant murdered the victim and stole her tip money from the jar in the bedroom and was relevant, admissible, and clearly not introduced for the purpose of showing that the defendant was a drug user.

Am Jur 2d, Evidence §§ 452-457.

17. Evidence and Witnesses §§ 213, 221 (NCI4th)— first-degree murder—defendant's actions prior to and after murder

The trial court did not err in a first-degree murder prosecution by admitting testimony concerning defendant's actions prior to and after the murder where the testimony tends to implicate defendant in the theft of quarters missing from the victim's bedroom and therefore in the murder, and tends to show that defendant had the opportunity to carry out his threats to kill the victim on the night of the murder. Although defendant argued that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice, the defendant did not demonstrate any abuse of discretion.

Am Jur 2d, Evidence §§ 525, 541, 542.

18. Evidence and Witnesses § 1694 (NCI4th)— first-degree murder—photographs of victim—admissible

The trial court did not err in a first-degree murder prosecution by admitting into evidence crime scene and autopsy photographs where the crime scene photographs were received with limiting instructions and illustrated different aspects of the witness' testimony. The autopsy photographs were also admitted with a proper limiting instruction, were not repetitive or excessive, and helped illustrate the medical examiner's testimony regarding the victim's injuries and cause of death.

Am Jur 2d, Homicide §§ 416-419, 453; Trial § 507.

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

19. Criminal Law § 463 (NCI4th)— first-degree murder—prosecutor's argument—supported by evidence

There was no error in a first-degree murder prosecution where defendant contended that the trial court erred in allowing the prosecutor to use inadmissible evidence during closing arguments, but all of the evidence of which defendant complains was properly admitted.

Am Jur 2d, Trial § 554.

20. Criminal Law § 463 (NCI4th)— first-degree murder—prosecutor's argument—use of hearsay testimony

There was no plain error in a first-degree murder prosecution where defendant contended that the trial court should have intervened *ex mero motu* where the prosecutor referred in closing arguments to the victim's statements of fear, her belief that the defendant was going to kill her, and her statements relating to the defendant's threats and prior assault. Although defendant contended that the prosecutor used the hearsay testimony admitted to show the victim's state of mind other than for the purpose admitted, the victim's statements were highly relevant to show the status of the victim's relationship with defendant and it was proper for the prosecutor to argue all reasonable inferences that may be drawn from this evidence. Clearly the victim's statements were relevant evidence from which the jury could conclude that the defendant intentionally killed the victim and that he had done so with malice, premeditation, and deliberation.

Am Jur 2d, Trial § 554.

21. Criminal Law § 468 (NCI4th)— first-degree murder—prosecutor's argument—not grossly improper

There was no error so grossly improper as to require the trial court's intervention *ex mero motu* in a first-degree murder prosecution where defendant argued that the prosecutor argued facts outside the record and expressed his own personal and highly prejudicial opinions, but the prosecutor's arguments fall well within the wide latitude accorded prosecutors in the scope of their argument and are consistent with and reasonably inferable from the record.

Am Jur 2d, Trial § 554.

22. Criminal Law § 442 (NCI4th)— first-degree murder—prosecutor's argument—biblical references

There was no error requiring intervention *ex mero motu* in a first-degree murder prosecution where defendant contended that the prosecutor improperly opened his closing argument with a biblical reference which indicated that the jury was ordained by God to condemn defendant, but, viewed in context, the prosecutor was effectively arguing that the evidence cried out that defendant perpetrated the crime even though it was committed in secret and without any witnesses. This is in no manner equivalent to saying that state law is divinely inspired or ordained by God.

Am Jur 2d, Trial §§ 567, 568.

23. Criminal Law § 447 (NCI4th)— first-degree murder—prosecutor's argument—defendant's hatred of his father

There was no error requiring intervention *ex mero motu* in a first-degree murder prosecution where defendant argued that the prosecutor improperly commented on the personal characteristics of the victim, but the argument was a reasonable inference drawn from the evidence.

Am Jur 2d, Trial §§ 664 et seq.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3d 8.

24. Criminal Law § 468 (NCI4th)— first-degree murder—prosecutor's argument—right to remain silent, shifting burden of proof, presumption of innocence

Portions of a prosecutor's closing argument in a first-degree murder case did not constitute a comment on defendant's exercise of his right to remain silent, a shifting of the burden of proof, or the deprivation of defendant's presumption of innocence, as defendant contended.

Am Jur 2d, Trial §§ 554, 579, 580.

25. Criminal Law §§ 436, 465 (NCI4th)— first-degree murder—prosecutor's closing argument—decision from appellate courts

There was no error in a first-degree murder prosecution where defendant contended that the prosecutor improperly encouraged the jury to convict the defendant on the basis of com-

munity sentiment and that the prosecutor's use of excerpts from decisions of the appellate courts confused and misled the jury.

Am Jur 2d, Trial §§ 554, 569.

Prejudicial effect of prosecuting attorney's argument to jury that people of city, county, or community want or expect a conviction. 85 ALR2d 1132.

26. Criminal Law § 427 (NCI4th)— first-degree murder—prosecutor's argument—State's evidence not rebutted

There was no error in a first-degree murder prosecution where defendant contended that the prosecutor's argument that the State's evidence was uncontradicted was an improper comment on his exercise of his right not to testify. It is well settled that the State may properly draw the jury's attention to the failure of the defendant to produce exculpatory evidence to contradict the State's case. The unavailability of a witness for the defense is not a determinative factor; theoretically, the evidence was contradictable by testimony of persons other than defendant or by cross-examination of the witnesses themselves.

Am Jur 2d, Trial §§ 554, 579, 580.

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.

27. Homicide § 552 (NCI4th)— first-degree murder—request for instruction on second-degree murder denied

The trial court did not err in a first-degree murder prosecution by denying defendant's request to instruct the jury on second-degree murder as a lesser-included offense. The evidence supports a finding of premeditation and deliberation and evidence of the lesser-included offense was totally lacking. The fact that the defendant did not bring the murder weapon to the scene of the killing, without more, will not support an instruction of second-degree murder.

Am Jur 2d, Homicide §§ 470, 471, 525.

28. Homicide § 253 (NCI4th)— first-degree murder—sufficiency of evidence—premeditation and deliberation

The trial court did not err in a first degree murder prosecution by denying defendant's motion to set aside the verdict based

upon insufficient evidence of premeditation and deliberation where the victim did not provoke the defendant in any manner; the defendant harassed, threatened and assaulted the victim prior to the murder; the victim was rendered helpless by being bludgeoned in the face with a hammer-like instrument; and the killing was without question done in a brutal manner.

Am Jur 2d, Homicide §§ 452, 501.

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

29. Criminal Law § 468 (NCI4th)— first-degree murder—sentencing phase— prosecutor's argument—victim's state of mind—no error

There was no error in the sentencing phase of a first-degree murder prosecution in the court's decision not to intervene *ex mero motu* in the prosecutor's closing argument where defendant contended that the prosecutor improperly used hearsay testimony introduced to show the victim's state of mind to argue that defendant planned the crime and did not act under emotional disturbance, that defendant had a significant history of criminal activity, and that the murder was committed in retaliation for the victim's testimony against defendant in an earlier trial for assault. Other than unsupported allegations of impropriety, defendant fails to show how the arguments were improper or how the trial court abused its discretion by not intervening.

Am Jur 2d, Trial §§ 554, 569, 664.

30. Criminal Law § 462 (NCI4th)— first-degree murder—sentencing phase—prosecutor's argument—not outside record

There was no error requiring intervention *ex mero motu* in the sentencing phase of a first-degree murder prosecution where defendant contended that the prosecutor improperly argued facts outside the record and expressed his own personal and prejudicial opinions. The evidence clearly established that the cause of the victim's death was asphyxiation and there was no reasonable possibility that the use of the word "choked" rather than "suffocated" confused the jury. The argument that defendant did not lose his temper is a permissible inference drawn from the facts, the statement that defendant took matters into his own hands was nothing more than an expression that defendant took things

into his own hands by killing the victim, and the argument that the State had proven its case beyond a reasonable doubt was a permissible statement of the State's position.

Am Jur 2, Trial §§ 554, 569.

31. Criminal Law § 427 (NCI4th)— first-degree murder—sentencing phase—prosecutor's argument—defendant's failure to testify

There was no abuse of discretion in the trial court's failure to intervene in the sentencing phase of a first-degree murder prosecution where defendant contended that the prosecutor commented in his closing argument on his failure to testify, but the argument, when read in context, although less than clear, appears to refer to a state trooper not testifying rather than defendant. Assuming that the prosecutor's argument was improper, the impropriety was not so gross or excessive that the trial court abused its discretion by not intervening *ex mero motu*.

Am Jur 2d, Trial §§ 554, 579, 580.

32. Criminal Law § 465 (NCI4th)— first-degree murder—sentencing phase—prosecutor's argument—inaccurate statement of law

There was no reversible error in a first-degree murder sentencing hearing where defendant contended that the prosecutor inaccurately stated the law as to the statutory aggravating circumstances submitted by the court and as to defendant's burden of proof regarding mitigating circumstances. The defendant fails to point to any particular statement by the prosecutor which he contends misstated the law and did not cite any authority showing that a particular statement was incorrect. Any misstatement of the law would have been cured by the trial court's proper instructions to the jury.

Am Jur 2d, Trial §§ 640, 641, 643.

33. Criminal Law § 454 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—pause to show time for death by asphyxiation—no error

There was no error in a first-degree murder sentencing hearing where defendant argued that the court erred by not intervening *ex mero motu* to prevent the prosecutor's three minute pause intended to show the period of time it took for the victim to die

of asphyxiation. The evidence clearly established that the defendant forcibly held the victim's head down into a pillow for at least three or four minutes, the length of time it took for the victim to die of asphyxiation is relevant to the character and circumstances of the crime regardless of whether the victim suffered, and defendant failed to object to the prosecutor's argument. In light of *State v. Artis*, 325 N.C. 278, there was no impropriety whatsoever with the prosecutor's argument and no error in the decision not to intervene.

Am Jur 2d, Trial §§ 547 et seq., 554, 569.

34. Criminal Law § 468 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—sympathy for defendant's family

The trial court did not abuse its discretion by not intervening *ex mero motu* in a first-degree murder sentencing hearing where defendant contended that the prosecutor acted improperly by requesting that the jury not consider sympathy for defendant's family in its consideration of mitigating circumstances. It is clear that, when read in context, the prosecutor was not asking the jurors to ignore any feelings of sympathy that are supported by the facts, but was arguing that their duty nevertheless required them to recommend the death penalty.

Am Jur 2d, Trial §§ 648, 649.

35. Criminal Law § 442 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—jury's responsibility

There was no error in a first-degree murder sentencing hearing where defendant argued that the prosecutor's argument diminished the jury's sense of responsibility for determining the appropriateness of death because the prosecutor argued that the jurors had a duty, under the evidence presented, to recommend the death penalty and that they were servants of the law. The prosecutor did not suggest to the jurors that they could depend upon judicial or executive review to correct any errors they might make.

Am Jur 2d, Trial §§ 567 et seq.

36. Criminal Law § 455 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—deterrent value

There was no error in a first-degree murder sentencing hearing where defendant contended that the trial court erred by failing to sustain his objection to the prosecutor's comments on the relative deterrent values of life imprisonment and the death penalty and allegedly racist remarks. The argument that the death penalty was the only way to be sure that this defendant would never walk out again was a permissible argument that the jury should recommend the death penalty to foreclose further crimes by the defendant and the prosecutor's subsequent argument that it is hard to be penitent with televisions, basketball courts, and weight rooms emphasized the prosecution's position that life in prison was not an adequate punishment. Although defendant contended that a comment concerning "sitting around rapping" encouraged the jury to make its decision on the basis of racial prejudice, the common definition of rap is to talk and defendant presented no argument to convince the Court that rap as used by the prosecutor meant anything else. There was no violation of defendant's First Amendment rights because, regardless of whether the prosecutor intended rap to mean talk or sing, he did not argue that defendant should be put to death because he rapped.

Am Jur 2d, Homicide §§ 463, 464; Trial §§ 572, 658 et seq.

37. Criminal Law § 458 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—duration of life sentence

There was no gross impropriety requiring the trial court to intervene *ex mero motu* in a first-degree murder sentencing hearing where defendant contended that the court erred by failing to prevent the prosecutor's innuendo that the duration of a life sentence would be minimal when he would not be eligible for parole for twenty years. The prosecutor argued that the jury should impose the death penalty in order to insure that the defendant never kills again; there is no manner in which the argument could be construed to address the defendant's parole eligibility.

Am Jur 2d, Trial §§ 575, 576.

Prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 ALR3d 1137.

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

There was sufficient evidence in the sentencing hearing for a first-degree murder to submit the aggravating circumstance that the murder was especially heinous, atrocious, or cruel where the evidence supported a conclusion that the killing was physically agonizing, conscienceless, pitiless and unnecessarily dehumanizing to the victim and a finding that the killing involved psychological terror not normally present in murder. N.C.G.S. § 15A-2000(e)(9).

Am Jur 2d, Criminal Law §§ 598, 599.

39. Criminal Law §§ 1341, 1342 (NCI4th)— first-degree murder—sentencing—aggravating circumstances—pecuniary gain, former witness who exercised official duty

The evidence was sufficient in a sentencing hearing for first-degree murder to submit the aggravating circumstances of pecuniary gain and that the murder was committed against a former witness against the defendant because of the exercise of her official duty. The victim was found dead two days after testifying against defendant, over one hundred dollars in change was stolen from the victim's bedroom, and witnesses testified that defendant was making purchases with change shortly after the murder. Any error in submitting these aggravating circumstances was harmless because, based on the jury finding that the murder was especially heinous, atrocious, or cruel and the jury not finding any mitigating circumstances, it is unreasonable to believe that the jury would have ignored the fact that the defendant mercilessly and brutally killed the victim and thus would have found that the death penalty was not justified absent a finding that the victim was a former witness or that the defendant killed the victim for money.

Am Jur 2d, Criminal Law §§ 598, 599.

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

There was no error in the sentencing hearing for a first-degree murder where defendant argued that the jury was required to find the existence of the statutory mitigating circumstance that

defendant did not have a significant history of prior criminal activity given the uncontradicted evidence, but evidence regarding defendant's prior assault on the victim was susceptible to a finding by the jury that the defendant had a significant history of criminal activity. In those cases where the evidence is truly uncontradicted, the defendant is at most entitled to a peremptory instruction when he requests it and the defendant did not request a peremptory instruction in this case. The mitigating circumstance was submitted, the jury was required to consider it, and the jury simply declined to find that the evidence supported this mitigating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599.

41. Criminal Law § 1363 (NCI4th)— first-degree murder—sentencing—nonstatutory mitigating circumstances

There was no error in the sentencing hearing for a first-degree murder prosecution where the jury did not find the nonstatutory mitigating circumstances that defendant was regularly employed at the time of the offense and that defendant has a supportive family structure. It is the prerogative of the jury to believe or reject the evidence presented by the defendant as to the existence of a mitigating circumstance and the jury may determine that a nonstatutory mitigating circumstance has no value even if that circumstance is found to exist.

Am Jur 2d, Criminal Law §§ 598, 599.

42. Criminal Law § 1363 (NCI4th)— first-degree murder—sentencing—nonstatutory mitigating circumstances—instructions

The trial court in a first-degree murder prosecution did not err by instructing the jury that it must determine whether the evidence supported each nonstatutory mitigating circumstance submitted and whether it had mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599.

43. Criminal Law § 1327 (NCI4th)— first-degree murder—sentencing—duty to recommend death

The trial court did not err in a first-degree murder prosecution by instructing the jury that it had a duty to recommend a sentence of death if it determined that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and

that the aggravating circumstances were sufficiently substantial to warrant the imposition of the death penalty.

Am Jur 2d, Trial §§ 841, 1446, 1447.

44. Constitutional Law § 371 (NCI4th)— death penalty—constitutional

The North Carolina death penalty statute is constitutional.

Am Jur 2d, Criminal Law § 628.

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

The instruction for the especially heinous, atrocious or cruel aggravating circumstance is not inherently vague.

Am Jur 2d, Criminal Law §§ 598, 599.

46. Criminal Law § 1348 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—instructions

The instruction on mitigating circumstances in a first-degree murder sentencing hearing did not erroneously focus the jury's attention on the killing, thereby limiting their ability to consider defendant's character and background as a basis for a sentence less than death.

Am Jur 2d, Criminal Law §§ 598, 599.

47. Criminal Law § 1351 (NCI4th)— first-degree murder—instructions—burden of proof

The trial court in a first-degree murder sentencing hearing did not err when instructing the jury on defendant's burden of proof by defining preponderance of the evidence as evidence which "must satisfy you" rather than as "more likely than not."

Am Jur 2d, Evidence § 171.

48. Homicide § 493 (NCI4th)— first-degree murder—instructions—premeditation and deliberation—lack of provocation

There was no error in a first-degree murder prosecution where the trial court instructed the jury that premeditation and deliberation could be inferred from lack of provocation by the victim.

Am Jur 2d, Homicide §§ 482, 483, 501.

49. Criminal Law § 1363 (NCI4th)— first-degree murder—mitigating circumstances—instructions—circumstantial evidence

The trial court did not err in a first-degree murder prosecution by refusing to submit as a nonstatutory mitigating circumstance that the State's case was largely based upon circumstantial evidence.

Am Jur 2d, Criminal Law §§ 598, 599.

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

A sentence of death for a first-degree murder was not disproportionate where the record fully supports the aggravating circumstances found by the jury, there is no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence was not excessive or disproportionate to the penalty imposed in similar cases. The distinguishing characteristics of the case are that the jury convicted defendant under the theory of premeditation and deliberation; the victim's brutal murder was found by the jury to be especially heinous, atrocious, or cruel; the victim was killed in her own bedroom during the night; the victim suffered great physical and psychological pain before death; the victim was not only in pain, but was aware of her impending death as she suffocated; the victim was of unequal physical strength to defendant; the victim feared defendant; and the defendant failed to exhibit remorse after the killing.

Am Jur 2d, Criminal Law § 628.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Allen (J.B., Jr.), J., at the 19 October 1992 Criminal Session of Superior Court, Warren County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 14 February 1995.

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

Joseph B. Cheshire, V and Robert Manner Hurley for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 28 May 1991 for the first-degree murder of Pamela Renee Perry. The defendant was tried capitally, and the jury found the defendant guilty of first-degree murder on the theory of premeditation and deliberation. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death. For the reasons discussed herein, we conclude that the jury selection and the guilt and sentencing phases of defendant's trial were free from prejudicial error, and that the sentence of death is not disproportionate.

At trial, the State presented evidence tending to show that Pamela Perry died sometime during the late evening hours of 30 November 1990 or the early morning hours of 1 December 1990. Vonceil Perry, the victim's mother, discovered her daughter's body on the morning of 1 December 1990 after returning home from work. Ms. Perry testified that when she first saw her daughter, her daughter was lying face down on a pillow in her daughter's bedroom. When Ms. Perry lifted her daughter's head, she observed that the victim's face had been beaten severely.

Dr. John D. Butts, the Chief Medical Examiner for the State of North Carolina, testified that he performed an autopsy on the victim on 1 December 1990. Dr. Butts' testimony revealed that the victim received a number of blunt-force injuries to her face. He stated that the victim suffered substantial bruising and swelling over her entire face and neck, bruising and lacerations to her right eye, bruising on the left side of her neck, a tear in the skin at the corner of her mouth, a series of tears in the skin on the right cheek, tears in the skin on her left ear, tears to the skin along the left side of her jaw which were approximately one inch deep, a tear to the inner surface of her lip, and several scrapes and abrasions. Dr. Butts' internal examination disclosed blood over the surface of the brain, resulting from the blows to the face, and hemorrhaging inside the victim's neck, larynx, and trachea. The victim also had bruises and bleeding in the eyes. Dr. Butts testified that these injuries were caused by a blunt, hard object, having two edges or prongs which could break the skin and produce parallel scrapes. Dr. Butts opined that a hammer found on the victim's bed could have caused the injuries to the victim's face.

Dr. Butts further testified that the victim did not die as a result of the blunt-force injuries, but died as a result of asphyxiation or suffocation. Dr. Butts did, however, testify that the victim was alive when

she received the blunt-force injuries. Dr. Butts testified that in his opinion, a pillow could have been used to suffocate the victim, and that it normally took at least three to four minutes for a person to suffocate. Dr. Butts further opined that the victim could not have suffocated by merely lying face down in the pillow, but would have to have been forced down into the pillow.

Vonceil Perry's testimony revealed that the defendant and the victim had been dating each other for approximately one year. However, at some point in time prior to the murder, difficulties arose between the victim and the defendant. Ms. Perry was allowed to testify, over defendant's objection, that her daughter had been receiving threatening phone calls from the defendant. Specifically, Ms. Perry stated that her daughter told her that the defendant kept telling her (the victim) that she had a beautiful face and that he would hate to have to "smash it in" and "mess [it] up." As a result of the phone calls, the victim filed a complaint with the Warren County Sheriff's Department. Deputy Sean Brake, the deputy who took the complaint, testified that the victim indicated that the caller sounded like the defendant and had threatened to kill her during one of the phone calls.

Ms. Perry further testified that her daughter was a waitress and received a large quantity of quarters from tips earned on her job. Most of the coins had been rolled and placed in a large jar on a table in the victim's bedroom. When the victim's body was discovered, the jar was found empty at the edge of the victim's bed. The night of her death, the victim had more than one hundred dollars' worth of change in the jar.

Brenda Turner testified that she worked at Willoughby's Convenience Store on 1 December 1990, and that the defendant came into Willoughby's at approximately 11:00 p.m. that night and purchased gas and a soft drink with quarters. Ms. Turner stated that defendant's total expenditure was four or five dollars. Sherry Jiggetts testified that she knew the defendant, and that defendant came to her house and purchased forty to forty-five dollars' worth of crack cocaine. Ms. Jiggetts testified that the defendant paid for the drugs with change consisting of quarters, dimes and nickels. Although she could not remember at trial when this transaction occurred, she acknowledged that she had previously given a statement to the police that this transaction occurred within a week of the murder. Another witness, Phyllis Alexander, testified that she lived with Ms. Jiggetts

and that around the time of the murder, the defendant came to her house and wanted to exchange about forty to forty-five dollars in quarters for cash.

Other testimony revealed that on a separate occasion, the defendant broke into the victim's home and assaulted her and a friend. During this incident, the defendant struck the victim in the head approximately three times. The defendant was charged with assault, and the victim testified against defendant at the assault trial. The defendant was found guilty, placed on probation and ordered to pay for the victim's medical bills. Two days later, the victim was found dead.

The defendant moved to dismiss at the close of the State's evidence. The trial court denied the motion. The defendant presented no evidence during the guilt phase of the trial.

At the penalty phase of trial, the defendant called five witnesses in an attempt to establish a factual basis for the statutory and nonstatutory circumstances he requested be submitted to the jury. The State did not present any additional evidence.

Three aggravating circumstances were submitted to the jury: (1) the murder was especially heinous, atrocious, or cruel; (2) the murder was committed against a former witness; and (3) the murder was committed for pecuniary gain. Three statutory mitigating circumstances and three nonstatutory mitigating circumstances were also submitted to the jury. The statutory mitigating circumstances included: (1) no significant history of prior criminal activity; (2) capital felony committed while the defendant was under the influence of emotional or mental disturbance; and (3) any other circumstances arising from the evidence. The nonstatutory mitigating circumstances submitted were: (1) the defendant has a good reputation in the community; (2) the defendant was regularly employed at the time of the offense; and (3) the defendant has a supportive family structure. The jury found the existence of all three aggravating circumstances and declined to find the existence of any of the six mitigating circumstances. Consequently, the jury found that the aggravating circumstances outweighed the mitigating circumstances and recommended a sentence of death.

PRETRIAL/JURY SELECTION

I.

[1] The defendant first assigns error to the trial court's denial of his motion to permit *voir dire* of potential jurors regarding their beliefs about parole eligibility. The defendant, relying on *Simmons v. South Carolina*, — U.S. —, 129 L. Ed. 2d 133 (1994), argues that the trial court's restriction during *voir dire* prevented defense counsel from identifying and educating those potential jurors who held erroneous beliefs regarding parole eligibility and, thus, effectively concealed accurate sentencing information from the jurors ultimately selected. This Court, however, has previously held that information regarding parole eligibility is not relevant to the issues at trial and is not a proper matter for the jury to consider in a capital sentencing proceeding. *See State v. McNeil*, 324 N.C. 33, 44, 375 S.E.2d 909, 916 (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).

Simmons does not affect our prior rulings on this issue. In *Simmons*, the Supreme Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons*, — U.S. at —, 129 L. Ed. 2d at 138. The Supreme Court, however, acknowledged the rule stated in *California v. Ramos*, 463 U.S. 992, 1014, 77 L. Ed. 2d 1171, 1189 (1983), that when the defendant is eligible for parole, it is ultimately for the states to determine whether and under what circumstances juries are to be instructed regarding the availability of parole. *Simmons*, — U.S. at —, 129 L. Ed. 2d at 145. Unlike the defendant in *Simmons*, the defendant in the case *sub judice* would have been eligible for parole had he received a life sentence. This Court has consistently rejected the argument that *Simmons* requires North Carolina juries be informed as to the length of time a defendant must serve before becoming eligible for parole. *See State v. Price*, 337 N.C. 756, 763, 448 S.E.2d 827, 831 (1994) (*Simmons* limited to those situations where the alternative to a sentence of death is life imprisonment without the possibility of parole), *cert. denied*, — U.S. —, 131 L. Ed. 2d 224, *reh'g denied*, — U.S. —, 131 L. Ed. 2d 879 (1995). Consistent with prior decisions of this Court, we decline to expand *Simmons* to cases involving parole-eligible defendants. Accordingly, this assignment of error is overruled.

II.

The defendant next assigns error to (1) the trial court's denial of his motion to prohibit death qualification *voir dire* questions; (2) the State's use of peremptory challenges to excuse jurors not meeting the standard for excusal for cause under *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985) and *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, *reh'g denied*, 393 U.S. 898, 21 L. Ed. 2d 186 (1968); and (3) the trial court's excusal for cause of three prospective jurors based on their responses to death-qualification questions.

[2] The defendant first asserts that the trial court erred by denying his motion to prohibit death-qualification questioning during *voir dire*. The defendant argues that death qualification of the jury results in a jury that is biased in favor of the State and is predisposed to convict. Defendant further argues that the process of death qualification deprived him of his right to due process and to a trial by an impartial jury drawn from a representative cross-section of the community. We have repeatedly rejected these arguments and likewise do so here. *See State v. Oliver*, 309 N.C. 326, 336-37, 307 S.E.2d 304, 312-13 (1983); *State v. Avery*, 299 N.C. 126, 137-38, 261 S.E.2d 803, 810 (1980).

[3] The defendant next contends that the State's use of peremptory challenges to remove prospective jurors who were not excludable for cause under *Wainwright* and *Witherspoon* but who wavered in their ability to impose the death penalty violated his constitutional rights. This Court has previously rejected defendant's argument, holding that a prosecutor's use of peremptory challenges to excuse veniremen expressing qualms about the death penalty violates neither the federal nor the state Constitution even though the jurors could not have been excused for cause because of those concerns. *State v. Williams*, 339 N.C. 1, 22, 452 S.E.2d 245, 258 (1994), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 64 U.S.L.W. 3242 (1995); *see also State v. Allen*, 323 N.C. 208, 222, 372 S.E.2d 855, 863 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 331 N.C. 746, 417 S.E.2d 227 (1992), *cert. denied*, —— U.S. ——, 122 L. Ed. 2d 775, *reh'g denied*, —— U.S. ——, 123 L. Ed. 2d 503 (1993). The defendant has presented no argument to convince us that the prior decisions of this Court are incorrect.

[4] Finally, the defendant argues that under *Wainwright* and *Witherspoon*, it was error for the trial court to dismiss prospective jurors Reid, Richardson and Marrow for cause based upon their opposition to capital punishment. In *Witherspoon*, the Supreme Court held

that a prospective juror may not be excused for cause simply because he "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522, 20 L. Ed. 2d at 784-85. However, a juror may be excused for cause if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52. Further, jurors may be properly excused if they are unable to " 'state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.' " *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993) (emphasis omitted) (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149 (1986)).

When questioned by the prosecutor, prospective juror Reid stated that he was opposed to the death penalty and that he did not think he could vote for the death penalty. Following the prosecutor's challenge for cause, Reid was questioned by the trial court, and the following exchange took place:

> COURT: Mr. Reid, I want to ask you some questions to be sure I understand your answers. For my clarification did you say that you are opposed to the death penalty?
>
> JUROR: Yes, sir.
>
> COURT: Would you consider that a strong opposition to the death penalty?
>
> JUROR: Yes.
>
> COURT: And did I understand you to say that you could not vote to impose the death penalty under any circumstances?
>
> JUROR: Yes, sir; that's right.

Reid's responses indicated with unmistakable clarity that his bias against the death penalty would substantially impair his ability to perform his duties as a juror. Therefore, we conclude that the trial court did not err by granting the State's motion and excusing Reid for cause.

Prospective jurors Richardson and Marrow also indicated that they were opposed to the death penalty. Both jurors stated, unequivocally at times, that their views on the death penalty would substantially impair their ability to follow the law. At other times, each juror vacillated when asked whether she could set aside her beliefs and

vote for the death penalty. Neither Richardson nor Marrow was able to state clearly her willingness to temporarily set aside her own beliefs in deference to the rule of law. This Court has recognized "that a prospective juror's bias may not always be 'provable with unmistakable clarity,' " and in such instances, " 'reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially.' " *Brogden*, 334 N.C. at 43, 430 S.E.2d at 908 (quoting *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990)). After a thorough review of the exchange between the prosecutor, counsel for the defendant, the trial court and each juror, we cannot say that the trial court abused its discretion in determining that the views of prospective jurors Richardson and Marrow would prevent or substantially impair them from performing their duties as jurors. Deferring to the trial court's judgment, we find no error in excusing, for cause, prospective jurors Richardson and Marrow. This assignment of error is overruled.

III.

[5] The defendant next assigns error to the trial court's refusal to afford him an opportunity to rehabilitate fifteen prospective jurors excused for cause pursuant to *Witherspoon*. We find no error with respect to any of the jurors.

We first note that two of the jurors were dismissed for reasons other than their views on capital punishment. Juror Seward was peremptorily excused by the defense. Juror Williams was excused for cause after it became apparent to the trial court that she had been very sick with the measles and encephalitis, and that she did not understand the proceedings. The jury *voir dire* reveals that the defendant did not object to Williams' excusal, and that the excusal was with the consent of all parties. Clearly, there is no error with respect to jurors Seward and Williams.

Under questioning by the prosecutor and the trial court, the remaining thirteen jurors clearly and unequivocally stated that they were opposed to the death penalty, and that their opposition to the death penalty would cause them to vote against its imposition under any circumstances. It is well established that "[t]he defendant is not allowed to rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court." *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990). We note further that the defendant did

not request an opportunity to rehabilitate any of the prospective jurors, and only once did defendant take exception to a prospective juror's excusal. In the absence of any such request, and there being no showing that further questioning by the defendant would have produced different answers, it was not error for the trial court to deny defendant the opportunity to question the prospective jurors further. This assignment of error is overruled.

IV.

[6] By his next assignment of error, defendant contends that the State exercised its peremptory challenges to exclude nine black jurors on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). Specifically, defendant claims that the trial court should have intervened *ex mero motu* to prevent the State from excusing these jurors. We disagree.

In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the use of peremptory challenges to exclude a juror solely on account of his or her race. *Batson*, 476 U.S. at 89, 90 L. Ed. 2d at 83. The Supreme Court established a three-part test to determine if a prosecutor has impermissibly excluded a juror based on race. First, *the defendant must* establish a *prima facie* case of purposeful discrimination. *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87-88; *State v. Robinson*, 330 N.C. 1, 15, 409 S.E.2d 288, 296 (1991). If the defendant succeeds in establishing a *prima facie* case of discrimination, the burden shifts to the prosecutor to offer a race-neutral explanation for each challenged strike. *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88; *State v. Wiggins*, 334 N.C. 18, 31, 431 S.E.2d 755, 763 (1993). The prosecutor's explanation need not, however, rise to the level justifying a challenge for cause. *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88. Finally, the trial court must determine whether the defendant has proven purposeful discrimination. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991).

In each of the nine instances where defendant contends the trial court erred, the defense neither objected nor sought to establish a *prima facie* case of racial discrimination. Defendant's failure to object to the prosecutor's challenges precludes him from raising this issue on appeal. *State v. Adams*, 335 N.C. 401, 411, 439 S.E.2d 760, 765 (1994). We must assume that defendant, through counsel, was familiar with *Batson* but elected not to raise the issue at trial, because he did not in fact believe the State was exercising its peremptory chal-

lenges in a discriminatory manner. Defendant's assignments of error on these grounds are accordingly overruled.

V.

[7] By his next assignment of error, the defendant contends that the prosecutor misstated the definition of "reasonable doubt," thereby diminishing the State's burden of proof below the standard mandated by the United States Constitution. The defendant specifically contends that the prosecutor's statements during jury *voir dire*, that a reasonable doubt is one that is "real and substantial" and one which gives the jury "substantial misgivings about the State's case," were so grossly improper that the trial court erred by failing to intervene *ex mero motu*.

We first note that the defendant has cited no authority in support of his argument that the prosecutor misstated the law during jury *voir dire*. Pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure, an assignment of error is deemed abandoned if the defendant fails to cite reasonable authority in its support. *See State v. Bonney*, 329 N.C. 61, 82, 405 S.E.2d 145, 157 (1991).

Assuming, *arguendo*, that this assignment of error is not abandoned by the defendant's failure to cite reasonable authority, we find no error, constitutional, plain or otherwise, with the prosecutor's statements. This Court has consistently found no error in the use of the terms "substantial doubt" or "substantial misgivings" in a jury instruction defining reasonable doubt, if the instruction, as a whole, properly conveys the concept of reasonable doubt. *See State v. Taylor*, 340 N.C. 52, 60, 455 S.E.2d 859, 863 (1995); *State v. Bryant*, 337 N.C. 298, 306, 446 S.E.2d 71, 75-76 (1994). We similarly find no error in the use of these terms during jury selection. Further, any misstatement in the law by the prosecutor was cured by the trial court's subsequent correct jury instruction defining reasonable doubt. *See State v. Dodd*, 330 N.C. 747, 755, 412 S.E.2d 46, 50 (1992). This assignment of error is overruled.

VI.

[8] By his next assignment of error, the defendant contends that the trial court erred in denying his pretrial motion for a change of venue or, in the alternative, a special venire. Defendant asserts that extensive publicity, coverage of the murder by the media, and the potential for bias precluded his receiving a fair trial in Warren County.

In order to obtain a change of venue or a special venire, the burden is on the defendant to prove prejudice so great that he cannot obtain a fair and impartial trial. *State v. Jerrett*, 309 N.C. 239, 251, 307 S.E.2d 339, 345 (1983). Stated otherwise, a defendant must show a reasonable likelihood that the prospective jurors will base their decision in the case upon pretrial information rather than the evidence presented at trial and will be unable to remove from their minds any preconceived impressions they might have formed. *Id.* at 255, 307 S.E.2d at 347. This determination is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of a gross abuse of discretion. *State v. Gardner*, 311 N.C. 489, 497, 319 S.E.2d 591, 598 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985). Our review of the record reveals that the defendant has shown no abuse of discretion in the trial court's denial of the motion for change of venue or special venire.

At the hearing on the motion, the only evidence produced in support of defendant's motion was the testimony of private investigator Larry Mitchell. Mitchell testified that he had conducted a survey which revealed that 17 percent of the individuals surveyed either knew or had heard of the decedent and that 22 percent of those surveyed had read or heard about the case. Upon the State's objection to the survey, the trial court allowed Mitchell's *voir dire*, during which Mitchell indicated that he had no formal training in the field of statistics, that he had not determined the validity of the statistical sample, and that he could not say that a fair representation of the community was surveyed. The State's objection was properly sustained, and the survey results were not admitted into evidence. In addition to the survey results, Mitchell produced five newspaper articles, of which only two related to the present case. These articles were shown to be factual, informative and noninflammatory in nature. Standing alone, factual news accounts regarding the commission of a crime and the pretrial proceedings do not warrant a change of venue. *Gardner*, 311 N.C. at 498, 319 S.E.2d at 598.

Further, we have held that when a defendant alleges prejudice as a result of pretrial publicity, he must show that he exhausted his peremptory challenges and that a juror objectionable to defendant on this ground sat on the jury. *Jerrett*, 309 N.C. at 255, 307 S.E.2d at 347-48. In the case *sub judice*, the defendant has neither referred to the *voir dire* of the jurors who served nor has he argued that a juror objectionable to him sat on the jury. Our review of the record reveals no basis upon which to conclude that any juror based his or her deci-

sion upon pretrial information rather than the evidence presented at trial. Of the twelve jurors hearing defendant's case, ten had never heard of the case before serving on the jury. The remaining two jurors had either read or heard something about the case but had no recollection of what they had read or heard, had formed no opinions about the case or knew of no reason why they could not be fair and impartial. We accordingly overrule this assignment of error.

GUILT/INNOCENCE PHASE

VII.

[9] The defendant's seventh assignment of error concerns the admissibility of evidence tending to show that the defendant had assaulted the victim in this case approximately one month before her murder. Defendant contends that the trial court committed reversible error by allowing the State to present the following evidence: (1) testimony of Curtis Hymon, a friend of the victim's; (2) testimony of James Hayes, the defendant's probation officer; (3) testimony of Johnny Williams, a deputy with the Warren County Sheriff's Department; (4) court files charging the defendant with the prior assault on the victim, trespass and first-degree burglary; and (5) a letter written by the victim describing the prior assault.

Curtis Hymon testified for the State that he witnessed defendant assault and injure the victim on the night of 20 October 1990. Specifically, Mr. Hymon testified that while he was watching a movie with the victim, they heard a knock on the door. The victim indicated that she knew who was at the door. They heard another knock and then a loud "boom," at which time the defendant came into the room, stood over the victim and stated, "What the hell is going on?" Mr. Hymon testified that the defendant then slapped the victim.

James Hayes, defendant's probation officer, testified for the State that defendant was convicted for the 20 October 1990 assault and that defendant was ordered to pay restitution to the victim in the amount of her medical bills. Mr. Hayes further testified that he met with the victim to discuss her medical bills, and during his meeting with the victim, she informed him that she was receiving threatening phone calls from someone she believed to be the defendant.

Johnny Williams, a deputy with the Warren County Sheriff's Department, testified for the State that he went to the victim's residence on 20 October 1990 to investigate defendant's assault upon the victim, and that he took statements from Curtis Hymon and the vic-

tim. Deputy Williams testified that he was told by Curtis Hymon that defendant kicked in the victim's door, and that he (Hymon) and the defendant got in a fight. Deputy Williams further testified that he was told by the victim that she and Mr. Hymon were sitting in the bedroom when she heard a knock and then heard the door being kicked in and that defendant came through the door and then "hit her upside the head" three times, causing a severe headache. Deputy Williams also testified that the victim had a "knot" on her head and that her hair was "all tore up."

The State also introduced into evidence court files indicating that the defendant was charged with the 20 October 1990 assault on the victim, first-degree trespass, and first-degree burglary, and a letter written by the victim to her congressman describing the assault. The letter reads as follows:

> Dear Mr. Congressman,
>
> My name is Pamela Perry and I am 25 years of age, single, with no children. On the nite [sic] of October 20, 1990, I was in my home with a friend when my house was broke into. His name is Charlie Mason Alston, Jr. This is my story:
>
> Mr. Alston knocked at my door and I refused to answer the knock. It was about 11:15 p.m. that nite [sic], and my mother had gone to work. A few seconds later, he broke in my front door and made his way to my bedroom. In my bedroom my friend and myself were in the process of getting ready to watch a VCR tape that I had rented. Mr. Alston's first words were "what in hell is this?" Mr. Alston and I had a thing going on in the past, but regardless, he didn't have the right to enter my home. Once he entered my room, he pushed me into my T.V. and I fell backwards. My friend was cornered and beatened [sic]. When I got to my feet, I tried to get him off. Finally Mr. Alston left and I phoned the police and my friend contacted a member of his family. He then went to the bathroom to clean his face and I was on the floor putting on my shoes waiting for the police officer. Mr. Alston came back to my home, this time with a large stick. He went for my friend once again but, I grabbed Mr. Alston begging him to leave. My friend ran out upon my request. Mr. Alston then struck me several times in my living room. I really didn't think he would strike me again, but I was wrong. He beat me over my head with his fists and struck me with his stick. I finally broke away and ran out my back door. He replied, "Daddy can't help you now." My father is dead.

> Someone from your office helped us get my sister here from Germany in 1989. We still have the sympathy letter that was sent. My point is, we had gone to court but my friend wasn't present. I wasn't able to tell my story. True enough, he's paying all doctor bills and is on probation for 5 years, but the system isn't fair. I never had a chance to tell my story. I was told if he had gotten any time he would have been out within 30 days. The system didn't give me a chance. He lives walking distance from me. We live in a very small town. I'm being treated as tho [sic] I asked him to beat me. I wasn't put here for a punching bag. All I want is satisfaction. The system is saying it's alright [sic] to beat a woman. A simple open and closed case makes me feel like a victim forever. Is there anything I can do? I don't have money the way his family do [sic].
>
> All I have is my mom and her support. When I close my eyes at nite [sic], I see Mr. Alston coming into my room. After this offense, I wasn't able to sleep in my own house. My mother works nights, and she worries. I work days. I am a 25 year old lady. I just want some satisfaction with the system. I've spoken all I could think of. Some are saying I've won, but he's still walking around the streets of small town Warrenton, North Carolina.
>
> Thank you. I hope there is something that I can do. I've been praying since, and I'll continue to pray.
>
> Thank you for listening. At least I've told my story to someone.
>
> Ms. Pamela Renee Perry

The defendant argues that this evidence of his prior assault on the victim was improperly offered to prove character, in violation of Rule 404(b) of the North Carolina Rules of Evidence.

The admissibility of specific acts of misconduct by the defendant is governed by Rule 404(b), which provides:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1992). Rule 404(b) is a general rule of inclusion of relevant evidence of other crimes or wrongs committed

by a defendant and is subject to but one exception which requires exclusion of such evidence only if offered to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. *State v. Syriani*, 333 N.C. 350, 377, 428 S.E.2d 118, 132, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 341 (1993), *reh'g denied*, —— U.S. ——, 126 L. Ed. 2d 707 (1994). In applying Rule 404(b), this Court has repeatedly held that a defendant's prior assaults on the victim, for whose murder defendant is presently being tried, are admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim. *Id.* at 376-78, 428 S.E.2d at 132; *State v. Spruill*, 320 N.C. 688, 692-93, 360 S.E.2d 667, 669 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988). In the case *sub judice*, the evidence of the defendant's prior assault on the victim, likewise, tends to establish malice, intent, premeditation and deliberation, all elements of first-degree murder. The evidence also tends to establish the defendant's ill will toward the victim. Thus, the evidence is relevant to an issue other than defendant's character. We therefore hold that the evidence of defendant's prior assault on the victim was admissible under Rule 404(b).

The defendant argues, in the alternative, that even if admissible under Rule 404(b), evidence of the prior assault still should not have been admitted, as the danger of unfair prejudice substantially outweighed the probative value of the disputed evidence, thereby rendering such evidence inadmissible under Rule 403 of the North Carolina Rules of Evidence. We disagree. The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court. *Syriani*, 333 N.C. at 379, 428 S.E.2d at 133. Abuse will be found only where the trial court's ruling is "manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *Id.* We conclude that the trial court did not abuse its discretion by admitting evidence of misconduct otherwise admissible under Rule 404(b).

VIII.

[10] In another assignment of error, the defendant contends that the trial court erroneously admitted hearsay statements by the victim that she was afraid of the defendant, pursuant to the exception to the hearsay rule found in N.C.G.S. § 8C-1, Rule 803(3).

The defendant specifically challenges testimony from five of the State's witnesses: Vonceil Perry, James Hayes, Lawrence Boyd, Sean Brake and Annette Burrows. Witnesses Perry, Hayes, Boyd and Brake

each testified generally that they had spoken with the victim shortly before her murder. During these conversations, the victim had told them that she was afraid of the defendant, that she was receiving threatening phone calls from the defendant, that the defendant was telling her that she had a beautiful face and that he (defendant) was going to "mess [it] up" or "smash it in," and that she believed the defendant was going to kill her. In addition, Annette Burrows, an assistant clerk of court, testified that one or two days before the victim's murder, she spoke to the victim about the defendant's assault proceedings. The victim was upset with the court system, and the victim stated that she was scared of the defendant and that the defendant's conviction "was not going to stop him."

After a *voir dire* of the five witnesses, the trial court admitted the statements into evidence on the grounds that the statements showed the victim's then-existing state of mind pursuant to an exception to the hearsay rule found in Rule 803(3), and that the victim's state of mind was relevant to show the state of her relationship with the defendant. The defendant contends that the trial court erred in this regard because the victim's state of mind was not relevant to the case at hand. Relying on *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973), the defendant argues that a victim's state of mind becomes relevant only when the defendant places it in issue by raising the defenses of suicide, self-defense or accident. The defendant further argues that the statements were not admissible under Rule 803(3), as they were statements of memory or belief which are explicitly excluded from the state of mind exception.

It is well established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant. *State v. McHone*, 334 N.C. 627, 637, 435 S.E.2d 296, 301-02 (1993) (state of mind relevant to show a stormy relationship between victim and defendant prior to the murder), *cert. denied*, —— U.S. ——, 128 L. Ed. 2d 220 (1994); *State v. Lynch*, 327 N.C. 210, 222, 393 S.E.2d 811, 818-19 (1990) (defendant's threats to victim shortly before the murder admissible to show victim's then-existing state of mind); *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (victim's statements regarding defendant's threats relevant to the issue of her relationship with defendant). Contrary to the defendant's assertions, we have long declined to follow *Brown's* strict rule. *See State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983).

After a thorough review of the record, we conclude that the conversations between the victim and the five witnesses related directly to the victim's fear of defendant and that the victim's statements were properly admitted pursuant to the state of mind exception to the hearsay rule to show the nature of the victim's relationship with the defendant and the impact of defendant's behavior on the victim's state of mind prior to her murder.

The defendant alternatively contends that even if the statements were relevant to show the victim's state of mind, the statements' prejudicial effect outweighs any probative value. The responsibility to determine whether the probative value of relevant evidence is outweighed by its tendency to prejudice the defendant is left to the sound discretion of the trial court. *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990). In the instant case, the trial court carefully weighed the probative value of the testimony against its prejudicial effect and made detailed findings to support its conclusion in this regard. The defendant has not demonstrated any abuse of discretion, and therefore, the trial court's ruling will not be disturbed on appeal. This assignment of error is accordingly overruled.

IX.

[11] The defendant next argues that the trial court erred in admitting into evidence the letter purportedly written by the victim, first, on the ground that the letter was not properly authenticated and, second, because the letter was inadmissible hearsay.

Rule 901 of the North Carolina Rules of Evidence provides that "[t]he requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C.G.S. § 8C-1, Rule 901(a) (1992). By way of illustration, the rule specifically recognizes that the requirement of authentication may be satisfied by a non-expert opinion as to the genuineness of handwriting if that witness has familiarity with the purported writer's handwriting. N.C.G.S. § 8C-1, Rule 901(b)(2).

In the case at bar, Vonceil Perry, the victim's mother, testified that she was familiar with her daughter's handwriting, that she recognized her daughter's handwriting, and that the letter was written in her daughter's handwriting. Ms. Perry also testified that the letter was signed "Pamela Renee Perry," and that she recognized the signature as that of her daughter. Based on this evidence, we hold that there

was sufficient evidence of authenticity to support the trial court's admission of the letter into evidence.

[12] The defendant next asserts that the trial court erred in admitting the letter under the residual exception to the hearsay rule found in N.C.G.S. § 8C-1, Rule 804(b)(5). However, it is unnecessary to consider whether the letter was properly admitted under the residual hearsay exception. " 'When a hearsay statement is made expressly admissible by a specific exemption category, there is no necessity for the trial court to consider the catch-all provisions of the other rules.' " *State v. Lynch*, 327 N.C. 210, 222, 393 S.E.2d 811, 818 (quoting *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74). The letter, set out in its entirety in Issue VII, shows that at the time it was written, the victim feared the defendant. As shown in Issue VIII, a victim's statements of fear are admissible and relevant to show the status of the victim's relationship with the defendant. *See State v. Cummings*, 326 N.C. at 313, 389 S.E.2d at 74. Thus, the letter was properly admissible under the state-of-mind exception to the hearsay rule found in N.C.G.S. § 8C-1, Rule 803(3). As the letter was more probative than prejudicial, we find no error in its admission. This assignment of error is overruled.

X.

[13] By his next assignment of error, the defendant contends that the trial court erroneously admitted testimony of two of the State's witnesses: Deputy Johnny Williams and Detective Fonzie Flowers.

During the presentation of its case, the State called Deputy Williams, one of the investigating officers in this case as well as the assault case. Deputy Williams testified that on 5 December 1990, Vonceil Perry, the victim's mother, informed him that the victim had been "having trouble" with the defendant. Deputy Williams later testified that during his investigation, he also spoke with Brenda Turner, who informed him that she was working at Willoughby's Convenience Store on 1 December 1990, and that the defendant came into Willoughby's at approximately 11:00 p.m. that night and purchased gas and a soft drink with quarters. In each instance, the prosecutor announced that the testimony was being offered solely for the purpose of corroborating the earlier testimony of Ms. Perry and Ms. Turner. The trial court allowed Deputy Williams to testify concerning the prior consistent statements made by Ms. Perry and Ms. Turner and gave proper limiting instructions to the jury. The defendant now contends that Deputy Williams' testimony was inadmissible hearsay

and was therefore improperly admitted to corroborate Ms. Perry's and Ms. Turner's earlier testimony. We disagree.

"A prior statement by a witness is corroborative if it tends to add weight or credibility to his or her trial testimony." *State v. Coffey*, 326 N.C. 268, 293, 389 S.E.2d 48, 63. "One of the most widely used and well-recognized methods of strengthening the credibility of a witness is by the admission of prior consistent statements." *State v. Locklear*, 320 N.C. 754, 761-62, 360 S.E.2d 682, 686 (1987). The fact that the testimony would otherwise be inadmissible hearsay will not prevent its admission for purposes of corroboration. *State v. Rose*, 335 N.C. 301, 321, 439 S.E.2d 518, 529, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 883 (1994). Admission of Deputy Williams' testimony was accordingly free of error.

[14] The defendant next asserts that the trial court erred by admitting the following testimony from Detective Flowers on redirect examination:

Q. Let me let you look at this document here, Mr. Flowers, and see if that might refresh your recollection.

A. Yes, sir.

Q. And was Ms. [Vonceil] Perry interviewed by you, Mr. Sims, and Mr. Williams at that time?

A. Yes, sir.

Q. And, Mr. Flowers, did she not state to you on that occasion—

[DEFENSE COUNSEL]: I object to the form of the question.

COURT: Objection is overruled. On cross examination the witness was asked if Ms. Perry ever made any statement that her daughter was afraid of Charlie Alston, and so this is proper redirect. You may proceed.

Q. —Ah, whether or not she made a statement to you on that occasion that her daughter ". . . Did not have any enemies, although she was afraid of Charlie Mason Alston, a former boyfriend. Ms. Perry stated she knew her daughter was frightened of him. She also remembered her daughter to tell her that she was not going to let anybody run her away from home." Did she make that statement to you on December the 5th, 1990?

A. Yes, sir; she did.

While the defendant contends that the above statement within the prosecutor's question was hearsay, he concedes that the trial court properly allowed the question for the nonhearsay purpose of showing that the statement was in fact made, rebutting the defense's assertion on cross-examination that no such statement had been made. However, the defendant asserts that the form of the question exceeded the scope for which the nonhearsay purpose allowed admission. Defendant contends that the jury could not discern between the two different uses of the evidence and most likely construed the question to be an assertion of truth.

This Court has consistently permitted the introduction of evidence in explanation or rebuttal of a particular fact or transaction even though such latter evidence would be incompetent or irrelevant had it been offered initially. *State v. Syriani*, 333 N.C. 350, 378, 428 S.E.2d 118, 133; *State v. Garner*, 330 N.C. 273, 290, 410 S.E.2d 861, 870 (1991); *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). In the case *sub judice*, the defendant "opened the door" to the introduction of any incompetent or irrelevant hearsay contained in the prosecutor's question by creating an inference during Detective Flowers' cross-examination that the victim was not, in fact, afraid of the defendant. We find no impropriety with regard to the form of the prosecutor's question, nor do we find that the risk of prejudice to the defendant outweighs the probative value of this evidence. This assignment of error is overruled.

XI.

[15] In his next assignment of error, the defendant contends that the trial court erred by admitting into evidence court files relating to defendant's prior conviction for assault. The defendant argues that the court files should not have been admitted pursuant to the business record exception to the hearsay rule found in N.C.G.S. § 8C-1, Rule 803(6). We hold that the court files were admitted for a nonhearsay purpose and therefore find it unnecessary to address whether they were properly admitted under Rule 803(6). As previously held in Issue VII, the court files were admitted for the nonhearsay purpose of showing motive, intent and plan. Because the files were not introduced to prove the truth of the matter asserted, the trial court did not err in their admission.

Further, three witnesses testified that the defendant broke into the victim's home on 20 October 1990 and attacked her, and that the victim prosecuted the defendant for the assault and trespass. Other

witnesses testified that the defendant harassed the victim, threatened to "smash in" or "mess up" her face, and that the victim believed the defendant was going to kill her. The court files added little, if anything, to the State's case. The defendant has shown no prejudice by the admission of these files. This assignment of error is accordingly overruled.

XII.

[16] By another assignment of error, the defendant contends that the trial court erred by admitting evidence of the defendant's drug use shortly after the victim's death. The defendant argues that such evidence was inadmissible character evidence and thereby improperly introduced at the guilt phase, and it was improperly considered by the jury at the penalty phase of the trial. We disagree.

Evidence of prior bad conduct is admissible if it is relevant to any fact or issue other than the character of the accused. *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54. In the case *sub judice*, Sherry Jiggetts testified that she knew the defendant; that the defendant came to her house and bought forty to forty-five dollars' worth of crack cocaine; and that the defendant paid for the drugs with change consisting of quarters, dimes and nickels. Ms. Jiggetts also acknowledged that she had given a statement to the police and the prosecutor stating that this transaction occurred during the week of the murder. Prior to Ms. Jiggetts' testimony, Vonceil Perry testified that the victim worked at a restaurant and received a large quantity of change from tips; that the victim had over one hundred dollars in quarters in a jar in her bedroom the night before her death; and that when she found the victim, the jar was empty.

The obvious purpose of Ms. Jiggetts' testimony was to show that in the days following the murder, the defendant was making large purchases with change. The testimony was strong circumstantial evidence tending to show that the defendant murdered the victim and stole her tip money from the jar in the bedroom. The evidence was relevant, admissible, and clearly not introduced for the purpose of showing that the defendant was a drug user. This assignment of error is without merit and is accordingly overruled.

XIII.

[17] By another assignment of error, the defendant contends that the trial court erred by admitting testimony concerning the defendant's actions before and after the victim's murder. The defendant argues

that the testimony from three of the State's witnesses (1) was irrelevant and therefore inadmissible under Rule 402 of the North Carolina Rules of Evidence, or (2) if relevant, was so prejudicial as to outweigh any probative value.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Generally, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1992). This Court has interpreted Rule 401 broadly and has consistently stated that in criminal cases, every circumstance calculated to throw light on the alleged crime is admissible. *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994). We have thoroughly reviewed the testimony of each witness of whom the defendant complains and find each witness' testimony relevant and admissible.

Phyllis Alexander testified for the State that she lived with Sherry Jiggetts, that she remembered seeing the defendant at her home and that the defendant wanted to exchange quarters for forty or forty-five dollars in currency. Ms. Alexander did not recall the exact date but stated she saw the defendant "about the time that [the murder] happened." More than one hundred dollars, consisting mostly of quarters, was stolen from the victim on the night of her murder. Ms. Alexander's testimony is clearly relevant, as it tends to implicate the defendant in the theft of the quarters and therefore the murder.

Esteen Hymon testified that on the night the victim was murdered, the defendant was at her house until 10:00 p.m. The defendant left and returned approximately one hour and thirty minutes later. When he returned, the defendant was "sweating and steam was coming from his body." Mattie Broussart testified that she often gave the defendant rides in her car when he was walking. Ms. Broussart further testified that on the night of the murder, shortly before 11:00 p.m., she saw the defendant walking; that the defendant was walking in the direction of his and the victim's homes, but not in the direction of Ms. Hymon's home; and that she offered defendant a ride, which was refused. Defendant cannot realistically argue that his disappearance for over one hour and thirty minutes, including therein the time period when the victim was murdered, was not relevant. Both Ms. Hymon's and Ms. Broussart's testimony tends to show that the defendant had the opportunity to carry out his threats to kill the victim on the night of the murder. The testimony clearly sheds light on

the murder and makes defendant's guilt more probable than it would be without the evidence.

The defendant argues, in the alternative, that if relevant, the probative value of the testimony was substantially outweighed by the danger of unfair prejudice and was therefore inadmissible under Rule 403 of the North Carolina Rules of Evidence. The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court. *Syriani*, 333 N.C. at 379, 428 S.E.2d at 133. The defendant has not demonstrated any abuse of discretion, and therefore, the trial court's ruling will not be disturbed on appeal. This assignment of error is overruled.

XIV.

[18] The defendant next contends that the trial court erred by admitting into evidence a number of crime scene and autopsy photographs. Specifically, the defendant objects to State's exhibit 3, a crime scene photograph depicting the face of the decedent at the time her body was discovered, and State's exhibits 8, 9, 10 and 11, autopsy photographs illustrating the decedent's injuries.

"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). Whether the use of photographic evidence is excessive in light of its illustrative value and whether the evidence is more probative than prejudicial are matters generally left to the sound discretion of the trial court. *Id.* at 285, 372 S.E.2d at 527. Abuse will be found only where the trial court's ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.*

In the case *sub judice*, the defendant argues that State's exhibit 3 was irrelevant and cumulative on the ground that State's exhibit 2, another crime scene photograph, had previously been admitted into evidence. We disagree. Exhibits 2 and 3 were introduced during the testimony of Vonceil Perry. Ms. Perry identified exhibit 2 as a photograph of the victim's body as it appeared on the morning the body was discovered. Ms. Perry further testified that she discovered the victim lying face down on a pillow, that she turned over the victim's head, and that the victim's face was "all smashed in." Ms. Perry testified that

State's exhibit 3 accurately depicted the victim's face as it appeared when she turned the victim over and that the photograph would help her explain what she meant by "all smashed in." Both photographs were received with limiting instructions that they were being admitted for the purpose of "illustrating and explaining the testimony of Vonceil Perry" and were "not to be considered for any other purpose." Such a cautionary instruction limits the likelihood of unfair prejudice. *State v. Syriani*, 333 N.C. 350, 385, 428 S.E.2d 118, 137. Further, each photograph illustrated a different aspect of the witness' testimony and therefore foreclosed the possibility that their use was excessive or repetitive. Defendant has failed to show an abuse of discretion by the trial court in admitting the crime scene photograph of the victim's face.

The defendant next argues that the four autopsy photographs introduced by the State possessed little probative value relative to the risk of prejudice to the defendant and added little to the substance of the medical examiner's testimony. Again, we disagree. Each autopsy photograph depicted isolated areas of injury to the victim's face. Dr. John Butts, the Chief Medical Examiner for the State of North Carolina, testified that each of the four photographs would aid him in illustrating his testimony relative to the injuries he observed on the victim's body. The trial court again gave a proper limiting instruction before admitting the photographs. Contrary to the defendant's assertions, the photographs were not repetitive or excessive and helped illustrate the medical examiner's testimony regarding the victim's injuries and the cause of death. We find no abuse of discretion by the trial court in admitting the autopsy photographs. This assignment of error is overruled.

XV.

[19] By another assignment of error, the defendant contends that the trial court erred in allowing the prosecutor to use inadmissible evidence during closing arguments, thereby violating his constitutional right to due process. Defendant points to the prosecutor's arguments referring to (1) hearsay statements made by the victim regarding defendant's threats to "smash in" her face and her fear of defendant, (2) the letter written by the victim to her congressman, (3) evidence of the prior assault, and (4) the crime scene and autopsy photographs.

As discussed in Issues VII, VIII, IX, X and XI, each piece of evidence of which the defendant now complains was properly admitted

into evidence. A prosecutor's argument is proper where it is consistent with the record and does not espouse conjecture or personal opinion. *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). Counsel may 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. In the present case, the prosecutor argued facts properly admitted into evidence. Defendant's argument is without merit and is accordingly overruled.

XVI.

[20] By another assignment of error, the defendant contends that the trial court erred by failing to intervene *ex mero motu* to correct seven instances of grossly improper conduct by the prosecutor during closing arguments during the guilt-innocence phase of the trial. We note for purposes of our review that the defendant failed to object with respect to any of these instances at any time during the State's closing arguments.

It is well established that control of counsel's arguments is left largely to the discretion of the trial court. *State v. Johnson*, 298 N.C. 355, 368, 259 S.E.2d 752, 761 (1979). When no objections are 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), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995). 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 refer. *Pinch*, 306 N.C. at 24, 292 S.E.2d at 221.

Further, 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. "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." *Johnson*, 298 N.C. at 368, 259 S.E.2d at 761. 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.

In light of these principles, the defendant first argues that he is entitled to a new trial because the prosecutor used hearsay testimony admitted to show the victim's state of mind, not for the purpose admitted, but primarily to show identity, to disprove accident and to prove premeditation and deliberation. Specifically, the defendant complains of portions of the closing argument in which the prosecutor referred to the victim's statements of fear, her belief that the defendant was going to kill her, and her statements relating to the defendant's threats and prior assault.

As discussed in Issue VIII, hearsay evidence must be relevant before it will be admitted under the state of mind exception. Here, the victim's statements were highly relevant to show the status of the victim's relationship to the defendant. The evidence indicated that the relationship was a stormy one at best. The defendant had assaulted the victim approximately one month before the murder, and after his conviction for the assault, the defendant harassed and threatened the victim. It was proper for the prosecutor to argue all reasonable inferences that may be drawn from this evidence. *Syriani*, 333 N.C. at 398, 428 S.E.2d at 144. Clearly, the victim's statements were relevant evidence from which the jury could conclude that the defendant intentionally killed the victim, and that he had done so with malice, premeditation and deliberation. We therefore find no impropriety with the prosecutor's argument in this regard and no error with the trial court's decision not to intervene to prevent this argument.

[21] The defendant next argues that the prosecutor acted improperly by arguing facts outside the record and by expressing his own personal and highly prejudicial opinions. The defendant specifically contends that the prosecutor impermissibly and prejudicially: (1) argued that the defendant killed the victim in retaliation for prosecuting him for assault and that the defendant did not want any other man to have her, (2) argued that the victim was intentionally suffocated, (3) argued that there was "clinical" and "manifold" evidence of defendant's guilt, (4) made irrelevant arguments regarding women's rights, (5) commented that the photographs of the victim made him sick, and (6) expressed opinions regarding the strength of the evidence and the weakness of the defendant's position. After thoroughly reviewing the record, we find that the prosecutor's arguments fall well within the wide latitude accorded prosecutors in the scope of their argument, are consistent with and reasonably inferable from the record, and therefore are not so grossly improper as to require the trial court's intervention.

[22] The defendant next argues that the prosecutor improperly opened his closing argument with a biblical reference which indicated that the jury was ordained by God to condemn the defendant. The defendant, who failed to object at trial, now takes exception to the following statement by the prosecutor:

> Ladies and gentlemen of the jury, "The voice of thy brother's blood crieth unto me from the ground." So spoke the Lord when the first murder was committed on this earth; a murder committed, as this one was, in secrecy, in private and in stealth.

This Court, noting the wide latitude afforded counsel in closing arguments, has disapproved of biblical references only in limited instances where the arguments indicate that the law enforcement powers of the State were divinely inspired or ordained by God. *See State v. Moose*, 310 N.C. 482, 501, 313 S.E.2d 507, 519-20 (1984); *State v. Oliver*, 309 N.C. 326, 359, 307 S.E.2d 304, 326. Here, when viewed in context, the prosecutor was effectively arguing that even though the murder was committed in secret and without any witnesses, the evidence "cried out" that the defendant perpetrated the crime. This remark is in no manner equivalent to saying that state law is divinely inspired or ordained by God. We therefore hold that the remarks were not so improper as to require intervention by the trial court *ex mero motu*.

[23] The defendant next argues that the prosecutor acted improperly by commenting on personal characteristics of the victim. The defendant specifically complains of the prosecutor's argument that the defendant hated the victim's father. We find that this argument was a reasonable inference drawn from the evidence in light of the defendant's threat to the victim that "[d]addy can't help you anymore."

Assuming, *arguendo*, that this argument was improper, it was not so grossly improper as to require intervention by the trial court. The defendant has failed to show any prejudice caused by this argument or an abuse of discretion by the trial court in not intervening to prevent an argument that even defense counsel did not believe to be prejudicial when heard.

[24] The defendant next sets out, without discussion, thirteen instances in which he contends the prosecutor improperly commented on his exercise of his rights to remain silent, proof beyond a reasonable doubt, and the presumption of innocence, thereby effectively negating the exercise of these rights. After thoroughly review-

ing each argument at issue, we find none constituting a comment on the defendant's exercise of his right to remain silent, shifting the burden of proof, or depriving defendant of the presumption of innocence.

[25] Finally, the defendant argues (1) that the prosecutor improperly encouraged the jury to convict the defendant on the basis of community sentiment by arguing, "If you can't be safe in your own home, members of the jury, if the law is not going to protect you there, then where is it going to protect you?" and (2) that the prosecutor's use of excerpts from decisions of the appellate courts "confused and misled the jury as to the State's burden to prove every element of the offense beyond a reasonable doubt." Defendant has failed to show how either of these arguments was improper or that he was prejudiced in any manner by the arguments. Accordingly, we hold that these arguments were not so improper as to require the trial court's intervention *ex mero motu*. This assignment of error is overruled.

XVII.

[26] By another assignment of error, the defendant contends that the trial court erred by overruling his objection to the prosecutorial argument that defendant had failed to contradict or rebut the State's case. The prosecutor made the following argument, to which defendant took exception:

> And all of the evidence that you've heard from this witness stand in this courtroom this week has not been denied, contradicted or rebutted. And so when the evidence comes in, members of the jury, that he was down there at Willoughby's buying gas and a soda with quarters, and when he went off to somebody's house and asked to change forty-five dollars for quarters, that evidence has not been denied, it's not been contradicted, it's not been rebutted. And when evidence comes in that he was over there beating on Pamela Renee Perry with Mr. Hymon there, that evidence has not been denied, contradicted, or rebutted.
>
> . . . .
>
> Members of the jury, the evidence of the man across the street who said he was on the phone the very night that Pamela Perry was dead and she told him that Charlie Mason Alston was calling her, and threatening to beat in her face and to kill her, that's not been denied, contradicted or rebutted.

The defendant contends that by arguing that the State's evidence was uncontradicted, the prosecutor was improperly commenting on the defendant's exercise of his right not to testify. Defendant argues that since the answers raised by the evidence not "denied, contradicted or rebutted" were solely within his knowledge, the prosecutor's argument must be construed as a comment on his failure to testify. We disagree.

This Court has, on numerous occasions, considered and rejected the contention that statements by the prosecutor in closing argument that the evidence was uncontradicted or unrebutted amount to impermissible comments on the defendant's failure to testify. *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). It is well settled that the State may properly draw the jury's attention to the failure of the defendant to produce exculpatory evidence to contradict the State's case. *Id.*

We also disagree with the defendant's argument that this case is distinguishable because the answers raised by the evidence not "denied, contradicted or rebutted" were solely within his knowledge. This Court specifically rejected such an argument in *State v. Foust*, 311 N.C. 351, 357-58, 317 S.E.2d 385, 389 (1984), *overruled on other grounds by State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986). As in *Foust*, we do not consider the unavailability of a witness for the defense to be a determinative factor. *Id.* The evidence was theoretically contradictable by testimony of persons other than the defendant or by cross-examination of the witnesses themselves. This assignment of error is without merit.

XVIII.

[27] The 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. "The determinative factor is what the State's evidence tends to prove." *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983). If the State's evidence establishes each and every element of first-degree murder, and there is no evidence to negate these elements, it is proper for the trial court to exclude second-degree murder from the jury's consideration. *Id.*

Here, evidence of the lesser-included offense of second-degree murder is totally lacking. The defendant presented no evidence. The State's evidence tended to show that the defendant harbored malice toward the victim and had threatened to kill the victim by "smashing in" her face. The medical examiner testified that before the victim was killed, she was beaten on the face and neck with an instrument consistent with a hammer, causing extensive injuries. After the beating, the victim was smothered, causing her death. The medical examiner testified that it would have taken at least three or four minutes before the victim died as a result of being suffocated. The medical examiner further testified that the manner of suffocation and the injuries to the victim's face indicated that her face was forcibly held against the pillow until her death.

The fact that the defendant did not bring the murder weapon to the scene of the killing, without more, will not support an instruction for second-degree murder. The evidence permits no other inference than the defendant went to the victim's residence to carry out his threat to "smash in" her face, bludgeoned her mercilessly, and then killed her by forcing her face into a pillow for three or four minutes. The evidence supports a finding of premeditation and deliberation and accordingly an instruction for first-degree murder. To suggest that the defendant acted without premeditation and deliberation is to invite total disregard of the evidence. 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.

XIX.

[28] By another assignment of error, the defendant contends that the trial court erred by denying the defendant's motion to set aside the verdict based upon the insufficiency of the evidence.

For the evidence to be sufficient in a criminal case, there must be substantial evidence to support a finding of each essential element of

the offense charged. *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971). Substantial evidence means "that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Robbins*, 309 N.C. 771, 774-75, 309 S.E.2d 188, 190 (1983).

In the case *sub judice*, the defendant argues that the evidence was not sufficiently substantial to support a finding that the murder was committed with premeditation and deliberation. We disagree. Premeditation means that the act was thought out beforehand for some length of time, however short. *State v. Skipper*, 337 N.C. 1, 27, 446 S.E.2d 252, 265-66 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). 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. *Id.* at 27, 446 S.E.2d at 266. Premeditation and deliberation are ordinarily not susceptible to proof by direct evidence and therefore must usually be proven 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), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Circumstances to be considered in determining whether a killing was committed with premeditation and deliberation include the following: (1) want of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and during the killing, (3) threats and declarations of the defendant, (4) ill will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, and (6) evidence that the killing was done in a brutal manner. *Id.* at 59, 337 S.E.2d at 823.

We conclude that there was substantial evidence that the killing was premeditated and deliberate. The evidence tended to show all six circumstances set out above. The victim did not provoke the defendant in any manner; the defendant harassed, threatened and assaulted the victim prior to the murder; the victim was rendered helpless by being bludgeoned in the face with a hammer-like instrument; and without question, the killing was accomplished in a brutal manner. In light of such evidence, we hold that there was sufficient evidence to

support the defendant's conviction for first-degree murder on the theory of premeditation and deliberation. The trial court did not err by denying the defendant's motion to set aside the verdict.

SENTENCING PHASE

XX.

[29] By another assignment of error, the defendant contends that the trial court erred by failing to intervene *ex mero motu* to correct seven instances of grossly improper conduct by the prosecutor during closing arguments in the sentencing phase of the trial. As in Issue XVI, the defendant failed to object to any of the arguments of which he now complains, and therefore, the prosecutor's argument will be subject to limited appellate review for gross improprieties which make it plain that the trial court abused its discretion by failing to intervene *ex mero motu*. *State v. Pinch*, 306 N.C. 1, 17, 292 S.E.2d 203, 218.

The defendant first argues that the prosecutor acted improperly by using the hearsay testimony admitted to show the victim's state of mind, not for the purpose admitted, but primarily to argue (1) that the defendant planned the crime and did not act under emotional disturbance, (2) that the defendant had a significant history of criminal activity, and (3) that the murder was committed in retaliation for the victim's testimony against defendant in an earlier trial for assault. Other than his unsupported allegations of impropriety, the defendant fails to show how the foregoing arguments were improper or how the trial court abused its discretion by not intervening to prevent these arguments. Based on our review of the record, we find no impropriety with the prosecutor's arguments and no error with the trial court's decision not to intervene to prevent them.

[30] The defendant next argues that the prosecutor acted improperly by arguing facts outside the record and by expressing his own personal and prejudicial opinions. The defendant specifically contends that the prosecutor impermissibly (1) argued that the defendant held and choked the victim, (2) argued that the defendant "didn't lose his temper when he went to [the victim's] house," (3) argued that the defendant "took the law into his own hands," and (4) opined that "we [the prosecution] have proven [our case] beyond a reasonable doubt." After thoroughly reviewing the record, we hold that the prosecutor's arguments fall well within the wide latitude accorded prosecutors in the scope of their arguments and are consistent with the record.

The prosecutor's argument that the defendant held the victim down and continued to hold her until she suffocated is supported by the medical examiner's testimony that, in his opinion, the victim had to have been forced face down in the pillow for three or four minutes to suffocate. The comment that the victim was "choked" rather than "suffocated" was not so grossly improper as to warrant the trial court's intervention. Each word essentially means to interfere with another's breathing. The evidence clearly established the cause of the victim's death was asphyxiation. We find no reasonable possibility that the use of the word "choke" confused the jury in any manner.

The prosecutor's argument that the defendant did not "lose his temper" at the victim's house is a permissible inference drawn from facts upon which the jury could conclude that the defendant went to the victim's house to carry out a long-intended killing and did not act under the influence of a sudden, violent passion or legal provocation. The prosecutor's statement that the defendant "took the law into his own hands" was nothing more than an expression that the defendant took matters into his own hands by killing the victim. Finally, the argument that the State had proven its case beyond a reasonable doubt was not expert testimony as argued by defendant, but rather was a permissible statement of the State's position. The trial court's intervention was not required to prevent any of the foregoing arguments by the prosecutor.

[31] The defendant next argues that the prosecutor improperly commented on his failure to testify. The prosecutor made the following argument, about which the defendant now complains:

> If there was any evidence he [defendant] was under any mental or emotional disturbance when he got in the car of that trooper, don't you know they would have him on the stand testifying that he was under some mental or emotional disturbance that evening?

When read in context, this argument does not appear to be a comment on the defendant's failure to testify. Although less than clear, it appears the prosecutor was referring to the trooper not testifying, not the defendant. This segment of the argument, as it seems intended, was that the trooper observed the defendant's behavior, and had the defendant been under any emotional disturbance, the defense would certainly have called the trooper to so testify. In any event, assuming, *arguendo*, that the prosecutor's argument was improper, the impro-

priety was not so gross or excessive that we would conclude the trial court abused its discretion by failing to intervene *ex mero motu*.

[32] The defendant next contends that the prosecutor inaccurately stated the law as to the statutory aggravating circumstances submitted by the trial court and as to the defendant's burden of proof regarding mitigating circumstances. The defendant, however, fails to point to any particular statement by the prosecutor which he contends misstated the law, nor has the defendant cited any authority showing that a particular statement was incorrect. After a careful review of the record, we find no instance in which the prosecutor's argument misstated the law. Further, had there been a misstatement of the law by the prosecutor, any such misstatement would have been cured by the trial court's proper instructions to the jury. *See State v. Dodd*, 330 N.C. 747, 755, 412 S.E.2d 46, 50.

[33] The defendant next argues that the trial court erred by not intervening *ex mero motu* to prevent the prosecutor's three-minute pause intended to show the period of time it took for the victim to die of asphyxiation. This Court rejected a similar argument in *State v. Artis*, 325 N.C. 278, 323-25, 384 S.E.2d 470, 496-97 (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).

In *Artis*, the prosecutor asked the jurors, *over defendant's objection*, to hold their breath as long as they could during a four-minute pause clocked by the prosecutor. Noting that the argument occurred in the sentencing phase of trial, this Court found it neither improper nor prejudicial. *Id.* at 325, 384 S.E.2d at 497. We reasoned that during sentencing, the emphasis is on the nature of the crime and the character of the criminal, and therefore, urging the jurors to appreciate the circumstances of the crime by voluntarily suffering oxygen deprivation was not improper. *Id.*

In the case *sub judice*, the defendant argues that this case is distinguishable from *Artis* for two reasons. First, in *Artis*, the cause of death was manual strangulation which required conscious physical exertion to cause death. Here, the defendant argues, there is no credible proof that the defendant held the victim to cause her asphyxiation and, therefore, no correlative amount of moral blameworthiness. Second, the defendant argues that unlike *Artis*, the actual sequence of events was unknown. Therefore, without knowing whether the victim was conscious when she suffocated, the amount of time between the beginning of asphyxiation and death is not relevant to the victim's suffering.

We disagree. The evidence clearly established that the defendant forcibly held the victim's head down into a pillow for at least three or four minutes. The medical examiner testified that, in his opinion, the victim could not have suffocated by any other manner. Clearly, this crime entails a correlative amount of moral blameworthiness to that in *Artis*, which bears directly on the defendant's character. Further, the length of time it took for the victim to die of asphyxiation is relevant to the character and circumstances of the crime regardless of whether the victim suffered. Finally, the defendant here, unlike *Artis*, failed to object to the prosecutor's argument and therefore must show that the prosecutor's argument amounted to a gross impropriety before we will find that the trial court abused its discretion by failing to intervene *ex mero motu*. *State v. Pinch*, 306 N.C. at 17, 292 S.E.2d at 218. In light of our previous holding in *Artis*, we find no impropriety whatsoever with the prosecutor's argument and accordingly no error with the trial court's decision not to intervene to prevent it.

[34] The defendant next contends that the prosecutor acted improperly by requesting that the jury not consider sympathy for the defendant's family in its consideration of mitigating circumstances.

This Court has stated that "a defendant's eighth amendment rights are jeopardized only when the jury is urged to ignore such feelings that are supported by facts in the record." *State v. Price*, 326 N.C. 56, 87, 388 S.E.2d 84, 102, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated on other grounds*, —— U.S. ——, 122 L. Ed. 2d 113, *on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993), *sentence vacated on other grounds*, —— U.S. ——, 129 L. Ed. 2d 888, *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). In the present case, the prosecutor argued:

> When the defense asks you to find this as an aggr—as a mitigating factor, they're asking you to do it out of sympathy. They're asking you to do it because you feel sorry for Mr. Alston's parents. But in this case, ladies and gentlemen of the jury, the evidence simply does not support any finding that this defendant had any mental or emotional disturbance. . . . He's before you today, asking you to find some reason in your hearts to feel sympathy for him. And you may feel some sympathy for his family, ladies and gentlemen of the jury. But when . . . you were selected as jurors, you were asked if you could do your duty in this case. And your

> duty in this case, I submit to you, is to find as an aggravating factor . . . .

It is clear that when read in context, the prosecutor was not asking the jurors to ignore any feelings of sympathy that are supported by the facts. The prosecutor acknowledged that the jurors may have feelings of sympathy for the defendant's family, but argued that their duty nevertheless required them to recommend the death penalty. The defendant has failed to show that the prosecutor's argument was improper or that the trial court abused its discretion by not intervening *ex mero motu*.

[35] The defendant next contends that the prosecutor's argument diminished the jury's sense of responsibility for determining the appropriateness of death, in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985).

In *Caldwell*, the Supreme Court held it unconstitutional to argue that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. *Id.* at 328-29, 86 L. Ed. 2d at 239. This Court has limited *Caldwell's* applicability to those cases in which the prosecutor "suggest[s] to the jurors that they could depend upon judicial or executive review to correct any errors in their verdict." *State v. McCollum*, 334 N.C. 208, 226, 433 S.E.2d 144, 153 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 895, *reh'g denied*, — U.S. —, 129 L. Ed. 2d 924 (1994). In this case, the prosecutor argued that the jurors had a duty, under the evidence presented, to recommend the death penalty, and that they were "servants of the law." The prosecutor did not, however, suggest to the jurors that they could depend upon judicial or executive review to correct any errors they might make. Accordingly, we find no error with regard to this aspect of the prosecutor's argument.

Finally, the defendant contends generally that he is entitled to a new sentencing hearing in light of the "persistent" prosecutorial misconduct above referenced. As we have reviewed the defendant's arguments and found no error or gross improprieties with respect to the prosecutor's closing argument, this general argument must also be dismissed. These assignments of error are accordingly overruled.

XXI.

[36] By another assignment of error, the defendant contends that the trial court erred by failing to sustain his objection to the prosecutor's improper comments on the relative deterrent values of life imprison-

ment and the death penalty and to racially inflammatory remarks. The prosecutor made the following argument, to which the defendant took exception:

> The only way you can be sure that this man will never walk out again is to give him the death penalty. Oh, you might say, let's let him have life in the penitentiary. Do you know where the word penitentiary came from? The same root word as penitent. You see, the notion was when we built penitentiaries hundreds of years ago, that we would lock people up in a cell for a while and let them be penitent, and think about what they had done, and they would rationally come out and be different people. I argue and I suggest to you, members of the jury, it's difficult to be penitent with televisions, and basketball courts, and weight rooms. It's difficult to be penitent—
>
> [DEFENSE COUNSEL]: Your honor, I object.
>
> [PROSECUTOR]: —when you stand around and rap all day—
>
> COURT: Ladies and gentlemen, again, you will take your instructions on the law from the court. The attorneys have an opportunity to argue to you what they contend the punishment should be.
>
> [PROSECUTOR]: It's difficult to be penitent, members of the jury, sitting around rapping.

It is well established that control of counsel's arguments is left largely to the control and discretion of the trial court. *State v. Johnson*, 298 N.C. 355, 368, 259 S.E.2d 752, 761. It is equally well settled that 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.

The defendant first argues that the prosecutor's argument violated this Court's decision in *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, by "arguing against the general deterrent" value of a life sentence. However, when the portion of the argument to which defendant refers is read in context with the rest of the argument, it is clear that the prosecutor did not espouse the position that prison does not deter.

The prosecutor began this portion of his closing argument, "The only way you can be sure that this man will never walk out again is to give him the death penalty." This is a permissible argument that the jury should recommend the death penalty to foreclose further crimes

by the defendant. *See Zuniga*, 320 N.C. at 269, 357 S.E.2d at 920 (allowing argument that imposition of death penalty will foreclose further commission of crimes by defendant). The prosecutor's subsequent argument that it is hard to be penitent with televisions, basketball courts, and weight rooms emphasized the prosecution's position that life in prison was not an adequate punishment. 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 upheld an argument in which the prosecutor commented that if sentenced to life, the defendant would have a "cozy little prison cell . . . with [a] television set, air conditioning and three meals a day." *Id.* at 732, 448 S.E.2d at 817. As in *Reeves*, we hold that the argument did not relate to general deterrence, but served to emphasize the State's position that the defendant deserved the penalty of death rather than a comfortable life in prison. In light of the wide latitude accorded prosecutors during their arguments, we find that the defendant has failed to show that the prosecutor's argument was improper, or that the trial court abused its discretion in allowing it.

The defendant next argues that the prosecutor's comments "stand around and rap all day" and "sitting around rapping" violated his right to equal protection by denigrating a form of music closely identified with the black race, thereby encouraging the jury to make its decision on the basis of racial prejudice. We disagree. The common definition of "rap" is "to talk." The defendant has presented no argument to convince this Court that the word "rap," as used by the prosecutor, meant anything else. Accordingly, we find no error in the use of the word "rap."

The defendant next contends that the prosecutor's argument violated his First Amendment rights because "rapping" is protected by the First Amendment and the prosecutor may not argue a First Amendment activity, or the prevention thereof, as a basis for imposing the death penalty. Regardless of whether the prosecutor intended the word "rap" to mean "talk" or "sing," it is clear that he did not argue that the defendant should be put to death because he "rapped." We find no error with respect to this argument. This assignment of error is overruled.

XXII.

[37] In a related assignment of error, the defendant contends that the trial court erred by failing to intervene *ex mero motu*, with respect to the above argument, to prevent the prosecutor's improper innuendo

that the duration of a life sentence would be minimal, when in fact he would not become eligible for parole for twenty years. There is no manner in which the prosecutorial argument set forth above can reasonably be construed to address the defendant's parole eligibility. Contrary to defendant's assertion, the prosecutor argued that the jury should impose the death penalty in order to insure that the defendant never kills again. It has always been a fact of prison life that murder is no stranger there. This is a proper argument in all respects. *Zuniga*, 320 N.C. at 269, 357 S.E.2d at 920. Accordingly, this assignment of error is overruled, as defendant has failed to show any gross impropriety requiring the trial court's intervention *ex mero motu*.

XXIII.

[38] In another assignment of error, the defendant contends that the evidence was insufficient to support the submission of three aggravating circumstances to the jury.

First, the defendant argues that the evidence was not sufficient to submit to the jury the aggravating circumstance that the murder "was especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9) (Supp. 1994).

This Court has identified several types of murders which may warrant submission of the "especially heinous, atrocious, or cruel" aggravating circumstance:

> One type includes killings physically agonizing or otherwise dehumanizing to the victim. A second type includes killings less violent but "conscienceless, pitiless, or unnecessarily torturous to the victim," including those which leave the victim in her "last moments aware of but helpless to prevent impending death." 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."

State v. Sexton, 336 N.C. 321, 373, 444 S.E.2d 879, 908-09, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429 (1994) (citations omitted).

In determining the sufficiency of the evidence to support the submission of an aggravating circumstance to the jury, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference drawn therefrom. *Syriani*, 333 N.C. at 392, 428 S.E.2d at 141. Applying these principles, we conclude that the evidence here supports not only a conclusion that the killing

was physically agonizing, conscienceless, pitiless and unnecessarily dehumanizing to the victim, but also supports a finding that the killing involved psychological terror not normally present in murder.

The evidence tends to show that the defendant repeatedly beat the victim with a hammer or similar blunt object. The majority of the wounds were to the victim's face. The victim suffered severe swelling, bruising and lacerations to her face. Other blows to the victim's neck caused hemorrhaging inside her neck, in the area around the larynx and inside the trachea. The victim's skull was not fractured, but the beating was severe enough to cause bleeding over the surface of her brain and in her eyes. These blows, however, did not cause the victim's death. At this point, the victim's life was in the hands of the defendant. Instead of sparing the victim's life after inflicting this punishment, the defendant, acting without conscience or pity, forced the victim's face into a pillow, suffocating her. The medical examiner testified that it takes at least three or four minutes for a person to die by suffocation, but if the blood supply to the brain is completely interrupted, the person will become unconscious within seven to ten seconds. Although seemingly a short period of time, "when struggling for the breath of life it can be an eternity." *State v. Artis*, 325 N.C. 278, 320, 384 S.E.2d 470, 494.

Additionally, evidence of the defendant's threats to "smash in" the victim's face and kill the victim, defendant's assault on the victim a little more than one month prior to the killing and the victim's letter and statements made prior to her death, suggest that she feared the defendant. It is reasonable to infer that the victim suffered psychological torture and anxiety as her fears were realized and the defendant carried out his threats. In the last minutes of the victim's life, as her face was forced into the pillow and she struggled to breath, she undoubtedly was left aware of, but unable to prevent, her impending death.

This evidence supports a finding that the killing was physically agonizing and involved psychological terror not normally present in murder. *See State v. Sexton*, 336 N.C. at 373-74, 444 S.E.2d at 909 (finding evidence of extreme anguish and psychological terror where death caused by strangulation took three to four minutes, left the victim conscious for at least ten seconds, and left the victim knowing that death was impending but helpless to prevent it); *State v. Artis*, 325 N.C. at 319-20, 384 S.E.2d at 493-94 (finding evidence of psychological suffering where victim killed by strangulation rendering her

helpless, but aware of, impending death). We conclude that the evidence of psychological terror combined with the unrelenting murderous effort on the part of the defendant to kill the victim clearly supported a finding that the murder was "especially heinous, atrocious, or cruel."

[39] Next, the defendant argues that the evidence was not sufficient to submit to the jury the aggravating circumstances that the murder was committed for pecuniary gain and that the murder was committed against a former witness against the defendant because of the exercise of her official duty. N.C.G.S. § 15A-2000(e)(6), (e)(8). We disagree. First, the victim was found dead two days after testifying against the defendant in the assault trial. This evidence supports the submission of the former witness aggravating circumstance. Second, over one hundred dollars in change was stolen from the victim's bedroom and witnesses testified that shortly after the murder, the defendant was making purchases with change. This evidence supports the pecuniary gain aggravating circumstance. There was no evidence that the defendant's sole motive for killing the victim was jealousy. Clearly, the evidence was sufficient to support an inference that the defendant sought to kill the victim in retaliation for testifying against him and to rob her of her money. Each aggravating circumstance was supported by the evidence and was properly submitted.

This Court has held that the erroneous submission of an aggravating circumstance in a capital sentencing procedure is not reversible *per se*, but rather, is subject to a harmless error analysis. *See State v. Taylor*, 304 N.C. 249, 285-86, 283 S.E.2d 761, 784 (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). Assuming, *arguendo*, that the trial court erred by submitting the pecuniary gain and former witness aggravating circumstances, we hold that any such error was harmless.

The victim was murdered in a brutal and senseless manner. The jury found that the murder was especially heinous, atrocious, or cruel. The jury did not find any mitigating circumstances. Based on the foregoing, it is unreasonable to believe that absent a finding that the victim was a former witness or that the defendant killed the victim for the money in the jug, the jury would have ignored the fact that the defendant mercilessly and brutally killed the victim and thus would have found that the death penalty was not justified. Accordingly, this assignment of error is overruled.

XXIV.

[40] In his next assignment of error, the defendant contends that the jury's failure to find clearly proven mitigating circumstances violated his constitutional rights. Specifically, defendant argues that the evidence was uncontroverted as to the existence of one statutory mitigating circumstance and two nonstatutory mitigating circumstances and that the jury's failure to find them constitutes error.

First, the defendant argues that given the uncontradicted evidence that the defendant did not have a significant history of prior criminal activity, the jury was required to find the existence of this statutory mitigating circumstance. The defendant misinterprets the law relative to uncontradicted evidence of statutory mitigating circumstances. We first find that the evidence before the jury in the present case was not uncontradicted in regard to the defendant's prior criminal history. Evidence regarding defendant's prior assault on the victim was susceptible to a finding by the jury that the defendant had a significant history of criminal activity.

In those cases where the evidence is truly uncontradicted, the defendant is, at most, entitled to a peremptory instruction when he requests it. *State v. Johnson*, 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979). A peremptory instruction tells the jury to answer the inquiry in the manner indicated by the trial court *if it finds* that the fact exists as all the evidence tends to show. *Id.* at 75, 257 S.E.2d at 617. The defendant did not request a peremptory instruction in the present case. However, even where all of the evidence supports a finding that the mitigating circumstance exists and a peremptory instruction is given, the jury may nonetheless reject the evidence and not find the fact at issue if it does not believe the evidence. *Id.*

The jury's failure to find this statutory mitigating circumstance does not indicate that the jury was prevented from or failed to consider it. To the contrary, this mitigating circumstance was submitted, thus, the jury was required to consider it. The jury simply declined to find that the evidence supported this mitigating circumstance.

[41] The defendant also contends that the jury was required to find two nonstatutory mitigating circumstances: (1) that the defendant was regularly employed at the time of the offense, and (2) that the defendant has a supportive family structure. As stated above, it is the prerogative of the jury to believe or reject the evidence presented by

the defendant as to the existence of a mitigating circumstance. Unlike statutory mitigating circumstances, the jury may determine that a nonstatutory mitigating circumstance has no value even if that circumstance is found to exist. *State v. Fullwood*, 323 N.C. 371, 395-97, 373 S.E.2d 518, 533-34 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991). Thus, as to these two mitigating circumstances, the jury either did not believe the evidence and on that basis determined that the mitigators did not exist, or it determined that the mitigators did exist but decided that they had no mitigating value and on that basis rejected them.

We therefore conclude that the jury's failure to find these three mitigating circumstances did not violate any of the defendant's constitutional rights. This assignment of error is accordingly overruled.

PRESERVATION ISSUES

[42-44] The defendant raises three issues which he concedes have been decided against him by this Court: (1) the trial court erred by instructing the jury that it must determine whether the evidence supported each nonstatutory mitigating circumstance submitted and whether it had mitigating value, (2) the trial court erred by instructing the jury that it had a "duty" to recommend a sentence of death if it determined that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to warrant the imposition of the death penalty, and (3) the trial court erred by denying his motion to eliminate the death penalty on the grounds that the North Carolina death penalty statute is unconstitutional. We have considered the defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule these assignments of error.

The defendant raises five additional issues which are not conceded, but which nevertheless should have been treated as preservation issues.

[45] First, the defendant contends that the trial court erred by instructing the jury on the "especially heinous, atrocious, or cruel" aggravating circumstance because the instruction was inherently vague. This Court has previously considered and rejected the defendant's argument. *See State v. Syriani*, 333 N.C. 350, 389-92, 428 S.E.2d 118, 139-41.

[46] Second, the defendant contends that the trial court's instruction defining mitigating circumstances erroneously focused the jury's attention on the killing itself, thereby limiting the jury's ability to consider the defendant's character and background as a basis for a sentence less than death. We note that the instructions given were virtually identical to the North Carolina Pattern Jury Instructions. This Court has previously rejected this argument, holding that instructions identical to those given in the present case were a correct statement of the law of mitigation. *See State v. Robinson*, 336 N.C. 78, 122, 443 S.E.2d 306, 327-28.

[47] Third, the defendant contends that the trial court's instruction on defendant's burden of proof in establishing mitigating circumstances erroneously defined "preponderance of the evidence" as evidence which "must satisfy you" of the existence of any mitigating circumstance. Specifically, defendant argues that the term "satisfy" is vague and subjective and that "preponderance of the evidence" should have been defined as "more likely than not." This precise argument has previously been considered and rejected by this Court. *See State v. Payne*, 337 N.C. 505, 531-33, 448 S.E.2d 93, 108-09 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995).

[48] Fourth, the defendant contends that the trial court erred by instructing the jury that premeditation and deliberation may be inferred from "lack of provocation by the victim." Defendant argues that this instruction misled the jury and impermissibly shifted the burden of proof to the defendant on an element of the offense. This Court has previously considered and rejected this argument. *See State v. Skipper*, 337 N.C. 1, 32-34, 446 S.E.2d 252, 269-70; *State v. Handy*, 331 N.C. 515, 525, 419 S.E.2d 545, 549-50 (1992).

[49] Finally, defendant contends that the trial court erred by refusing to submit as a nonstatutory mitigating circumstance that "the State's case in chief against the defendant was based solely upon circumstantial evidence." This Court has previously held that trial courts should not submit lingering doubt of guilt as a mitigating circumstance, as it has no bearing on a defendant's character or record or the circumstances of the offense. *State v. Hill*, 331 N.C. 387, 415, 417 S.E.2d 765, 778-79 (1992), *cert. denied*, — U.S. —, 122 L. Ed. 2d 684, *reh'g denied*, — U.S. —, 123 L. Ed. 2d 503 (1993).

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

PROPORTIONALITY REVIEW

[50] Having found no error in either the guilt-innocence or sentencing phases, we are required by statute to review the record and determine (1) whether the evidence supports the aggravating circumstances found by the jury; (2) whether passion, prejudice, or "any other arbitrary factor" influenced the imposition of the death sentence; and (3) 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). We have thoroughly reviewed the record, transcript and briefs in the present case. We conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

One purpose of proportionality review "is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Another is to guard "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 defined the pool of cases for proportionality review in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983), and *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), and we compare the instant case to others in the pool that "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). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994).

In the case *sub judice*, the jury found the defendant guilty of first-degree murder under the theory of malice, premeditation and deliberation. The trial court submitted three aggravating circumstances, each of which the jury found: that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); that the murder was

committed against a former witness because of the exercise of her official duty, N.C.G.S. § 15A-2000(e)(8); and that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). The jury declined to find the existence of any of the six statutory and nonstatutory mitigating circumstances submitted for its consideration.

This case has several distinguishing characteristics: the jury convicted the defendant under the theory of premeditation and deliberation; the victim's brutal murder was found by the jury to be especially heinous, atrocious, or cruel; the victim was killed in her own bedroom during the night; the victim suffered great physical and psychological pain before death; the victim was not only in pain, but was aware of her impending death as she was suffocated; the victim was of unequal physical strength to defendant; the victim feared the defendant; and finally, the defendant failed to exhibit remorse after the killing. These characteristics distinguish this case from those in which we have held the death penalty disproportionate.

"Of the cases in which this Court has found the death penalty disproportionate, only two involved the 'especially heinous, atrocious, or cruel' aggravating circumstance. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983)." *Syriani*, 333 N.C. at 401, 428 S.E.2d at 146-47. Neither *Stokes* nor *Bondurant* is similar to this case.

In *Stokes*, the defendant and a group of coconspirators robbed the victim's place of business. The evidence failed to show who the "ringleader" of the group was or that defendant Stokes deserved a sentence of death any more than another party to the crime who received only a life sentence. In the present case, the defendant alone was responsible for the victim's death. Defendant Stokes was only seventeen years old at the time of the crime. In this case, the defendant was thirty-one years old at the time of the crime. In *Stokes*, the defendant was convicted under a theory of felony murder, and there was virtually no evidence of premeditation and deliberation. In the present case, the defendant was convicted upon a theory of 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. Finally, in *Stokes*, the victim was killed at his place of business. In this case, the victim was killed in her bedroom. A murder in one's 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).

In *Bondurant*, the victim was shot while riding with the defendant in a car. *Bondurant* is distinguishable because the defendant immediately exhibited remorse and concern for the victim's life by directing the driver to go to the hospital. The defendant also went into the hospital to secure medical help for the victim, voluntarily spoke with police officers, and admitted to shooting the victim. In the present case, by contrast, after rendering the victim helpless by repeatedly beating her in the face with a hammer, the defendant literally held the victim's life in his hands. Instead of seeking aid for the victim, the defendant chose to take her life, smothering her with a pillow as she lay aware yet helpless to prevent her impending death. Additionally, after taking the victim's life, the defendant showed an utter lack of remorse by stealing her money and using it to buy drugs.

As noted above, one distinguishing characteristic of this case is that three aggravating circumstances were found by the jury. Of the seven cases in which this Court has found a sentence of death disproportionate, including *Stokes* and *Bondurant*, in only one, *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), did the jury find the existence of multiple aggravating circumstances. In *Young*, this Court focused on the failure of the jury to find the existence of the "especially heinous, atrocious, or cruel" aggravating circumstance. The present case is distinguishable from *Young* in that one of the three aggravating circumstances found by the jury was that the murder was especially heinous, atrocious, or cruel.

For the foregoing reasons, we conclude that each case where this Court has found a sentence of death disproportionate is distinguishable from the case *sub judice*.

There are two similar cases in the pool in which the jury recommended a sentence of death after finding as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879; *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518.

In *Sexton*, this Court found the sentence of death proportionate on facts strikingly similar to the present case. In both cases, the victims were killed by asphyxiation, and many of the same injuries were inflicted. As here, the jury found three aggravating circumstances,

one of which was the "especially heinous, atrocious, or cruel" aggravator, and no mitigating circumstances. This Court held the sentence of death proportionate, noting, as we have above, that only two cases in which the "especially heinous, atrocious, or cruel" aggravating circumstance was found have ever been held disproportionate, and that only one case in which the jury found multiple aggravating circumstances has ever been held disproportionate.

In *Rose*, the defendant murdered his victim by beating and strangling her. The jury found two aggravating circumstances, including that the murder was especially heinous, atrocious, or cruel. The sentence of death was held proportionate.

The defendant relies on two cases in which the jury recommended life sentences as being similar to this case. *State v. Bullock*, 326 N.C. 253, 388 S.E.2d 81 (1990); *State v. Whiteside*, 325 N.C. 389, 383 S.E.2d 911 (1989).

Bullock is similar to the present case in the manner of death, yet is still distinguishable. In the present case, the defendant was thirty-one years of age. In *Bullock*, the defendant was only nineteen years of age. In addition, in the present case, the jury found multiple aggravating circumstances but failed to find any mitigating circumstances. In *Bullock*, the jury found the existence of four statutory mitigating circumstances, including that the defendant was mentally or emotionally disturbed and that the defendant's ability to appreciate the criminality of the crime was impaired.

Whiteside is similar to the present case in that the medical examiner testified that, in his opinion, the cause of death was strangulation. Other evidence tended to show that the victim was severely beaten as well. However, the medical examiner's testimony indicated that his evidence of death was not consistent with that of a severe beating. The jury found one aggravating circumstance, that the murder was "especially heinous, atrocious, or cruel," and four statutory mitigating circumstances. In the present case, multiple aggravating circumstances were found by the jury, and no mitigating circumstances were found. In addition, in *Whiteside*, the evidence showed that the killing resulted from an altercation provoked by the victim. In the present case, the decedent was the victim of an unprovoked and long-intended killing.

Further, regardless of how similar the cases cited by defendant may be to the present case, we noted in *State v. Daniels*, 337 N.C. 243,

446 S.E.2d 298 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995), that similarity of cases is not the last word on the subject of proportionality. *Id.* at 287, 446 S.E.2d at 325. Similarity "merely serves as an initial point of inquiry." *Id.; see also State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 46-47. The issue of whether the death penalty is proportionate in a particular case ultimately rests "on the experienced judgment of the members of this Court, not simply on a mere numerical comparison of aggravators, mitigators, and other circumstances." *Daniels*, 337 N.C. at 287, 446 S.E.2d at 325.

Based on the nature of this crime, and particularly the distinguishing features noted above, we cannot conclude as a matter of law that the sentence of death was excessive or disproportionate. We hold that the defendant received a fair trial and sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. JOHN EDWARD BURR

No. 179A93

(Filed 8 September 1995)

1. Jury §§ 150, 226 (NCI4th)— capital trial—jury selection—challenges for cause—denial of rehabilitation—exercise of court's discretion

The record shows that the trial judge exercised his discretion in denying defendant's *general* pretrial motion seeking to be allowed to attempt to rehabilitate every prospective juror challenged for cause by the State and then properly exercised his discretion in denying defendant's specific requests to rehabilitate three prospective jurors after the State challenged them for cause based on their unequivocal opposition to the death penalty.

Am Jur 2d, Jury § 279.

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

2. Jury § 227 (NCI4th)— capital trial—jury selection—death penalty views—conflicting answers—excusal for cause

Although a prospective juror gave equivocal and conflicting responses to questions about her ability to follow the law impartially because of her death penalty views, the trial court did not err in excusing this prospective juror where some of her responses revealed that she was opposed to the death penalty and that her views on the death penalty would cause her automatically to vote for a life sentence regardless of the circumstances, and her responses showed that she thought her death penalty views would make it difficult for her to follow the law and thus carry out her duties as a juror.

Am Jur 2d, Jury § 279.

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

3. Jury § 142 (NCI4th)— jury selection—question not attempt to stake out juror

In a prosecution of defendant for the murder of a four-month-old child, the prosecutor's inquiry as to whether a prospective juror could impartially focus on defendant's guilt or innocence regardless of the child's living conditions and lack of motherly care was not an impermissible attempt to ascertain how the juror would vote upon a given state of facts; rather, the question was properly allowed in the exercise of the prosecutor's right to secure an unbiased jury.

Am Jur 2d, Jury § 284.

4. Jury § 148 (NCI4th)— capital trial—jury selection—preference for death penalty—exclusion of question

Defendant was not precluded from inquiring into whether a prospective juror would automatically vote for the death penalty in violation of the holding in *Morgan v. Illinois*, 504 U.S. 719, where defendant asked the juror whether she had "a preference for the death penalty as opposed to life imprisonment"; the trial court sustained the State's objection to defendant's question as to form and stated that defendant could rephrase the question, but defendant chose not to do so; and defendant was allowed to ask the juror if she would be able to give life imprisonment the same consideration as the death penalty.

Am Jur 2d, Jury § 279.

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

5. Criminal Law § 1322 (NCI4th)— capital trial—jury selection—parole question by prospective juror—instruction on meaning of life sentence not required

The trial court did not err by failing to instruct a prospective juror, and the jury panel, on the meaning of a life sentence when defense counsel asked the prospective juror if he would be able to consider life imprisonment as an appropriate penalty for first-degree murder, and the juror replied, "is that without privilege of parole?"

Am Jur 2d, Trial § 1443.

6. Evidence and Witnesses § 304 (NCI4th)— murder of child—misconduct toward child's mother—similarity of circumstances—admissibility to show identity

In a prosecution of defendant for the first-degree murder of a four-month-old child, testimony by the child's mother and by others concerning defendant's misconduct toward the mother by choking her, bruising various parts of her body with his hands and fingers, and bending her hands behind her back to make her say and do whatever he wanted was admissible under Rule 404(b) to show defendant's identity as the perpetrator of the crime charged where the evidence showed that, at the time of her death, the child victim was covered with bruises similar to those inflicted by defendant upon the mother, including bruises in the shape of fingerprints on the cheek and handprints on the neck; the child suffered fractures in both legs caused by the knees being bent forward; the child suffered fractures in both shoulders inflicted by the arms being bent backward; and the unusual injuries inflicted on the victim were thus particularly similar to those inflicted by defendant upon the mother and the unusual acts which would have caused the victim's injuries were particularly similar to those acts defendant committed against the mother. The probative value of this testimony outweighed any potential for unfair prejudice against defendant. Furthermore, assuming that testimony concerning defendant's threats to kill the mother for infidelity and his pointing of a gun at her was not

competent to show identity, the admission of this testimony was harmless error in light of other competent evidence tending to show that defendant was the perpetrator of the murder. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 421.

7. Evidence and Witnesses § 701 (NCI4th)— evidence admitted to show identity—sufficiency of limiting instruction

The trial court's pattern instruction that evidence of defendant's prior misconduct toward the child victim's mother was admitted "solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed," and that the jury "may consider it, only for the limited purpose for which it was received" was sufficient to limit the jury's consideration of this evidence to the issue of identity without defendant's further requested instruction that the jury was not to consider such evidence as evidence of bad character. N.C.P.I.—Crim. 104.15.

Am Jur 2d, Trial § 1141.

8. Evidence and Witnesses §§ 114, 90 (NCI4th)— murder of child—DSS records—inadmissibility to show third-person guilt—impeachment value outweighed

In a prosecution of defendant for the murder of a four-month-old child, records the Alamance County DSS relating to the one-year supervision and investigation of the child's mother following the child's death were not admissible to show the mother's guilt of the murder where the records showed that the mother was having difficulty in performing her parental duties but contained no evidence that the mother physically abused or acted violently toward her children. Further, any probative value of this evidence to impeach the mother's testimony that she had done nothing wrong to her other children was substantially outweighed by the danger of confusion and undue delay where defendant had been allowed to impeach the mother with evidence similar to the evidence in the DSS records and the evidence in the DSS records would have been merely cumulative. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence §§ 324 et seq.

9. Criminal Law § 261 (NCI4th)— denial of continuance—no violation of rights of confrontation or effective assistance

Defendant's rights of confrontation and effective assistance of counsel were not violated by the trial court's denial of his motion for continuance of his trial for the murder of an infant to give defense counsel the opportunity to evaluate the need for a medical expert to aid the defense and to file motions for the necessary funds where attorneys were originally appointed to represent defendant on 30 August 1991 and 5 September 1991; defendant's attorneys received and copied the district attorney's investigative file, including the victim's medical records; at defendant's request, the trial court removed defendant's court-appointed counsel on 15 December 1992 based on irreconcilable differences with defendant and appointed two other attorneys to represent defendant; the case was originally set for trial on 25 January 1993 but was continued upon defendant's motion to 1 March 1993; defense counsel filed a motion to continue the case for an additional thirty days; the district attorney informed defendant's new counsel on 30 December 1992 that the file containing the complete investigative and medical reports was available to them; the file included the names and addresses of doctors who had treated the victim at two hospitals and the victim's medical records at both hospitals; the district attorney also informed defendant's attorneys about x-rays taken at both hospitals, the persons to contact to observe these x-rays, photographs taken by the medical examiner, and his request that doctors bring to court drawings, charts and models of portions of the victim's body in which injuries were found; and defense counsel thus had access to medical evidence regarding the need for an expert two months prior to the trial. Nor were defendant's rights violated by the denial of his motion for continuance on the ground that counsel did not have adequate time to interview witnesses contained in a DSS report about the victim's mother in order to investigate third-party guilt where the DSS report was referenced in the investigative report and the victim's medical records, both of which were in the file made available to defense counsel prior to January 1993; defense counsel could have requested the full report from DSS at this time; and, in any event, the DSS report did not contain evidence relevant to third-party guilt.

Am Jur 2d, Continuance § 97.

10. Evidence and Witnesses § 1064 (NCI4th)— instruction on nonflight not required

The trial court did not err in failing to instruct the jury that evidence of defendant's nonflight from the scene may be considered in determining whether the combined circumstances indicate innocence or a showing of nonguilt.

Am Jur 2d, Evidence §§ 532 et seq.

11. Criminal Law § 466 (NCI4th)— jury argument—having witnesses in court—not attack on counsel's competence

In a prosecution for the murder of a child in which defense counsel read into evidence the report of a hospital social worker about her investigation of the child's death because the social worker, due to a miscommunication, was out of town the day she was to testify, the prosecutor's jury argument concerning the necessity of talking to witnesses before taking a case to court and having the witnesses in the courtroom was not an attack on the competence and professionalism of defense counsel but was an attempt to minimize the effect of the evidence contained in the social worker's report and was not improper.

Am Jur 2d, Trial §§ 686-688.

12. Criminal Law § 465 (NCI4th)— murder trial—jury argument—prior acts by defendant—consideration to show identity

The prosecutor's argument to the jury in a prosecution for the murder of a child, "Now, who acts with malice, who bends arms, who hits, who chokes, who acts with malice? There he sits," was not an improper misstatement of law that jurors could infer defendant's identity as the perpetrator from his malicious character but was a proper reference to the fact that the jury could consider evidence of defendant's prior acts on the issue of identity.

Am Jur 2d, Evidence § 423.

13. Criminal Law § 465 (NCI4th)— first-degree murder—jury argument—provocation negating deliberation

The prosecutor's statement in his jury argument in a trial for the first-degree murder of a child that defendant needed to show "adequate provocation" in order to negate deliberation was not an incorrect statement of the law which prevented the jury from properly considering a verdict of second-degree murder. Rather,

the prosecutor was referring to the kind of provocation which is insufficient to negate malice and reduce the murder to manslaughter but is sufficient to incite defendant to act suddenly and without deliberation.

Am Jur 2d, Evidence §§ 643-647.

14. Evidence and Witnesses § 2090 (NCI4th)— murder of child—another child's fear of defendant—relevancy—competency of lay testimony

In a prosecution for the murder of a child, the mother's testimony that another of her children was scared of defendant was relevant and admissible to demonstrate the state of the familial relationship in the brief period preceding the murder during which defendant resided in the mother's home. Further, testimony by a neighbor that the children "didn't act like kids when [defendant] was around" was rationally based on the witness's perception and was competent to show the relationship defendant had with the children, one of whom was the murder victim. Also, a social worker's testimony that the mother told her that one of her children was scared of defendant was admissible to corroborate the mother's testimony.

Am Jur 2d, Expert and Opinion Evidence §§ 359, 360.

15. Evidence and Witnesses § 2442 (NCI4th)— medical records—subpoena duces tecum

The proper method for defendant to obtain medical records not in the possession, custody or control of the State is by a subpoena *duces tecum*.

Am Jur 2d, Witnesses § 24.

16. Constitutional Law § 252 (NCI4th)— furnishing of medical and psychological records—motion properly denied

Defendant's motion for an order requiring that all medical and psychological records of an infant murder victim's mother be made available to defendant by five entities and any other persons providing medical and psychological services to the mother amounted to a fishing expedition and was properly denied by the trial court where defendant contended that DSS files indicated that the mother suffered from depression and her records might

reveal abuse toward her children, but the DSS records contained no evidence that the mother physically abused or acted violently toward her children.

Am Jur 2d, Criminal Law § 998.

17. Criminal Law § 480 (NCI4th)— anonymous telephone call—hypothetical question—communication with juror—inquiry of jury panel not required

The trial court did not abuse its discretion by failing to conduct an inquiry of the jury panel about an alleged communication between a seated juror and a pastoral counselor during the penalty phase of defendant's capital trial where a local attorney informed the court during an *in camera* hearing that he had received an anonymous call during the penalty phase from a purported pastoral counselor who asked him a hypothetical question as to whether a juror who has assented to a verdict and is still a juror in the case may thereafter change his verdict; the caller did not indicate where the trial was being held, if not merely hypothetical, or the name of a particular juror; the attorney properly informed the caller that a juror may not impeach the verdict after it has been rendered and received in open court and that the juror should address his questions to the trial judge if the scenario was real; and the *in camera* hearing thus revealed no misconduct by a juror in defendant's trial.

Am Jur 2d, Trial § 1562 et seq.

18. Criminal Law § 416 (NCI4th)— capital sentencing—heinous, atrocious, or cruel aggravating circumstance—jury argument—comparison to facts of published opinions—gross impropriety—absence of prejudice

Assuming *arguendo* that the prosecutor in a capital trial improperly encouraged the jury to find the especially heinous, atrocious, or cruel aggravating circumstance by comparing the facts in this case with the facts in published N.C. Supreme Court opinions which upheld findings of this circumstance and that this argument amounted to a gross impropriety, defendant failed to show that he was prejudiced by the trial court's failure to intervene *ex mero motu* in light of the overwhelming evidence that the killing was especially heinous, atrocious, or cruel.

Am Jur 2d, Trial § 610.

19. Criminal Law § 461 (NCI4th)— capital sentencing—jury argument—facts not in evidence—absence of prejudice

Assuming *arguendo* that the prosecutor in a capital trial improperly traveled outside the record during his argument on the especially heinous, atrocious, or cruel aggravating circumstance by stating that he didn't know when injuries to the infant victim's ears occurred but he would "submit to you [the injuries were] probably done prior to the time before the final blow that struck . . . her head," this statement was not prejudicial error in light of the overwhelming amount of evidence that the killing was especially heinous, atrocious, or cruel.

Am Jur 2d, Trial § 632.

20. Criminal Law § 1326 (NCI4th)— capital sentencing—mitigating circumstances—burden of proof—instruction

The trial court's instruction on the burden of proof for finding mitigating circumstances did not constitute plain error.

Am Jur 2d, Trial §§ 1441 et seq.

21. Criminal Law § 1343 (NCI4th)— heinous, atrocious, or cruel aggravating circumstance—instruction not unconstitutionally vague

The trial court's instruction on the especially heinous, atrocious, or cruel aggravating circumstance was not unconstitutionally vague.

Am Jur 2d, Trial §§ 1441 et seq.

22. Criminal Law § 1329 (NCI4th)— capital sentencing—jury argument—Issue Three—unanimity for "no" answer

The prosecutor did not misstate the law when he informed the jury in a capital sentencing proceeding that it had to be unanimous in determining that the mitigating circumstances outweighed the aggravating circumstances before it could answer "No" to Issue Three.

Am Jur 2d, Criminal Law § 609.

23. Criminal Law § 1323 (NCI4th)— nonstatutory mitigating circumstance—good conduct in jail—mitigating value—instruction

The trial court did not err by instructing the jury that it could refuse to consider the nonstatutory mitigating circumstances per-

taining to defendant's good conduct in jail if it deemed the evidence to have no mitigating value.

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

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

The prosecutor could properly argue in a capital sentencing proceeding that the jury was the conscience of Alamance County.

Am Jur 2d, Trial § 569.

25. Criminal Law § 452 (NCI4th)— capital sentencing—jury argument—no limit to nonstatutory mitigating circumstances

The prosecutor's argument in a capital sentencing proceeding that there is no limit to the number of nonstatutory mitigating circumstances that may be submitted was not grossly improper.

Am Jur 2d, Trial § 572.

26. Criminal Law § 1373 (NCI4th)— death sentence not disproportionate

A sentence of death imposed upon defendant for the first-degree murder of a four-month-old child was not excessive or disproportionate to the penalty imposed in similar cases where defendant was convicted on the theory of premeditation and deliberation; the jury found the aggravating circumstance that the killing was especially heinous, atrocious, or cruel; the infant was cruelly murdered by being shaken and beaten to death; the child had been left in the care of defendant, the mother's live-in boyfriend, at the time of the murder; defendant had the mother's permission to discipline her children and violated a position of trust; defendant refused to take the child to the hospital until the mother threatened to call an ambulance; the child suffered bruises all over her body, including bruises on her neck indicating she had been grabbed "very tightly" around the neck; the child suffered fractures in both legs caused by the knees being hyperextended and fractures in both shoulders inflicted by the arms being pulled backward; the child received a skull fracture from being struck in the side of the head with a blunt object; the child had bleeding behind both eyes which indicated shaken-baby syn-

drome; and the child suffered these injuries over a prolonged period of time.

Am Jur 2d, Criminal law § 628.

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

Justice WHICHARD concurring in the result in part.

Justice FRYE joins in this concurring opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Stanback, J., at the 1 March 1993 Criminal Session of Superior Court, Alamance County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to the additional judgment imposed for assault on a female and conviction for felony child abuse was allowed 13 July 1994. Heard in the Supreme Court 16 February 1995.

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

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

ORR, Justice.

On 16 September 1991, defendant was indicted for the first-degree murder of Tarissa Sue O'Daniel, who, at the time of her death, was four months old, and in addition was indicted for one count of felony child abuse. These charges were joined for trial with defendant's appeal from a consolidated judgment finding defendant guilty of two counts of assault on a female entered 6 November 1991 in District Court, Alamance County. Following the presentation of the State's case, the trial court granted defendant's motion to dismiss one charge of assault on a female.

On 16 April 1993, the jury returned a verdict finding defendant guilty of the three remaining charges. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction. The judge sentenced defendant in accord-

ance with the jury's recommendation regarding the murder conviction and sentenced him to a term of thirty days' imprisonment for the assault on a female conviction. The judge arrested judgment on the conviction for felony child abuse. From these judgments and conviction, defendant appeals.

The State's evidence tended to show the following: Tarissa Sue O'Daniel ("Susie") was born on 1 April 1991 to Lisa Porter Bridges and Bridges' husband at that time, John Wesley O'Daniel. When Susie was a few weeks old, Bridges began having sexual relations with defendant, who was separated from his wife at the time. When Susie was six weeks old, John O'Daniel discovered his wife was having an affair with defendant and told Bridges that he wanted a divorce.

Subsequently, in June 1991, Bridges and her four children moved into a trailer located next to a trailer owned by Bridges' brother, Donald Wade. Near the end of June, defendant moved into the trailer with Bridges and her four children. Bridges testified that when defendant first moved in with her, "[h]e seemed like a pretty good person," but that after a few weeks, he became physically abusive toward her, bending her hands back in a painful manner, threatening her with a gun, bruising her body, and choking her. Bridges testified that she remained with defendant after this abuse because she "was scared of him."

On 24 August 1991, defendant and Bridges argued most of the day over defendant spending the previous night at his wife's house and his refusing to take Bridges to her parents' house. At approximately 6:00 p.m., Bridges' son Scott tripped over a cord while he was carrying Susie. Bridges testified, however, that she examined Susie after the fall and did not find any marks on her body except for some redness on her arm, which disappeared. Bridges further testified that later that evening, while she was sitting on the trailer steps with Susie and defendant was mowing the yard, defendant hit Bridges in her lower back with his fist.

After defendant hit her, Bridges went over to her brother's trailer, where defendant eventually joined her. Defendant and Bridges began arguing again, and Bridges left the trailer with the infant child. Bridges testified that defendant followed her and shoved her in the back while she was holding the child. Bridges also told defendant that he was going to make her hurt the child, but Bridges testified that "he just kept running his mouth" and followed her inside her trailer, still arguing.

Once inside the trailer, Bridges placed Susie in her infant swing located in the living room. Bridges testified that while she was still holding onto the swing, defendant pushed her down onto the couch, almost causing her to knock over the swing. When Bridges attempted to get up from the couch, defendant pushed her down again and told her not to leave the couch. Bridges sat on the couch a few minutes and then stood up and walked down the hallway into her bedroom. Bridges testified that defendant followed her to the bedroom and pushed her onto the waterbed, causing the waterbed to break. Bridges testified that after the waterbed broke, defendant "started talking like everything was fine." Bridges and defendant then began repairing the waterbed.

Bridges testified that as they were repairing the waterbed, Susie began to cry and that defendant told Bridges, "go on up there and get her, that's all in the hell she wants anyway, she is so damned spoiled." Bridges took the child out of her swing and brought her back to the bedroom, where she laid her on the waterbed. After defendant finished fixing the bed, Bridges helped her two sons, Scott and Tony, prepare for bed, while her youngest son, John, Jr., remained at Donald Wade's trailer. Bridges testified that she also "got [Susie] to sleep" and placed her in her "baby bed" located in Bridges' bedroom. Bridges testified that when she placed Susie in her bed, she appeared to be physically fine and that she did not have any marks on her. Bridges then went back to the Wades' trailer to wash the dishes. Bridges testified that when she left her trailer, Scott and Tony were ready for bed, Susie was asleep in her bed, and defendant was working on a plug in the living room.

Bridges' son Scott testified that after his mother left to go to the Wades' trailer, and after he went to bed, he was awakened by "hammer noises." When Scott awoke, he heard Susie crying. Scott testified that he then heard defendant "mumbling" and that, after he heard defendant mumbling, Susie stopped crying.

After approximately forty-five minutes, Bridges returned to her trailer and found Susie in her swing in the living room. Bridges testified that defendant was pacing the floor at this time and that he told her to look at the bruises on Susie. Defendant told Bridges that he had moved the child to the swing after she woke up and that some of the marks were grease. Bridges attempted to wash these marks off but discovered that they were not grease.

Bridges testified that she observed bruises in the child's ears, under her neck, on her arms, and on her legs. Bridges further testified that her eyes did not "look right," that she did not act right, and that she did not smile or respond to anything. According to Bridges, defendant refused to take the child to the hospital, so Bridges called North Carolina Memorial Hospital in Chapel Hill from the Wades' trailer.

After Bridges talked to a person at the hospital, who instructed her to bring the child in to be examined, she told defendant that she would call an ambulance if he did not take her to the hospital, and defendant finally agreed to take Susie to the hospital. Bridges testified that at this time, Susie was "jerking." Bridges also testified that she did not know how to get to Memorial Hospital and that they ended up at Alamance County Hospital. On the way to the hospital, defendant stopped at a gas station for gas.

Susie was admitted to the Alamance County Hospital at 2:55 a.m. on 25 August 1991. Bridges told the examining doctor, Dr. Willcockson, that her son had fallen while holding the child the day before. Dr. Willcockson examined the child and observed that she was unconscious and "poorly responsive." The child's eyes were wandering but did not "have any particular following," and her right eye deviated to the right. Dr. Willcockson observed that the child made no oral sounds and that her movements appeared lethargic. The child had occasional twitching of the eyes, face, and arms, which appeared to be seizures according to Dr. Willcockson. The child's respiratory rate was fast, and she had multiple bruises and swellings all over her head, scalp, ears, face, neck, arms, legs, and main portion of her trunk. Further, the soft spot on the child's head where the bones were forming was bulging, a symptom which Dr. Willcockson testified indicates swelling in the head. Dr. Willcockson also testified that Susie had a "grating feeling" in both arms and legs which meant the bones were grating upon each other and which indicates bone fractures. The X rays revealed that both of the child's arms were broken, as well as both of her thigh bones. The X rays further showed that the child had suffered some posterior rib fractures.

Dr. Willcockson testified that based on the multiplicity of trauma, Bridges' story of another child falling with Susie did not account for the injuries, and he immediately asked Bridges if Susie had been abused, to which Bridges responded in the negative. Dr. Willcockson testified that he "felt that there was such a high suspicion of abuse in

the matter" that he contacted the sheriff's department and social services. Dr. Willcockson further testified that based on the bruising around the head, the seizures, and the bulging of the soft spot, he formed the opinion that the child had suffered some form of "closed head injury."

At 5:15 a.m., the child was transferred by ambulance to the intensive care unit at Memorial Hospital in Chapel Hill. Dr. Azizkhan, who was the chief of pediatric surgery and associate professor of surgery at UNC Medical School at this time, testified that he examined Susie at 6:00 a.m. Dr. Azizkhan testified that Susie had bruising of the neck, particularly on the left side of the neck and a two-centimeter-by-two-centimeter area underneath the mastoid and the mandibular portion of her neck. Dr. Azizkhan observed bruising on the right side of the face that extended onto the ear, circumferential bruising of the right arm, and bruising on the back. Dr. Azizkhan testified that the child's blood pressure "was very low for a baby [her] age" and that she had lost "half of her blood volume" from internal bleeding.

Dr. Azizkhan further testified that the bones of a child Susie's age "are quite malleable and soft" and that "when you see fractures that are of this magnitude in a baby, you know that the amount of force that's been delivered is very significant, much, much greater than from a simple fall." Dr. Azizkhan testified that to inflict the injuries to the child's legs "would require either a severe direct blow or some kind of a snapping activity" and that the fractures to the child's arms "could be from intense grabbing of the arm and torquing and pulling the child's arms backwards." In Dr. Azizkhan's opinion, Susie's injuries were "inflicted" instead of "accidental."

Dr. David Merten, a professor of radiology in pediatrics at UNC Medical School and chief of the section of pediatric radiology at Memorial Hospital, studied the child's X rays and testified at trial. Dr. Merten testified that these X rays revealed fractures in both thigh bones with evidence of early healing. In Dr. Merten's opinion, these leg fractures were eight to nine days old. The X rays also revealed fractures on or near both shoulders. These fractures did not show any signs of healing, and, in Dr. Merten's opinion, they occurred five days later than the leg fractures. Dr. Merten testified that the fractures in the legs "were produced simply by bending the knee with violence, significance [sic] force, forward, and hyperextending [the knees]" and that the shoulder fractures were "inflicted and incurred" by "taking the arms and bending them back." Regarding the injuries to the head,

Dr. Merten testified that the child had a depressed skull fracture where the skull was actually broken and that the child had suffered injury to the brain underneath this fracture. Dr. Merten testified that this head injury was "a very unusual fracture in a very unusual place" and that "it would take a relatively confined direct blow to that area to produce this type of fracture." Dr. Merten further testified that this head injury occurred within hours before her admission to the hospital in Chapel Hill.

Dr. Michael Byron Tennison, a child neurologist at Memorial Hospital, testified regarding a CT scan done on Susie. Dr. Tennison testified that this scan showed not only a depressed skull fracture, but also "multifocal intercranial injuries" and bleeding behind both eyes. Dr. Tennison testified that bleeding behind both eyes is "highly suggestive of a shaken baby syndrome," which he defined as a "specific kind of injury where the baby has a whiplash kind of injury from being shaken back and forth." Dr. Tennison further testified that, based on the nature of the skull fracture, the child suffered "quite a force . . . by some blunt object" to the side of the head and that it would have taken a great deal of force to cause this fracture.

The trauma team at Memorial Hospital attempted to reduce the swelling of the child's brain, but they could not obtain a consistent response, and, after twenty-four hours, they could not reduce the pressure in the brain. The child was pronounced dead at approximately 6:30 p.m. on 27 August 1991. Dr. Tennison testified that the child died as a result of "multiple trauma to her head that resulted in contusions of the brain and eventually brain swelling and herniation and brain death."

Dr. Karen Chancellor, a pathologist at Memorial Hospital, performed an autopsy of the child. Dr. Chancellor observed multiple bruises on the child's neck that were consistent with marks caused by a hand and bruises on the cheek that were consistent with marks caused by fingers. Dr. Chancellor further observed round bruises on the upper chest area and a round bruise on the back, which bruises, in her opinion, were caused by a blunt object. Dr. Chancellor also observed bruises on the back of the head.

Defendant presented evidence that tended to show the following: Defendant testified that on the evening of 24 August 1991, he mowed the yard at Bridges' trailer until dark. During this time, Bridges was sitting on the back steps with Susie. Defendant denied having a conversation with Bridges or striking Bridges while he was mowing.

Defendant testified that when he finished mowing the yard, he joined Bridges and her children and Donald Wades' daughters, Misty and Christy, at the Wades' trailer and watched television for approximately thirty to thirty-five minutes. Defendant and Bridges were arguing at this time about Bridges going to her parents' house. Defendant testified that Bridges finally "got mad enough [and] went out the door" to her trailer, taking Susie with her. Defendant testified that he remained in the Wades' trailer with Bridges' sons and Wades' daughters.

Defendant testified that after a few minutes passed, he told Scott to tell Bridges that if she wanted to spend the night with her parents, he would take her to their house. Scott left, and, approximately ten minutes later, Bridges returned to the Wades' trailer without Susie. Defendant testified that he told Bridges that he would take her to her parents' house to spend the night. Approximately five minutes later, defendant and Bridges left the Wades' trailer and returned to Bridges' trailer. Defendant testified that he pushed her in a playful manner on the way to her trailer.

Defendant further testified that once they were in Bridges' trailer, he and Bridges went back to the bedroom where the waterbed was located. Defendant testified that at this time, Susie was in her crib in this bedroom. Defendant pushed Bridges onto the waterbed "to have sex," and when he fell on top of her, the bed broke. Defendant and Bridges then attempted to repair the bed. Defendant testified that after they drained the water from the bed and removed the mattress, Bridges went to the Wades' trailer to wash dishes, and he began drilling on the bed. After he started drilling, defendant looked into Susie's crib to see if he had woken her up, and he noticed that her eyes were open. Defendant testified that he stopped drilling, picked up the child, took her into the living room, and put her in the swing, propping up her bottle with a blanket. Defendant wound the swing and pushed it.

Defendant testified that when Bridges returned to her trailer, she helped him put the remaining parts of the bed together. During this time, defendant walked to the kitchen, and he noticed that the swing had stopped and that Susie was holding the blanket with her head over to the side. Defendant returned to the bedroom. Defendant testified that after he and Bridges finished repairing the bed, he took the child out of the swing and brought her back to her crib. As defendant

was putting the child down in the crib, he noticed her diaper was wet, and he told Bridges to change the diaper. Defendant testified that when he picked up the child's legs, her eyes started rolling from one side to the other and that Bridges told defendant that the child was having a seizure. Bridges told defendant that one of her sons was born with seizures and that she knew what to do. Defendant testified that at this time, Bridges shook the child and her eyes stopped rolling. When asked how Bridges shook the child, defendant responded, "[I]t wasn't real hard or nothing." Defendant testified on cross-examination that at this time, he and Bridges took the child into the living room and kitchen where they had a lamp and that he noticed bruises on the child.

Defendant testified that when Susie did not respond to Bridges, Bridges left to call the hospital. Defendant further testified that Bridges returned five minutes later and that he told her that some of the marks on the child could be grease. They wiped the child with a cloth, and some of the marks came off. Defendant testified that he and Bridges then took the child to the hospital, stopping for gas on the way. Defendant denied that the child cried while he was alone with her that night, and he denied that he tried to settle her down or that he beat her.

Defendant also presented evidence, through the testimony of a social worker, that the Alamance County Department of Social Services ("DSS") had received allegations of neglect against Bridges regarding her son Scott on 18 November 1988 and regarding her son Tony on 19 February 1990. On cross-examination, the social worker testified that DSS found the report of neglect regarding Scott to be unsubstantiated, and the social worker testified on redirect that "unsubstantiated" meant that there were "no risk factors to the children in the house." The social worker also testified on cross-examination that in Tony's case, insufficient evidence existed regarding the allegation to open a file.

Colene Faith Flores testified that in August 1991, she went to her friend's house where she observed Bridges with "a little bitty baby." Flores testified that the baby was propped on the couch when she arrived and cried constantly for approximately thirty-five minutes. Flores testified that she then observed Bridges walk over to the baby and "smack" her, stating, "you're driving me crazy." Flores further testified that the baby fell off the couch.

On rebuttal, the State called Flores' ex-boyfriend, James Whitlow, to testify. Whitlow testified that he was with Flores at her friend's house and that at no time did he observe anyone slap the baby off the couch. Whitlow also testified that he had discovered Flores lying to him previously.

JURY SELECTION ISSUES

I.

[1] In his first assignment of error, defendant contends that the trial court erred in denying his pretrial motion to examine prospective jurors challenged for cause, thereby "issuing a blanket ruling prohibiting rehabilitation." Essentially, defendant argues that instead of exercising his discretion, the trial judge erroneously relied upon this blanket ruling to deny his request to rehabilitate prospective jurors Barbee, Watkins, and Torain after they were challenged for cause. We disagree.

> We have noted that while defendants can be given the opportunity to rehabilitate a juror, this is not an entitlement; judges are not required to allow a defendant to attempt to rehabilitate jurors challenged for cause. A trial court in its sound discretion may refuse a defendant's request to attempt to rehabilitate certain jurors challenged for cause by the State.

State v. Skipper, 337 N.C. 1, 18, 446 S.E.2d 252, 261 (1994), *cert. denied*, — U.S.—, 130 L. Ed. 2d 895 (1995).

In the present case, the trial judge did not enter a general ruling that, as a matter of law, defendant would not be allowed to attempt to rehabilitate a juror challenged for cause. Instead, the record shows that Judge Stanback exercised his discretion in denying defendant's *general* pretrial motion seeking to be allowed to attempt to rehabilitate *every* prospective juror challenged for cause by the State. Judge Stanback then exercised his discretion in ruling on defendant's specific requests to be allowed to attempt to rehabilitate individual jurors as these requests were made. Judge Stanback based his specific rulings on the individual juror's answers and demeanor.

Judge Stanback specifically acknowledged that the question of whether to allow defendant to attempt to rehabilitate a prospective juror was within the presiding judge's discretion, and, in at least one instance, he allowed defendant to attempt to rehabilitate a prospective juror. Thus, we conclude that Judge Stanback properly exercised

his discretion in denying defendant's specific requests to rehabilitate jurors Barbee, Watkins, and Torain after the State challenged them for cause based on their unequivocal opposition to the death penalty.

"The defendant is not allowed to rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court." *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990). In the present case, all three prospective jurors at issue unequivocally expressed an inability to sentence someone to death. Specifically, when asked whether he would vote against a sentence of death, regardless of the evidence, prospective juror Barbee without reservation stated that he would; when asked whether she could vote to return the death sentence, under any set of circumstances, regardless of the judge's instructions on the law, prospective juror Watkins unequivocally answered that she could not; and when asked whether there was any set of circumstances under which he could impose the death penalty, prospective juror Torain answered, "No," regardless of the judge's instructions on the law. Thus, the trial judge did not abuse his discretion in denying defendant's request to attempt to rehabilitate these prospective jurors by further questioning. *See id.*; *accord State v. Green*, 336 N.C. 142, 159-60, 443 S.E.2d 14, 25, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994). Accordingly, defendant's first assignment of error is overruled.

II.

[2] Next, defendant contends that the trial court erred in excusing prospective juror Mary Ervin for cause based on her opposition to the death penalty. We disagree.

"The standard for determining whether a prospective juror may be properly excused for cause for his views on capital punishment is whether those views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *State v. Syriani*, 333 N.C. 350, 369, 428 S.E.2d 118, 128 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985)), *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 341 (1993), *reh'g denied*, —— U.S. ——, 126 L. Ed. 2d 707 (1994). However, "a prospective juror's bias may not always be 'provable with unmistakable clarity [and,] [i]n such cases, reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially.' " *Id.* at 370, 428 S.E.2d at 128 (quoting *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert.*

denied, 496 U.S. 905, 110 L. Ed. 2d 268 (1990)) (alteration in original); *accord Wainwright*, 469 U.S. at 424-25, 83 L. Ed. 2d at 852.

The transcript reveals that at the outset, when asked whether she had any feelings about the death penalty that would influence her as a juror, prospective juror Ervin responded, "Yes, sir." When asked whether she was opposed to the death penalty, she again responded, "Yes, sir." Then, when asked whether her feelings about the death penalty were so strong that she could not vote for the death penalty under any set of circumstances, Ervin responded, "I couldn't." Thereafter, Ervin stated that she could abide by the law and that her feelings would not prevent her from following the law. In response to the question of whether she could vote for the death penalty under some circumstances, she stated, "It depends. Yes, in some."

After asking questions regarding other aspects of the trial, the prosecutor then explained the sentencing procedure to prospective juror Ervin and again asked her questions concerning her feelings about the death penalty. The prosecutor asked Ervin if she could recommend defendant be put to death if she were on the jury and the jury determined that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty. Ervin responded, "I couldn't, no."

Prospective juror Ervin later stated, however, that she "could vote for [the death penalty]," and, when asked whether she would automatically vote against the death penalty, she responded, "No." Thereafter, when asked whether she would automatically vote for death or life, Ervin responded, "Automatic vote for life." When told that this response implied that she would automatically vote against the death penalty, Ervin was asked, "Is that your honest answer, that you would automatically vote for life and against the death penalty because of your views?" Ervin responded, "Yes." However, Ervin then responded in the negative to the question of whether her views on the death penalty would "substantially impair [her] in performing [her] duties as a juror in accordance with the judge's instructions and [her] oath as a juror." The prosecutor then stated:

> Well, you've lost me there. [Y]ou say that you could vote for death, but then you tell me you would automatically vote for life and then you say that your views would not impair you in . . . reaching that. I—it can't be all three ways. I need to know where

you stand on this thing. The [c]ourt needs to know. Where do you stand on this?

Prospective juror Ervin responded, "I would vote for the death penalty, yes." The court then called a fifteen-minute recess.

After the court reconvened, the following transpired:

[PROSECUTOR]: All right, Ms. Ervin, again . . . I want to emphasize something here. It's not that there's any right answers or wrong answers. I want you to just be as honest with yourself and with the [c]ourt as you can be, and before we broke I was asking you about your feelings that you had on your views on the death penalty and my question is this: [I]t's very simply this: Are your views on the death penalty such that they will impair substantially, make it very difficult for you to serve on this case?

MS. ERVIN: Yes, it would be.

[PROSECUTOR]: Okay. [A] little while ago you told me you would automatically vote for life and then you've come back and said well, you think you could vote for death. What I'm asking you [is,] are your views on the death penalty such that it would make it very difficult for you to follow the law if it required that you come to that point where you vote to impose the death penalty?

MS. ERVIN: Yes, it would be.

[PROSECUTOR]: And along those lines, are you saying that for that reason you believe that you would tend to automatically vote for a life sentence as opposed to a death sentence?

MS. ERVIN: Yes.

[PROSECUTOR]: Even if you were otherwise satisfied? Is that —

MS. ERVIN: Yes.

The prosecutor then moved to excuse prospective juror Ervin for cause. Following a discussion outside the presence of the prospective juror, the court ruled:

The [c]ourt has observed the demeanor of the witness in addition to her inconsistent answers to the questions that have been posed to her and in its discretion will allow the challenge for cause for this witness.

Ms. Ervin's equivocal yet conflicting responses exemplify the situation anticipated by the United States Supreme Court in *Wainwright*, where the Court recognized that, in some instances, a prospective juror's bias may not be provable with unmistakable clarity. *Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 852. Thus, we defer to the trial court's judgment concerning whether prospective juror Ervin would have been able to follow the law impartially. *See Davis*, 325 N.C. at 624, 386 S.E.2d at 426. Some of Ms. Ervin's responses reveal that she was opposed to the death penalty and that her views on the death penalty would cause her to automatically vote for a life sentence, regardless of the circumstances. Further, those responses show that she thought her views on the death penalty would make it difficult for her to follow the law and thus carry out her duties as a juror. Although there were conflicting responses, we conclude that the trial court did not err in excusing prospective juror Ervin for cause. *See Syriani*, 333 N.C. at 371, 428 S.E.2d at 129.

III.

[3] Defendant also contends that the trial court erred in allowing the prosecutor to question prospective juror Fuller about his ability to overlook certain facts in the case based on the argument that these questions improperly "staked out" the juror. We disagree.

> 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, *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 63 U.S.L.W. 3907 (1995). "The nature and extent of the inquiry made of prospective jurors on *voir dire* ordinarily rests within the sound discretion of the trial court." *State v. Hill*, 331 N.C. 387, 404, 417 S.E.2d 765, 772 (1992), *cert. denied*, —— U.S. ——, 122 L. Ed. 2d 684, *reh'g denied*, —— U.S. ——, 123 L. Ed. 2d 503 (1993). Thus, "[i]n order for the defendant to show reversible error, he must show that the trial court abused its discretion and that he was prejudiced thereby." *Jones*, 339 N.C. at 134, 451 S.E.2d at 835.

In the present case, the prosecutor informed prospective juror Fuller that the evidence may tend to show that the child died from abuse, that she had been subjected to some form of abuse prior to her death, and that the child was not living in "the best of family environment." The prosecutor then asked Fuller if he could

> look beyond the issue of what kind of environment this child was living in, look beyond the issue of the mother and how she may have been caring for her children at the time, and concentrate on what, if anything, this defendant, Mr. Burr, did, concentrate on whether or not he is guilty of killing this child?

Defendant objected, and the court asked the prosecutor to repeat the question. The prosecutor restated the question as follows:

> Notwithstanding the environment, the evidence—how the evidence may tend to show the environment the child was living in or whether or not her mother was fulfilling all of her motherly duties, can you focus, can you view, on whether or not this defendant, Mr. Burr, is guilty or not guilty of killing the child?

Thereafter, the court overruled defendant's objection, and Fuller responded, "Yes, sir."

We do not agree with defendant's assertion that the prosecutor's rephrased question was an impermissible attempt to stake out prospective juror Fuller. The rephrased question did not contain incorrect or inadequate statements of law. Further, the prosecutor's inquiry into whether the prospective juror could impartially focus on the issue of defendant's guilt or innocence, regardless of the child's living conditions and lack of motherly care, was not an impermissible attempt to ascertain how this prospective juror would vote upon a given state of facts. Instead, this question was properly allowed in the exercise of the prosecutor's right to secure an unbiased jury. *See State v. Williams*, 41 N.C. App. 287, 254 S.E.2d 649 (upholding the State's questioning prospective jurors as to whether they could be fair and impartial in a case involving a proposed sale of marijuana), *disc. rev. denied*, 297 N.C. 699, 259 S.E.2d 297 (1979). Defendant's third assignment of error is overruled.

IV.

[4] In his next assignment of error, defendant contends that the trial court erred by not allowing him to ask one prospective juror, "Do you have a preference for the death penalty as opposed to life imprison-

ment?" In support of his contention, defendant cites to the holding in *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992).

In *Morgan*, "the United States Supreme Court held that a defendant must be allowed to ask a potential juror whether he would automatically or always vote for the death penalty following a defendant's conviction of a capital offense." *State v. Miller*, 339 N.C. 663, 681, 455 S.E.2d 137, 147, *reh'g denied*, 340 N.C. 118, 458 S.E.2d 183 (1995), *petition for cert. filed*, —— U.S.L.W. —— (No. 95-5388, 21 July 1995); *accord State v. Robinson*, 336 N.C. 78, 100, 443 S.E.2d 306, 315-16 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995). As stated by the Supreme Court, 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." *Morgan*, 504 U.S. at 736, 119 L. Ed. 2d at 507.

In the present case, the trial court sustained the State's objection to defendant's question as to *form*. Defendant was not barred from asking the question in any form, but instead was told that he "may rephrase" the question, indicating that if properly put, it would be permissible. *See Skipper*, 337 N.C. at 23, 446 S.E.2d at 263. Defendant, however, chose not to rephrase the question. Thus, defendant was not precluded from inquiry into whether this prospective juror would automatically vote for the death penalty in violation of the holding in *Morgan*. In addition, defendant was allowed to ask the prospective juror if she would be able to give life imprisonment the same consideration as the death penalty. Accordingly, we find no error, and defendant's fourth assignment of error is overruled.

V.

[5] Defendant also contends that the trial court erred in failing to instruct prospective juror Stainback on the meaning of a life sentence. We disagree.

Counsel for the defense asked Stainback if he would be able to consider life imprisonment as an appropriate penalty for first-degree murder, and Stainback replied, "Is that without privilege of parole?" Counsel for the defense then stated:

> The judge will have to instruct you with regards [sic] to the life imprisonment or the possibility of life imprisonment. Whether or not he mentioned that or not, would you be able to follow the judge's instructions as they . . . apply to this case?

Prospective juror Stainback answered, "Yes, sir." After asking a few more questions, counsel for the defense accepted Stainback as a juror. Counsel for the defense did not ask the trial court to instruct Stainback or the jury panel on the meaning of life imprisonment. On appeal, defendant argues, however, that the court erred in failing to instruct Stainback, and the jury panel, on the meaning of life imprisonment based on Stainback's response.

"A defendant's eligibility for parole is not a proper matter for consideration by a jury." *State v. Campbell*, 340 N.C. 612, 632, 460 S.E.2d 144, 154 (1995), *cert. denied*, —— U.S ——, 133 L. Ed. 2d 871 (1996). Further, although we have approved the inclusion of the language "life means life" in instructions to the jury in response to inquiries by the jurors about the meaning of a life sentence during their sentencing deliberations, we have not required it. *See id.* Accordingly, we find no error with the trial court's failure to instruct the jury on the meaning of a life sentence on the facts in the present case. Defendant's fifth assignment of error is overruled.

GUILT/INNOCENCE PROCEEDING

VI.

[6] Next, defendant contends that the trial court erred in admitting testimony by Lisa Bridges; Donald Wade's wife, Rita Wade; the Wades' daughters, Misty and Christy Wade; and Bridges' son Scott regarding defendant's prior misconduct toward Lisa Bridges. The testimony given by these witnesses tended to show that on numerous occasions, defendant would bend Bridges' hands behind her back to make her say and do whatever he wanted; that on one occasion, defendant bent Bridges' wrist behind her back in an attempt to make her kiss her brother's feet and told her that he "could make that bone pop through the skin"; that on another occasion, defendant threw Bridges up against the wall and choked her, leaving bruises on her neck in the shape of a hand and fingerprints; and that defendant put a gun in Bridges' face and threatened to kill her and any man involved if she were unfaithful to him.

The testimony also included statements that defendant "grabbed [Bridges'] breast[s] and mashed them till he bruised them"; that he bruised her legs; that these bruises were in the shape of thumb and fingerprints; that defendant would grab Bridges' vagina, leaving bruises; and that defendant would tease Bridges and hit her. Scott testified that defendant told Bridges that if she left him, he would kill her.

Defendant also argues that it was error for the trial court to admit testimony by Officer Dan Qualls, Bridges' mother, and Bridges' stepsister corroborating Bridges' testimony regarding defendant's misbehavior by repeating descriptions Bridges had given to them. Defendant contends that all of the testimony regarding defendant's prior misconduct was inadmissible under N.C.G.S. § 8C-1, Rule 404(b). We disagree.

Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

> Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also "is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried."

State v. Bagley, 321 N.C. 201, 206-07, 362 S.E.2d 244, 247 (1987) (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986)), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

The State contends that the evidence of defendant's prior misconduct was admissible under Rule 404(b) to prove identity. In order for evidence of defendant's prior crimes or bad acts to be admissible to show identity of the perpetrator in the crime charged under Rule 404(b), there must be " 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both.' " *State v. Riddick*, 316 N.C. 127, 133, 340 S.E.2d 422, 426 (1986) (quoting *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983)). "However, it is not necessary that the similarities between the two situations 'rise to the level of the unique and bizarre.' " *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991) (quoting *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988)). "Rather, the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts." *Id.*

In the present case, defendant was charged with the first-degree murder of Susie O'Daniel, and the State was required to prove the

identity of the perpetrator. At the time of her death, the victim was covered with bruises similar to those inflicted upon Bridges by defendant, including bruises in the shape of fingerprints on the body and handprints on the neck. Specifically, Dr. Chancellor testified that she observed multiple bruises on the neck that were consistent with marks caused by a hand and bruises on the cheek that were consistent with marks caused by fingers.

In addition, the evidence tended to show that the victim's injuries were caused by acts similar to those acts defendant committed against Bridges. Dr. Azizkhan testified regarding the unusual two-centimeter-by-two-centimeter bruise on the child's neck as follows:

> What disturbed me when I looked at her, the two centimeter bruise that was underneath the edge of her mandible, that's a very unusual location for a bruise, except when someone is grabbed very tightly.
>
> And that also would match the bruising on the other side. It could also account for the child being grabbed around the head and the neck.

Dr. Azizkhan further testified that to inflict the injuries to the child's legs "would require either a severe direct blow or some kind of a snapping activity" and that the fractures to the child's arms "could be from intense grabbing of the arm and torquing and pulling the child's arms backwards." Similarly, Dr. Merten testified that the fractures in the child's legs were produced by bending the knees forward and that the shoulder fractures were inflicted by "taking the arms and bending them back."

Because we conclude that the unusual injuries inflicted on the victim were particularly similar to those inflicted by defendant upon Bridges and because we conclude that the unusual acts which would have caused the victim's injuries were particularly similar to those acts defendant committed against Bridges, we conclude that the evidence of defendant's prior misconduct toward Bridges regarding his choking her, bruising her with his hands and fingers, and bending her arms behind her back was relevant and admissible to show identity under Rule 404(b). *See State v. Carter*, 338 N.C. 569, 587-88, 451 S.E.2d 157, 167 (1994) (evidence that defendant assaulted an elderly man above his right eye with a piece of cinder block was admissible to show identity in the first-degree murder of a woman occurring eight years later where one cause of the victim's death was blunt

trauma to the head caused by a brick and the primary wound was above the right eye), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 263 (1995); *see also State v. Phillips*, 328 N.C. 1, 14, 399 S.E.2d 293, 299 (evidence defendants had previously chained the victim to a pole in their basement in Chicago was admissible to show identity in the felony child abuse of this victim in North Carolina, as "[t]hese circumstances were similar to the evidence that [the victim] was tied with a dog chain in North Carolina and explained the medical evidence that the serious injury to [the victim's] ankles was caused by their being tightly bound"), *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991). We also conclude that the trial court properly allowed testimony corroborating Bridges' testimony concerning these prior assaults. *See State v. Marlow*, 334 N.C. 273, 285-86, 432 S.E.2d 275, 282 (1993).

Further, the similarities between defendant's assaults against Bridges and the assault against the victim are highly probative on the issue of identity. Defendant was clearly identified as the one who committed these prior assaults, especially in light of defendant's own testimony regarding the fact that he "would grab [Bridges'] arm and bend it back" and that he bent her wrist back on one occasion and "she got on her knees like she was going to kiss [her brother's] feet." The identity of the perpetrator in this case was the critical issue at trial. Thus, we are satisfied that the probative value of defendant's prior misconduct toward Bridges regarding his choking her, bruising her with his hands and fingers, and bending her arms behind her back outweighs any potential for unfair prejudice against defendant. *See Carter*, 338 N.C. at 589, 451 S.E.2d at 168.

Further, assuming *arguendo* that the admission of the other testimony, concerning defendant's threats to kill Bridges for infidelity and defendant placing a gun in Bridges' face, was error, we conclude that any such error was not prejudicial. "Defendant has the burden under N.C.G.S. § 15A-1443 of demonstrating that but for the erroneous admission of this evidence, there is a 'reasonable possibility' that the jury would have reached a verdict of not guilty." *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). The State's evidence tended to show that the night of the murder, defendant was left alone with the victim and two of Bridges' young sons for forty-five minutes; that before Bridges left, the child appeared to be physically fine, with no marks on her body; that while defendant was with the child, Bridges' eight-year-old son, Scott, was awakened by hammering

and the victim crying; that Scott heard defendant "mumbling" and then the victim stopped crying; that after Bridges returned to the trailer, the victim was covered in bruises and had suffered a blow to the head; and that the child died from these injuries.

This evidence, in addition to the evidence regarding defendant's prior acts that was admissible to show identity, was competent to support a finding that defendant was the perpetrator of the murder, and defendant has failed to show a reasonable possibility that but for the admission of the evidence of defendant's threats to kill Bridges and his pointing a gun at her, the jury would have reached a different verdict. Accordingly, any error regarding the admission of defendant's threats to kill Bridges and his pointing a gun at her was not prejudicial. *See id.* Defendant's sixth assignment of error is overruled.

VII.

[7] Defendant's seventh assignment of error concerns the court's instruction with regard to the evidence of defendant's prior misconduct toward Bridges. Defendant requested an instruction "similar in form to North Carolina Pattern Instruction—Criminal 104.15, to inform the [jurors] that they are not to consider such evidence as evidence of the [d]efendant's character and limiting the purposes for which the jury may properly consider it." The trial court followed the pattern instruction and properly instructed the jurors that the evidence of defendant's prior misconduct towards Bridges was admitted "solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed," and that they "may consider it, only for the limited purpose for which it was received." *See* N.C.P.I.—Crim. 104.15 (1984). The trial court declined to include the extra sentence that the jury was not to consider the evidence as evidence of defendant's bad character.

We conclude that the trial court properly limited the jury's consideration of this evidence to the issue of identity and therefore that the trial court's instruction was in substantial conformity with defendant's request. Defendant's seventh assignment of error is overruled. *See State v. Brown*, 335 N.C. 477, 490, 439 S.E.2d 589, 597 (1994) ("[T]his Court has consistently held that a trial court is not required to repeat verbatim a requested, specific instruction that is correct and supported by the evidence, but that it is sufficient if the court gives the instruction in substantial conformity with the request.").

VIII.

[8] Next, defendant contends that the trial court erred in excluding evidence contained in records from the Alamance County Department of Social Services concerning the Department's one-year supervision and investigation of Lisa Bridges' family following the child's death. Defendant contends that these records "contained much information which incriminated Lisa" and was relevant and admissible to show third-party guilt, as well as to impeach Bridges' testimony that she had done nothing wrong to her other children. We disagree.

> [W]here the evidence is proffered to show that someone other than the defendant committed the crime charged, admission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant. Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt.

State v. McNeill, 326 N.C. 712, 721, 392 S.E.2d 78, 83 (1990).

> "Evidence which tends to show nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so, is too remote to be relevant and should be excluded."

State v. Brewer, 325 N.C. 550, 564, 386 S.E.2d 569, 576 (1989) (quoting *State v. Britt*, 42 N.C. App. 637, 641, 257 S.E.2d 468, 471 (1979)), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990).

In the present case, the DSS opened a case file on Lisa Bridges following the death of Susie as required under N.C.G.S. § 7A-544. The records reveal Bridges showed difficulty in keeping counseling appointments for herself and the children, taking her children to the dentist, helping her children at home with school-related work, bathing her children, and being home when her children returned from school; the records contain no evidence, however, that Bridges physically abused or acted violently toward these children. Following the year of supervision, the social worker for the case concluded that the children were "having their minimal needs met" and recommended closing the case. After a thorough review of the DSS records, we find no evidence pointing to the guilt of Lisa Bridges in the murder of the child.

Further, defendant was allowed to impeach Bridges with evidence similar to the evidence contained in the excluded DSS records regarding the lack of cleanliness of Bridges' home and her children, the truancy problem with her children, the fact that DSS had received allegations of neglect against Bridges concerning two of her sons, and a social worker's opinion that Bridges' psychiatric history and relationship with men "suggest[] instability." Thus, the evidence contained in the DSS record would have, for the most part, been merely cumulative, and any probative value for impeachment purposes was substantially outweighed by the danger of confusion and undue delay. N.C.G.S. § 8C-1, Rule 403 (1992). Defendant's eighth assignment of error is overruled.

IX.

[9] Defendant also contends that the trial court erred by failing to grant his motion for a continuance, thereby violating his constitutional rights to confrontation and to the effective assistance of counsel. We disagree.

> Traditionally, the decision to grant or deny a continuance rests within the discretion of the trial court. *Ungar v. Sarafite*, 376 U.S. 575, 589, 11 L. Ed. 2d 921, 931[, *reh'g denied*, 377 U.S. 925, 12 L. Ed. 2d 217] (1964); *State v. Roper*, 328 N.C. 337, 348, 402 S.E.2d 600, 606, *cert. denied*, [502] U.S. [902], 116 L. Ed. 2d 232 (1991). However, that discretion does not extend to the point of permitting the denial of a continuance that results in a violation of a defendant's right to due process. *See Roper*, 328 N.C. at 349, 402 S.E.2d at 606. This Court has long held that when a motion for a continuance is based on a constitutional right, the issue presented is an issue of law and the trial court's conclusions of law are fully reviewable on appeal.

State v. Tunstall, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993).

"The defendant's rights to the assistance of counsel and to confront witnesses are guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and by sections 19 and 23 of Article I of the Constitution of North Carolina." *Id.* "It is implicit in these guarantees that an accused have a reasonable time to investigate, prepare and present his defense." *State v. Harris*, 290 N.C. 681, 687, 228 S.E.2d 437, 440 (1976). Every defendant must " 'be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he

stands charged and to confront his accusers with other testimony.' " *State v. Thomas*, 294 N.C. 105, 113, 240 S.E.2d 426, 433 (1978) (quoting *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970)).

"However, no set length of time for investigation, preparation and presentation is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case." *Harris*, 290 N.C. at 687, 228 S.E.2d at 440. "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 337. In order to demonstrate that the time allowed was inadequate, defendant must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986).

In the present case, Craig Thompson, an attorney licensed in this State since 1977, was appointed as defendant's trial counsel on 30 August 1991, and attorney Robert Jacobs was appointed to assist Mr. Thompson on 5 September 1991. Mr. Thompson represented defendant at a preliminary hearing on 6 November 1991; received and copied the district attorney's investigative files, including statements from the State's witnesses and the victim's medical records from Alamance County Hospital and Memorial Hospital; and filed eighteen motions in the action.

On 14 December 1992, Judge Weeks held a hearing on defendant's pretrial motions, and, at the end of this hearing, defendant asked the court to remove his court-appointed counsel based on his allegation that they had not communicated with him and that they had not contacted witnesses whom he considered essential to his case. At this time, the trial was scheduled for 4 January 1993, and Judge Weeks took defendant's request under advisement.

The next day, after interviewing defendant again, Judge Weeks removed Mr. Thompson and Mr. Jacobs as defendant's counsel based on irreconcilable differences and appointed Robert Collins and Douglas Hoy to represent defendant. The district attorney then informed Mr. Collins that the case would be called for trial on 25 January 1993. Mr. Collins moved that the trial be continued, and on 4 January 1993, Judge Stanback heard this motion and continued the case until 1 March 1993. On 26 February 1993, Mr. Collins and Mr. Hoy

filed another motion to continue the trial for thirty days, which motion Judge Stanback denied on 1 March 1993.

On appeal, defendant argues that various "unanswered medical questions strongly imply that defendant required a medical expert to assist defendant in the preparation of his defense" and that "he sought a continuance in part to evaluate his need for an expert, to identify a suitable expert, and to file the motions necessary to obtain funds." Defendant also argues that because he did not receive the DSS records regarding Lisa Bridges in a timely manner, he did not have adequate time to interview witnesses contained in these records in order to investigate the issue of third-party guilt. Based on these arguments, defendant contends the trial court erred in failing to grant his motion for a continuance. We disagree.

By letter dated 30 December 1992, the district attorney informed Mr. Collins and Mr. Hoy that the file containing the complete investigative and medical report was available to them, as it had been made available to Mr. Thompson and Mr. Jacobs. Among other things, this file included the investigative report by the sheriff's department laying out the investigation and the witnesses who were interviewed, the names and addresses of the doctors involved at Alamance County Hospital and Memorial Hospital, and the victim's medical records from both hospitals. The district attorney also informed Mr. Collins and Mr. Hoy about X rays taken at both hospitals and about whom to contact in order to observe these X rays. Additionally, in this letter, the district attorney informed Mr. Collins and Mr. Hoy about photographs that were taken by the medical examiner and advised them that he had requested doctors to locate and bring to the court drawings, charts, and models of relevant portions of the body in which injuries were found to illustrate their testimony. Thus, defense counsel had access to the medical evidence containing the necessary evidence they required regarding the need for an expert for two months prior to trial, and having observed the evidence and medical testimony at trial, defendant has had ample opportunity to show how his case would have been better prepared with regard to this evidence had the continuance been granted, or to show that he was materially prejudiced. He has failed to do so.

Further, the DSS report on Bridges was referenced in the investigative report by the sheriff's department as well as in the medical records from Memorial Hospital, both of which were contained in the file made available to defense counsel prior to January 1993. Counsel

for the defense could have requested the full report from DSS at this time. In any event, as we held previously, the file did not contain evidence relevant to third-party guilt. Thus, defendant has also failed to show his case would have been better prepared with regard to this evidence had the continuance been granted or that he was materially prejudiced. Defendant's ninth assignment of error is overruled.

X.

[10] Next, defendant contends that the trial court erred in failing to instruct the jury that defendant did not attempt to flee the scene and that evidence of nonflight may be considered in determining whether the combined circumstances indicate innocence or a showing of nonguilt. We disagree.

> "The general rule is that the defendant in a criminal case is not, for the purpose of showing his innocence, allowed to prove that he refused to take to flight before his arrest or to escape from jail after his arrest, even though offered the opportunity to do so, at least in the absence of any testimony that he had attempted to flee or escape." 29 Am. Jur. 2d, 334, Evidence § 287. Refusal to flee or escape; voluntary surrender.

State v. Thomas, 34 N.C. App. 594, 596, 239 S.E.2d 288, 290 (1977), *cert. denied*, 294 N.C. 445, 241 S.E.2d 846, *cert. denied*, 439 U.S. 926, 58 L. Ed. 2d 318 (1978). Admitting evidence of defendant's refusal to flee to prove his innocence " 'would be permitting prisoners to make evidence for themselves by their subsequent acts.' " *State v. Wilcox*, 132 N.C. 1120, 1136, 44 S.E. 625, 630 (1903) (quoting *State v. Taylor*, 61 N.C. (Phil. Law) 508, 513 (1868)). Thus, we conclude that the trial court did not err in failing to instruct the jury on evidence of nonflight. Accordingly, defendant's tenth assignment of error is overruled.

XI.

[11] Defendant next contends that the trial court erred by overruling his objection to the prosecutor's closing argument concerning the failure of Nita Todd, a social worker with Memorial Hospital, to testify. Defense counsel had intended to have Ms. Todd testify for the defense regarding her investigation of the child's death, including her interviews with Bridges and defendant. Because of an apparent miscommunication, however, Ms. Todd was out of town the day she was to testify. Upon defendant's motion, the trial court allowed the

defense to read Ms. Todd's report into evidence. Thereafter, in his closing argument, the prosecutor stated:

> By gum, ladies and gentlemen, I hope that I don't try a case, particularly one as serious as murder, that I don't talk to my witnesses and if you, any of you ever become the victims of crime, which I hope you don't, but if any of you ever do, I think you would hope that I or some other prosecuting attorney would talk to you and to your witnesses before taking your case into the courtroom, because to do anything less would be working an injustice to the victims.
>
> You've got to make arrangements to have your witness in the courtroom sometimes.
>
> Now, I'll contrast that, if you will, please, to the testimony of Nita Todd, excuse me, not testimony, to the record of Nita Todd which was read to you.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

Defendant argues that because "[t]he prosecutor was well aware that defense counsel had made diligent efforts to arrange for Ms. Todd to be present to testify," the prosecutor's argument was a bad-faith attack on defense counsel's competence and professionalism. Our review of the prosecutor's argument in its entirety shows, however, that this statement was not an attack on defense counsel, but rather an attempt to minimize the effect of the evidence contained in the social worker's report, which evidence may have contradicted the testimony by the State's witnesses.

Trial counsel are allowed wide latitude in jury arguments and are permitted to argue the facts based on the evidence presented as well as reasonable inferences to be drawn therefrom. *State v. Morston*, 336 N.C. 381, 405, 445 S.E.2d 1, 14 (1994). Further, " 'prosecutorial statements are not placed in an isolated vacuum on appeal. Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred.' " *State v. Abraham*, 338 N.C. 315, 358, 451 S.E.2d 131, 154 (1994) (quoting *State v. Pinch*, 306 N.C. 1, 24, 292 S.E.2d 203, 221, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), *overruled on other grounds by*

State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988), *and by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994)).

Viewed in context, we cannot say that the argument complained of in the present case was error. Certainly any error in allowing this argument does not rise to the level of prejudicial error that would require a new trial. *See Green*, 336 N.C. at 186, 443 S.E.2d at 40 (for an inappropriate prosecutorial comment to justify a new trial, the comment must have " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process' ") (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157, *reh'g denied*, 478 U.S. 1036, 92 L. Ed. 2d 774 (1986)). Defendant's eleventh assignment of error is overruled.

XII.

[12] By his twelfth assignment of error, defendant contends that the trial court erred by failing to intervene *ex mero motu* to prevent the prosecutor from misstating the law on two occasions during his closing argument. The first occasion occurred when the prosecutor stated, "Now, who acts with malice, who bends arms, who hits, who chokes, who acts with malice? There he sits." Defendant contends that by this statement, the prosecutor erroneously argued to the jurors that they could infer defendant's identity as the perpetrator of the murder from his malicious character. We conclude, however, that under the facts of this case, the prosecutor's argument was referring to the jury considering evidence of defendant's prior acts to show his identity as the perpetrator of the murder. Based on our holding in section VI of this opinion, the jury could properly consider evidence of defendant's prior acts on the issue of identity, and the trial court did not, therefore, err in failing to intervene *ex mero motu* to prevent the prosecutor from making this argument.

[13] The second occasion occurred when the prosecutor stated:

> Considering premeditation and deliberation, you may consider one, provocation on the part of the deceased. Susie O'Daniel was a baby, she could not have provoked the defendant unless maybe she was crying and he didn't like it, but that's not adequate provocation.
>
> . . . .
>
> Cool state of blood does not mean an absence of passion. What is referred to is the lack of an adequate provocation. For

> instance, I'll give you an example. I go over there and I smack Ms. Rodriquez, the clerk of court. She pulls out a six shooter and plugs me.
>
> Well, my smacking her is not adequate provocation for her to kill me. Although well she may want to, well she might ought to, but ladies and gentlemen it's not under the law, adequate provocation.
>
> But what it does, it reduces the crime from first degree murder to second degree murder because her killing me is in the heat of the passion aroused by sudden and adequate provocation. My smacking her is adequate to reduce it from first to second degree murder. We don't have that situation in this case.

Defendant argues that because "adequate provocation" reduces murder to manslaughter, the prosecutor's statement that defendant needed to show "adequate provocation" in order to negate deliberation was an incorrect statement of the law which prevented the jury from properly considering the verdict of second-degree murder. We disagree.

> There are two kinds of provocation relating to the law of homicide: One is that level of provocation which negates malice and reduces murder to voluntary manslaughter. Mere words, however abusive or insulting are not sufficient provocation to negate malice and reduce the homicide to manslaughter. Rather, this level of provocation must ordinarily amount to an assault or threatened assault by the victim against the perpetrator.
>
> The other kind of provocation is that which, while insufficient to reduce murder to manslaughter, is sufficient to incite defendant to act suddenly and without deliberation. Thus, words or conduct not amounting to an assault or threatened assault, may be enough to arouse a sudden and sufficient passion in the perpetrator to negate deliberation and reduce a homicide to murder in the second degree.

State v. Watson, 338 N.C. 168, 176-77, 449 S.E.2d 694, 699-700 (citations omitted), *reconsideration denied*, 338 N.C. 523, 457 S.E.2d 302 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 569 (1995). Based on the foregoing, we conclude that defendant's argument is without merit and that the trial court did not err in failing to intervene *ex mero motu* to prohibit the prosecutor's argument. Defendant's twelfth assignment of error is overruled.

XIII.

[14] Defendant's thirteenth assignment of error concerns the admission of testimony that Bridges' son John, Jr. ("J.J.") was scared of defendant. Defendant filed a motion *in limine* to exclude this evidence, and the trial court denied defendant's motion, reserving the right to address defendant's specific objections when, and if, the State offered such evidence. Defendant did not except to the trial court's ruling.

At trial, the State asked Lisa Bridges, "Did you notice how your children behaved around [defendant]?" Bridges responded, "Well, the other ones, they wouldn't really say nothing about him, but J.J., he was scared of [defendant]." Defendant neither objected to this testimony nor moved to strike Bridges' answer. Defendant has failed, therefore, to preserve his right to appellate review of this issue. Thus, this assignment of error is reviewable only under the plain error rule. *State v. Rush*, 340 N.C. 174, 179-80, 456 S.E.2d 819, 822-23 (1995). "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.' " *Id.* at 180, 456 S.E.2d at 823 (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)).

Defendant has failed to show that the admission of this testimony constituted plain error, as it was relevant and admissible to demonstrate the state of the familial relationship in the brief period preceding the murder in which defendant resided in the home. *See State v. Lynch*, 337 N.C. 415, 424, 445 S.E.2d 581, 585 (1994). Defendant also argues, however, that the testimony by Misty Wade and social worker Brownlee Cable that J.J. was scared of defendant was also inadmissible. Misty Wade did not, however, testify that J.J. was scared of defendant. Instead, the State asked Misty what she had observed about the behavior of Bridges' children when defendant was around, and Misty testified, over objection, "Their behavior, they had—they didn't act like kids when [defendant] was around." This opinion testimony was rationally based on the witness' perception and was helpful to show the relationship defendant had with Bridges' children, one of whom was the murder victim. Admission of this testimony was, therefore, not error. *See State v. Baker*, 338 N.C. 526, 555, 451 S.E.2d 574, 591 (1994) (opinion testimony by lay witness admissible as an inference rationally based on the perception of the witness and helpful to the determination of a fact in issue). Defendant failed to object

to the remaining testimony by Misty that was admitted regarding the behavior of Bridges' children, and defendant has failed to show that the admission of this testimony amounts to plain error.

Finally, defendant called social worker Brownlee Cable to testify about her investigation of the murder, including her interviews with Bridges and defendant. On cross-examination, the State asked Cable if Bridges told her during her interview "that the kids were frightened of [defendant]." Over objection, Cable responded, "At that time she told me that J.J. was scared of [defendant]." This evidence was admissible to corroborate the prior testimony of Bridges. *See Marlow*, 334 N.C. at 285-86, 432 S.E.2d at 282. Defendant's thirteenth assignment of error is overruled.

XIV.

Next, defendant contends that the trial court erred in denying his motion to order that Lisa Bridges' medical records be made available to the defense. Defendant has failed, however, to make these documents part of the record on appeal. It is incumbent on defendant to provide a complete record for appellate review. Because defendant failed to include these documents in the record, we cannot review this assignment of error.

[15] "[T]here is no statute that grants a defendant in a criminal trial access as of right to any documents unless they are 'within the possession, custody, or control of the State.' " *State v. Newell*, 82 N.C. App. 707, 708, 348 S.E.2d 158, 160 (1986) (quoting N.C.G.S. § 15A-903(d)). In the present case, the documents at issue were not in the possession, custody, or control of the State. Thus, a proper method for obtaining these records would have been through the use of a subpoena *duces tecum*. *See State v. Love*, 100 N.C. App. 226, 395 S.E.2d 429 (1990), *dismissal allowed and disc. rev. denied*, 328 N.C. 95, 402 S.E.2d 423 (1991).

> The subpoena *duces tecum* is the process by which a court requires that particular documents or other items which are material to the inquiry be brought into court. It is issued by the clerk of court, and can be issued to any person who can be a witness. G.S. 7A-103(1); *Vaughan v. Broadfoot*, 267 N.C. 691, 149 S.E.2d 37 (1966).
>
> The purpose of the subpoena *duces tecum* is to require the production of specific items patently material to the inquiry. *Id.*

> Therefore, it must specify with as much precision as fair and feasible the particular items desired. *Id.*

Newell, 82 N.C. App. at 708, 348 S.E.2d at 160.

[16] Defendant in the present case did not subpoena the records at issue. Instead, he made a general motion for the court to order five specified entities and "any and all physicians, psychologists, health care providers and any other person providing medical or psychological care to Lisa [Bridges to] make all such records available to the [d]efendant for inspection and/or copying." Defendant's argument that he was entitled to all of Bridges' medical and psychological records because the DSS files revealed that she suffered from depression and therefore her medical and psychological files might reveal that she became abusive toward her children is unpersuasive. As we held in section VIII of this opinion, the DSS records contain no evidence that Bridges physically abused or acted violently toward her children. Thus, defendant's general request for all of Bridges' medical and psychological records could amount to nothing more than a fishing expedition. Accordingly, defendant's fourteenth assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

XV.

[17] Regarding the sentencing proceeding, defendant first contends that the trial court erred in failing to conduct an inquiry of the jury panel about an alleged communication between a seated juror and a pastoral counselor during the jury's penalty proceeding deliberations. Based on the specific facts of this case, 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. It is within the discretion of the trial judge as to what inquiry to make." *State v. Willis*, 332 N.C. 151, 173, 420 S.E.2d 158, 168 (1992).

In the present case, the trial court conducted an *in camera* hearing with a local attorney, Mr. Hemrick, regarding the alleged juror communication. Mr. Hemrick informed the court that during the penalty proceeding deliberation of this case, he received a call from an organization known as Pastoral Care and that he had spoken to a person who apparently was a psychologist there. Mr. Hemrick told the court that this alleged psychologist told him that he wanted to ask

him a "hypothetical question about a trial situation." The question was "may a juror who has assented to a verdict who is still a juror in the case . . . change their [sic] verdict after they've [sic] rendered a verdict." Mr. Hemrick informed the caller that the only thing he knew about the law in North Carolina was "that a verdict cannot be assailed after it[']s a verdict." Mr. Hemrick also informed the caller, however, that if the question were not hypothetical, if he had a client who was sitting on a panel who had changed his or her mind, then

> that person should address their questions to the trial bench, should have a written question addressed to the trial bench, should inform the foreman, first of all, that the juror wants to have a conference or a written communication with the trial judge.

Mr. Hemrick further informed the court that the caller did not indicate in what state or city this "hypothetical" trial was located, if in fact the trial was not hypothetical.

We conclude that the trial court did not abuse its discretion in failing to conduct an inquiry of the jury regarding this communication. The trial court properly conducted an interview with Mr. Hemrick, and nothing in this interview revealed any juror misconduct. The caller presented the scenario in the hypothetical and did not indicate where the trial was being held, if indeed it was not a hypothetical, nor did the caller indicate the name of the particular juror. Further, Mr. Hemrick properly informed the caller of the law in North Carolina that "a juror may not impeach the verdict of the jury after it has been rendered and received in open court," *State v. Martin*, 315 N.C. 667, 685, 340 S.E.2d 326, 336 (1986), and instructed him to tell the juror to address his questions to the trial judge, if the scenario was real. Under these circumstances, we cannot say that this anonymous phone call and hypothetical scenario evinced juror contact in the present case which resulted in substantial and irreparable prejudice to defendant so as to require the court to conduct an inquiry of the jury panel. Accordingly, defendant's fifteenth assignment of error is overruled.

XVI.

[18] By his next assignment of error, defendant contends that he is entitled to a new sentencing proceeding because the prosecutor improperly referred to this Court's decisions in *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *sentence vacated on other grounds*, 497 U.S.

1021, 111 L. Ed. 2d 777 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991), and *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), to bolster his argument that the jury should find that the murder was especially heinous, atrocious, or cruel. Because defendant failed to object during the closing arguments, "he must demonstrate that the prosecutor's closing arguments amounted to gross impropriety." *State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560 (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).

Defendant refers to the following statements by the prosecutor:

> 1989 case, *State v. Huff*, and this is a case involving the killing of an infant. The North Carolina Supreme Court wrote, "a finding that this aggravating circumstance, especially heinous, atrocious and cruel, exists and only is permissible if the level of brutality involved exceeds that normally found in first degree murder or when the first degree murder in question is conscienceless, pitiless or unnecessarily torturous to the victim."
>
> The Court went on to write, the killing of the infant was conscienceless, pitiless, and unnecessarily torturous to the victim when the facts tend to establish that the killing or when the facts tend to establish the killing was both conscienceless and pitiless.
>
> And then finally, another case by the North Carolina Supreme Court and this is [a] 1984 case, *State v. Hufstettler* [sic], the Court writes, "we decline to limit the definition of especially heinous, atrocious or cruel murder to include only those which involve physical injury or torture prior to death."
>
> . . . .
>
> What the Court is saying in its opinion is that we decline to limit the definition of especially heinous, atrocious or cruel murder to include only those which involve physical injury or torture prior to death. In other words, the Court is saying you don't have to decide which injury was first, in determining whether this was especially heinous, atrocious or cruel killing. That is not the issue.
>
> The Court goes on to write, we have upheld the submission of this aggravating circumstance even though the evidence did not

establish at what point during a brutal attack[] the victim's death or unconsciousness occurred.

So the North Carolina Supreme Court has answered that question for you. It doesn't matter if the first injury, the middle injury or the last injury was the one which caused her to lose consciousness, that is not an issue in deciding if the circumstance exists.

The Court went on to say, we hold the evidence presented by the State in present cases for submission would permit the jury to consider whether the murder of the victim, whose name was Edna Powell, was especially heinous, atrocious or cruel.

"Edna Powell died as a result of being battered to death by what could only have been a prolonged series of blows, blows from a cast iron skillet, so severe as to fracture her skull, neck, jaws and collarbone.["]

"And it caused her skull to be pushed into her brain. The severity and the brutality of the numerous wounds inflicted amply justified the submission of this aggravating circumstance to the jury."

Ladies and gentlemen, that's an important case. It's an important case in the context of the one that is before you. Why do I say that?

Let's think about it. In determining the appropriate sentence the Judge will tell you you may rely not only [on] the evidence that you heard in this sentencing hearing, the witnesses that were called yesterday, but you may rely on all the evidence which you have previously heard. And as you may recall at yesterday's sentencing hearing I announced at the outset that we would rely upon the previous presentation of evidence.

Both cases, the one dealing with Mr. Huff, the infant who died, and . . . the present case involved the death of infants. Both cases involved the killings which demonstrated a lack of conscience, a pitiless crime. Likewise that last case that I just read to you for [sic] *Huffstetler* case, demonstrates lack of pity, lack of conscience.

In all those cases and in the present case we're dealing with multiple injuries. Susie certainly had multiple injuries . . . .

Defendant argues that by these statements, the prosecutor encouraged the jury to find the especially heinous, atrocious, or cruel aggravating circumstance based on the fact that other juries had found this circumstance in factually similar cases and because this Court reviewed those decisions favorably. In so doing, defendant contends that the prosecutor violated the prohibition enunciated in *State v. Gardner*, 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986), that "counsel may not read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client."

It is, however, "permissible for counsel in argument to state his view of the law applicable to the case on trial, to read published decisions of this Court in support thereof, and to recount some of the facts on which those other decisions were based." *State v. Laws*, 325 N.C. 81, 115-16, 381 S.E.2d 609, 630 (1989) (citing *Wilcox v. Motors Co.*, 269 N.C. 473, 479, 153 S.E.2d 76, 81 (1967)), *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). Assuming *arguendo* that the prosecutor's unobjected-to reading from *Huffstetler* and *Huff* and argument in this regard were so grossly improper as to require the trial court to intervene *ex mero motu*, we nevertheless conclude that defendant has failed to show any resulting prejudice in light of the overwhelming evidence of this aggravating circumstance introduced at trial. *See Laws*, 325 N.C. at 116, 381 S.E.2d at 630.

"A murder is [especially] 'heinous, atrocious, or cruel' when it is a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' " *Rouse*, 339 N.C. at 97, 451 S.E.2d at 564 (quoting *State v. Goodman*, 298 N.C. 1, 25, 257 S.E.2d 569, 585 (1979)). Evidence of a "prolonged brutal attack inflicting injuries beyond what would be necessary to kill the victim" may be considered in determining the existence of this aggravating circumstance, *Laws*, 325 N.C. at 114, 381 S.E.2d at 628, as well as the victim's age and the existence of a parental relationship between the victim and defendant, *see Huff*, 325 N.C. at 56, 381 S.E.2d at 667.

In the present case, the murder victim was a defenseless four-month-old baby who was left in the care of defendant at the time of the murder. Defendant had been living in the child's home for approximately half of the child's life in a relationship with the child's mother,

and testimony by Bridges that she had given defendant permission to discipline her children tends to show that he had taken on a parental role in the family. Thus, defendant's murder of this defenseless child was not only pitiless, but it also betrayed the special role which defendant had been given in the family.

The evidence also supports a finding that the injuries inflicted upon the child were numerous, going beyond what would be necessary to kill the victim, and brutal. The medical evidence and testimony showed that the child suffered bruises all over her body, including bruises on her neck, which indicated she had been grabbed "very tightly" around the neck, and bruises on her arms, ears, torso, and legs. Both of the child's arms and legs were broken, which injuries would have required a great amount of force to inflict. The breaks in her arms could have been caused by "intense grabbing of the arm and torquing and pulling the child's arms backwards," and the breaks in her legs were produced by hyperextending the knees "with violence [and] significan[t] force."

Further, the child suffered from a fracture to the skull, which indicated that "quite a force [was] delivered by some blunt object to [the] side of the head," as well as multifocal intercranial injuries and bleeding behind both eyes, which would have been caused by repeated shaking of the child, and which resulted in the child's "brain [being] slosh[ed] essentially inside of the skull" and "pounded against the bones of the skull." The evidence also showed that the child suffered injuries over a prolonged period of time, as the breaks in her legs were eight to nine days old, and that she would have been conscious from "minutes to an hour or so" following the infliction of injuries, during which time she would have experienced severe pain. In light of this overwhelming evidence that the killing was especially heinous, atrocious, or cruel, we conclude that defendant has failed to show any prejudice resulting from any error by the trial court in failing to intervene *ex mero motu* to prevent the prosecutor's argument.

Furthermore, the trial court subsequently instructed the jurors that it was their duty to decide from all the evidence presented that the aggravating circumstance existed, and in his closing argument, defense counsel was also allowed to argue the facts in *Huff* to defendant's advantage. Defense counsel argued:

> Finally, [the prosecutor] talked to you about the case *State v. Huff* and mentions a child, and read to you parts about the pitiless, conscienceless nature of what Mr. Huff did to the child.

> He neglected to mention to you what Mr. Huff did do to this child was to take his nine-month-old baby out into the woods and dig a hole about two feet deep and put the baby in the hole and slowly covered her up while she was alive. Again, that was a very cold-blooded, conscienceless, hideous act. I submit to you that's not an act that we have in this situation.

Defendant's sixteenth assignment of error is overruled.

XVII.

[19] In his next assignment of error with regard to the prosecutor's sentencing argument, defendant contends that the trial court erred in allowing the prosecutor, over defendant's objection, to state, "I don't know when that was done, [the injuries to the victim's ears,] but I would submit to you [the injuries were] probably done prior to the time before the final blow that struck to [sic] her head." Defendant contends that by this statement, the prosecutor was allowed to improperly travel outside the record and postulate on the order in which certain injuries were inflicted upon the victim. Defendant argues that this error prejudiced him by increasing the likelihood that the jury would find the especially heinous, atrocious, or cruel aggravating circumstance. Based on the overwhelming amount of evidence that the killing was especially heinous, atrocious, or cruel, assuming *arguendo* the admission of this statement was error, any such error was necessarily harmless beyond a reasonable doubt. Defendant's seventeenth assignment of error is overruled.

XVIII.

[20] In his next assignment of error, defendant contends that the trial court's instruction on the burden of proof for finding mitigating circumstances, to which defendant failed to object, constituted plain error. However, the instruction given in this case is the same instruction we held did not constitute plain error in *State v. Payne*, 337 N.C. 505, 531-32, 448 S.E.2d 93, 108-09 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995). Further, defendant's arguments in support of his assignment of error are the same arguments we rejected in *Payne*. Defendant's eighteenth assignment of error is overruled.

XIX.

[21] Next, defendant contends that the trial court's instruction with regard to the aggravating circumstance, especially heinous, atrocious, or cruel, was unconstitutionally vague. Because defendant

failed to object to this instruction, he is entitled to relief only if plain error occurred. *Id.* at 530, 448 S.E.2d at 107.

Except for a sentence requested by defendant, that "[t]his aggravating circumstance is limited to acts done during the commission of the murder," the instruction given by the trial court in the present case is identical to the instruction we upheld as providing "constitutionally sufficient guidance to the jury" in *Syriani*, 333 N.C. at 391-92, 428 S.E.2d at 140-41, and defendant has presented this Court no reason to reexamine our holding. Accordingly, defendant's nineteenth assignment of error is overruled.

XX.

In his twentieth assignment of error, defendant contends that the trial court erred by failing to prevent the prosecutor from misstating the law on two occasions during his closing argument. Defendant first refers to the prosecutor's argument set out in section XVI of this opinion. Based on our holding in that section, we conclude any error was not prejudicial.

[22] The second argument to which defendant refers occurred during the prosecutor's explanation of Issue Three of the capital sentencing procedure. The prosecutor argued:

> The third issue, is—are the mitigating circumstances insufficient to outweigh the aggravating circumstances?
>
> . . . .
>
> You must make a determination whether or not these mitigating circumstances beyond a reasonable doubt, are insufficient to outweigh this aggravating circumstance. Again, your finding as to this, if you find that the mitigating are sufficient to outweigh the aggravating, your finding must be unanimous, all twelve of you must agree to it.

Defendant argues that the prosecutor misstated the law when he informed the jury that it had to be unanimous in determining that the mitigating circumstances outweighed the aggravating circumstances before it could answer "No" to Issue Three. What the prosecutor argued, in essence, is that if the mitigators did not outweigh the aggravators, then a "Yes" answer required unanimity. On the other hand, if the mitigators did outweigh the aggravators, then a "No" answer by the jury to Issue Three required unanimity.

For the reasons set forth in *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), and *State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1 (1995), we conclude that the prosecutor did not misstate the law, and this assignment of error is overruled.

XXI.

[23] Relying on *Skipper v. South Carolina*, 476 U.S. 1, 90 L. Ed. 2d 1 (1986), defendant next contends that the trial court erred in instructing the jury that it could refuse to consider the nonstatutory mitigating circumstances pertaining to defendant's good conduct in jail if it deemed the evidence had no mitigating value. We recently decided this issue against defendant's position in *State v. Basden*, 339 N.C. 288, 451 S.E.2d 238 (1994), *cert. denied*, — U.S. —, — L. Ed. 2d —, 63 U.S.L.W. 3891 (1995).

In *Basden*, we concluded that "*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." *Basden*, 339 N.C. at 304, 451 S.E.2d at 247. Instead, the issue in *Skipper* was whether the exclusion from the sentencing hearing of defendant's evidence regarding his good behavior in jail deprived him of his right to place before the sentencer relevant evidence in mitigation of punishment. Here, defendant was allowed to place such evidence before the jury. Accordingly, we conclude that the trial court did not err in its instruction on the nonstatutory mitigating circumstances pertaining to defendant's good conduct in jail. *See Basden*, 339 N.C. at 304, 451 S.E.2d at 247.

PRESERVATION ISSUES

Defendant raises four additional issues which he concedes have recently been decided against defendant's position by this Court: (1) the trial court erred in denying defendant's motion to prohibit the State from death-qualifying the jury; (2) the trial court erred in instructing the jurors they must consider whether the nonstatutory mitigating circumstances have mitigating value; (3) the trial court erred in instructing the jury that at Issues Three and Four, each juror "may" rather than "must" consider any mitigating circumstance found by the juror in Issue Two; and (4) the trial court erred in instructing the jury that it should answer Issue Three "yes" if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstance.

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

[24] Defendant also asserts two other assignments of error in the preservation portion of his brief. First, defendant asserts that the trial court erred in failing to prevent the prosecutor from arguing during the penalty proceeding that the jury was the conscience of Alamance County. The prosecutor merely reminded the jury that it was the voice and conscience of the community. Based on our holding in *State v. Artis*, 325 N.C. 278, 330, 384 S.E.2d 470, 499-500 (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), that "it is not improper to remind the jury . . . that its voice is the conscience of the community," we find no error.

[25] Defendant also asserts under this assignment of error that the trial court erred in failing to prevent the prosecutor from arguing during the penalty proceeding that "[t]here is no limit to the number of . . . nonstatutory mitigating circumstances that could be submitted." In *State v. Harris*, 338 N.C. 129, 148-49, 449 S.E.2d 371, 379 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 752 (1995), we held that the prosecutor's argument "that he was limited in the circumstances which he could submit justifying the imposition of the death penalty, while there was no limit except that of their own imagination as to what the defendant's attorney[s] could submit in mitigation of his punishment . . . was not so grossly improper that the conviction was a denial of due process." Based on our holding in *Harris*, we overrule defendant's assignment of error.

Finally, defendant contends the North Carolina death penalty procedure is unconstitutional. We continue to uphold our prior rulings on this issue and overrule this assignment of error. *Payne*, 337 N.C. at 535, 448 S.E.2d at 111; *see State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980).

PROPORTIONALITY REVIEW

[26] Having concluded that defendant's trial and separate capital sentencing proceeding were free from prejudicial error, we turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. We have thoroughly examined the record, transcripts, and briefs in the present case and conclude that the record

fully supports the aggravating circumstance found by the jury, that the killing was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9) (Supp. 1994). Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must then turn to our final statutory duty of proportionality review.

"Proportionality review is designed to 'eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.' " *Miller*, 339 N.C. at 692, 455 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)). In conducting proportionality review, we determine whether "the sentence of death in the present case is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 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); *accord* N.C.G.S. § 15A-2000(d)(2). We cannot conclude based on the record that the imposition of the death penalty in this case is aberrant or capricious.

This case is distinguishable from those cases in which this Court has found the death penalty disproportionate. In three of those cases, *Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant either pled guilty or was convicted by the jury solely under the theory of felony murder. Here, defendant was convicted on the theory of premeditation and deliberation. We have said that "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *Artis*, 325 N.C. at 341, 384 S.E.2d at 506.

In *State v. 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), defendant shot the victim while trying to shoot a different person with whom he had argued. The only aggravating circumstance found in *Rogers* was that it was part of a course of conduct which included the commission of other violent crimes. In the present case, an infant was cruelly and violently murdered by being shaken and beaten to death. Defendant, being the mother's boyfriend, violated a position of trust, as the infant was helpless and defenseless to resist this senseless crime. The facts of the case are clearly distinguishable from *Rogers* and involve a much more brutal killing.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the two aggravating circumstances found were pecuniary gain and committed in the commission of a robbery. In finding the death sentence disproportionate, this Court focused on the fact that there was no finding that defendant was engaged in a course of conduct including other violent crimes or that it was especially heinous, atrocious, or cruel. The present case is distinguishable from *Young* because, among other things, in this case the jury found the aggravating circumstance that it was especially heinous, atrocious, or cruel.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), a police officer was shot with his own gun while he and defendant struggled on the ground. The only aggravating circumstance found by the jury was that the offense was committed against a law enforcement officer engaged in the performance of his official duties. In the present case, the jury found that the murder was especially heinous, atrocious, or cruel, and once again, the facts in this case are clearly distinguishable from *Hill.*

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), several friends were riding in a car when defendant began taunting the victim by telling him that he would shoot him. Defendant eventually shot the victim and then immediately drove to the emergency room of the local hospital. While the jury found both that the murder was especially heinous, atrocious, or cruel and that it was part of a course of conduct including other violent crimes, this Court focused on defendant's attempt to obtain medical assistance in finding the death sentence disproportionate. Here, defendant refused to take the infant to the hospital until the infant's mother threatened to call an ambulance. Then, instead of rushing the infant to the hospital, defendant stopped for gas. Thus, the facts of this case are clearly distinguishable from the facts in *Bondurant.*

We recognize that juries have imposed sentences of life imprisonment in certain cases involving the death of an infant. However, "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." *Green*, 336 N.C. at 198, 443 S.E.2d at 46.

Defendant in the present case refers us to two cases, other than the ones we have already discussed, in which juries following capital sentencing proceedings recommended life sentences. These cases are

clearly distinguishable from the present case on their facts. In *State v. Huff*, 328 N.C. 532, 402 S.E.2d 577 (1991), this Court found sufficient evidence from which a reasonable juror examining defendant's behavior and mental problems could conclude that defendant's capacity to appreciate the criminality of his conduct was impaired. Such was not the case here. Further, in *Phillips*, 328 N.C. 1, 399 S.E.2d 293, defendants were sixty-eight and fifty-seven years old, and premeditation and deliberation were not elements of the offense as charged. Here, defendant was thirty-two years old, and he was convicted of the premeditated and deliberated murder of a four-month-old child.

Further, we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have *consistently* returned recommendations of life imprisonment. *E.g.*, *State v. Spruill*, 338 N.C. 612, 452 S.E.2d 279 (1994) (murder of an acquaintance in which the jury found as the only aggravating circumstance that the murder was especially heinous, atrocious, or cruel—death sentence proportionate), *petition for cert. filed*, — U.S.L.W. — (No. 94-9410, 19 May 1995); *Syriani*, 333 N.C. 350, 428 S.E.2d 118 (murder in which the jury found as the only aggravating circumstance that the murder was especially heinous, atrocious, or cruel and in which defendant was convicted solely under the theory of premeditation and deliberation—death sentence proportionate); *Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (murder of elderly female in which the jury found the only aggravating circumstance to be that the murder was especially heinous, atrocious, or cruel—death sentence proportionate).

After comparing this case carefully with all others in the pool used for proportionality review, we conclude that it falls within the class of first-degree murders in which we have previously upheld the death penalty. For the foregoing reasons, we conclude that the sentence of death entered in the present case is not disproportionate.

Having considered and rejected all of defendant's assignments of error, we hold that defendant received a fair trial and sentencing proceeding, free from prejudicial error. Comparing this case to similar cases in which the death penalty was imposed and considering both the crime and defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive. Therefore, the sen-

tence of death entered against defendant must be and is left undisturbed.

NO ERROR.

Justice WHICHARD concurring in the result in part.

On issue XX, I do not agree that the prosecutor did not misstate the law in his explanation of Issue Three of the capital sentencing proceeding. For the reasons stated in Justice Frye's dissenting opinions in *McCarver* and *McLaughlin*, both filed simultaneously herewith, I believe the prosecutor's statement that the jury must be unanimous to answer Issue Three in the negative was incorrect.

In this case, however, unlike in *McCarver* and *McLaughlin*, the misstatement was by the prosecutor, not the judge. Further, there was no objection to the statement at trial, so the standard of review is whether the error was so egregious as to require the trial court to intervene *ex mero motu*. I do not believe the misstatement rose to that level, nor do I believe that, in the total context presented, there is any serious possibility the statement had an effect on the jury's decision. I therefore concur in the result reached on this issue in the opinion for the Court, though disagreeing with the reasoning.

Justice FRYE joins in this concurring opinion.

STATE OF NORTH CAROLINA v. PERRIE DYON SIMPSON

No. 43A93

(Filed 8 September 1995)

1. Jury § 151 (NCI4th)— first-degree murder—jury selection—questions concerning automatic death penalty—objections sustained

The trial court did not err during jury selection for a first-degree murder by sustaining the State's objections to questions purportedly designed to identify any prospective jurors who would automatically vote for the death penalty when the murder was premeditated. Each seated juror, through individual, sequestered examination, was made abundantly aware of the nature of the proceedings; that the issue of defendant's guilt had

been established with his plea of guilty to first-degree murder; that the jury would decide the sentence to be imposed with the only options being life imprisonment or the death penalty; and further that each juror understood the sentencing process, including the finding and weighing of aggravating and mitigating circumstances. The majority of defendant's questions to which objections were sustained were argumentative, were incomplete statements of the law, or were impermissible staking-out questions, and, while the prospective jurors were not allowed to say how they would deal with "premeditated murder," they were required to state whether they could consider both a sentence of life imprisonment and a sentence of death with respect to first-degree murder. Each individual juror answered affirmatively and positively that he or she could consider a sentence of life imprisonment in this first-degree murder case. While some of the questions which defendant attempted to ask were proper, any error in excluding them was rendered harmless through the examination by the trial court, the State and further examination by the defendant. The *voir dire* in the instant case was fully sufficient to serve its purpose of enabling counsel for the State and the defendant to determine whether grounds existed for challenge for cause and to exercise peremptory challenges intelligently.

Am Jur 2d, Jury § 279.

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

2. Jury § 151 (NCI4th)— first-degree murder—jury selection—whether jurors could properly consider aggravating and mitigating circumstances—objections sustained

There was no error during jury selection in a first-degree murder prosecution where defendant contended that the trial court erred by sustaining objections to a variety of questions to potential jurors on *voir dire* relating to whether they could properly consider aggravating and mitigating circumstances. The majority of the questions were properly disallowed as to form as attempts to stake out or determine what kind of verdict a juror would render under certain named circumstances not yet in evidence. Assuming that some of the questions should have been allowed, any error in excluding them was harmless beyond a reasonable doubt. The trial court permitted adequate leeway in sufficient

areas of questioning to enable defendant to discern any prospective juror who harbored a latent bias against any type of evidence which defendant proposed to present in mitigation.

Am Jur 2d, Jury §§ 206, 208.

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

3. Jury § 223 (NCI4th)— first-degree murder—jury selection—excusal for cause—opinions about death penalty

There was no error in jury selection in a first-degree murder prosecution where defendant contended that the excusal of five potential jurors for cause deprived him of his right to a fair and impartial jury in that the jurors' answers showed that they did not meet the standard for excusal under *Wainwright v. Witt*, 469 U.S. 412. It is abundantly clear from the responses of each potential juror that their personal beliefs substantially impaired their ability to follow the law under the *Witt* standard, and the court correctly allowed the challenge as to each for cause.

Am Jur 2d, Jury § 279.

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

4. Criminal Law § 683 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—lack of prior criminal activity

The trial court did not err during a first-degree murder sentencing hearing by not peremptorily instructing the jury on the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where the record reveals previous criminal convictions of carrying a concealed weapon, contributing to the delinquency of a minor, and larceny. Considering the nature of the offenses and the age of the acts, the jury had ample basis to find that defendant's prior criminal activity was significant.

Am Jur 2d, Criminal Law § 599.

5. Criminal Law § 681, 682 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—mental or emotional disturbance—impaired capacity

The trial court did not err during a first-degree murder sentencing hearing by not peremptorily instructing the jury on the statutory mitigating circumstance that defendant was under the influence of a mental or emotional disturbance and whether defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Although defendant maintained that the testimony of his psychological expert and his evaluation at Dorothea Dix Hospital point without contradiction to the conclusion that these two mitigating circumstances exist, defendant's written confession shows he was able to contemplate and plan the robbery and murder over a two-day period; he waited until dark to approach the house; once inside, he instructed that the drapes be closed and that the telephone lines be cut; he was able to select and choose his various murder weapons; defendant's psychological expert indicated on cross-examination that defendant's actions showed a plan rather than impulse; the diagnosis of Attention Deficit/Hyperactivity Disorder was made several years after the murder and at least three other mental health professionals who evaluated defendant did not share the opinion that he had ADHD; and defendant conceded that his evidence shows that he had the capacity to understand the wrongfulness of his conduct and requested that only his capacity to conform his conduct be submitted.

Am Jur 2d, Trial §§ 1077 et seq.

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

6. Criminal Law § 680 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—age of defendant

The trial court did not err in a sentencing hearing for a first-degree murder by not giving a peremptory instruction on the mitigating circumstance of the age of defendant where defendant was 21 at the time of the murder, soon to become a father, had held several employment positions, had a criminal background, and was over the age of majority. If found from the evidence and evaluated in light of all the facts and circumstances, a reasonable

juror could conclude that the defendant was immature or that he was mature beyond his years.

Am Jur 2d, Trial §§ 1077 et seq.

7. Criminal Law § 680 (NCI4th)— first-degree murder—sentencing—nonstatutory mitigating circumstances—peremptory instruction denied

The trial court did not err in a sentencing proceeding for first-degree murder by refusing to peremptorily instruct the jury upon nonstatutory mitigating circumstances. Jurors must remain free to assign no mitigating value to a nonstatutory mitigating circumstance should they so choose, even if they find that the circumstance exists; defendant's proposed instruction requires jurors to assign some amount of mitigating value to the nonstatutory mitigating circumstances.

Am Jur 2d, Trial §§ 1077 et seq.

8. Criminal Law § 1323 (NCI4th)— first-degree murder—sentencing—instructions—mitigating weight

The trial court did not err in a first-degree murder sentencing hearing by declining to instruct the jury that statutory mitigating circumstances proven by a preponderance of the evidence must be given some mitigating weight. The instructions given by the trial court imparted in substance the essence of defendant's proposed instruction and are identical to instructions previously found to be free from error.

Am Jur 2d, Trial §§ 1077 et seq.

9. Criminal Law § 1362 (NCI4th)— first-degree murder—sentencing—instructions—age of defendant

The trial court did not err in a first-degree murder prosecution by refusing to give an instruction proffered by defendant on the statutory mitigating circumstance of age. Rather than encouraging the jury to look at varying conditions and circumstances in its consideration of whether the defendant's age is mitigating, defendant's proposed instruction more narrowly defined age by confining consideration to only mental and emotional age along with chronological age. The trial court correctly declined to give the instruction inasmuch as the proffered instruction dictated a set formula for determining whether defendant's age had mitigat-

ing value. The instruction given informed the jury that the mitigating effect of age is to be considered in light of all the facts and circumstances found from the evidence, and permits the jury to consider such factors as defendant's mental and physical maturity, experience, and prior criminal history as well as chronological age in determining whether age is mitigating.

Am Jur 2d, Trial §§ 1077 et seq.

10. Criminal Law § 1314 (NCI4th)— first-degree murder—sentencing—mitigating evidence excluded

There was no error in a first-degree murder sentencing hearing where the trial court excluded testimony concerning defendant's placement in the foster-care system and his biological parents' refusal to allow his adoption into a permanent and stable family. The reasoning behind defendant's continued placement in the foster-care system, that his parents refused to allow his adoption, is irrelevant to defendant's sentencing proceeding; what is of import, however, is the effect this continued placement had upon defendant's life. One or more jurors found as a nonstatutory mitigating circumstance that "the defendant's development was adversely affected by the lack of permanence in his life that was the result of frequent changes of placement in different foster homes and frequent changes in schools." This circumstance was found from evidence before the jury and reflects the relevant fact of how the lack of permanence in defendant's life negatively affected him.

Am Jur 2d, Criminal Law § 598, 599.

11. Criminal Law § 1310 (NCI4th)— first-degree murder—sentencing—mental or emotional disturbance—expert evidence excluded

The trial court did not err in a first-degree murder sentencing proceeding by not allowing a social worker to render an expert opinion on defendant's emotional or mental disturbance where the excluded evidence would have been merely cumulative. Since defendant successfully elicited the same testimony through another witness clearly qualified in the field, any error in excluding this testimony was harmless.

Am Jur 2d, Appellate Review § 759; Criminal Law §§ 598, 599.

12. Criminal Law § 1310 (NCI4th)— first-degree murder—sentencing—rebuttal testimony limited—cumulative

There was no error in a first-degree murder sentencing hearing where defendant contended that he was not allowed to present evidence in rebuttal to the State's contentions that defendant was an aggressive and dangerous person. Although a social worker was not allowed to testify that she was not afraid or fearful when she was with defendant, she was allowed to give testimony from which it was clear that she was not only unafraid of defendant, but rather enjoyed his company.

Am Jur 2d, Appellate Review § 759; Criminal Law §§ 598, 599.

13. Criminal Law § 1309 (NCI4th)— first-degree murder—sentencing—excluded testimony

The trial court did not err in a first-degree murder sentencing hearing by not allowing defendant's expert witness to testify concerning her opinion as to whether most people who commit violent crimes suffer from mental or emotional disorders. Whether or not other defendants or criminals in general suffer from mental or emotional disorders has no relevance to the jury's determination of this particular sentence.

Am Jur 2d, Criminal Law §§ 598, 599.

14. Criminal Law § 1310 (NCI4th)— first-degree murder—sentencing—cumulative evidence

The trial court did not err in a first-degree murder sentencing hearing by not allowing defendant's expert to testify as to what the proper treatment for defendant's Attention Deficit/Hyperactivity Disorder would be. Any error was harmless beyond a reasonable doubt since the excluded evidence would have been cumulative.

Am Jur 2d, Criminal Law §§ 598, 599.

15. Criminal Law § 1314 (NCI4th)— first-degree murder—sentencing—codefendant's sentence

There was no error in a first-degree murder sentencing hearing where the trial court disallowed evidence that defendant's accomplice received a life sentence. A jury is not entitled to consider as mitigating a codefendant's sentence for the same offense.

Am Jur 2d, Criminal Law §§ 598, 599.

16. Criminal Law § 1316 (NCI4th)— first-degree murder—sentencing—robbery as aggravating circumstance—robbery sentence not allowed as mitigating circumstance

There was no error in a first-degree murder sentencing hearing where the State was allowed to argue that the jury should weigh his conviction of robbery with a dangerous weapon as an aggravating circumstance but defendant was not allowed to show in rebuttal that he received a forty-year sentence. *Simmons v. South Carolina*, 129 L. Ed. 2d 133, does not require the reversal of *State v. Robinson*, 336 N.C. 78.

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.

17. Evidence and Witnesses § 2296 (NCI4th)— first-degree murder—sentencing—defendant's mental health—reliance on reports of others

There was no error in a first-degree murder prosecution where the trial court allowed the State to cross-examine defendant's expert concerning the diagnosis of other mental health professionals. Under N.C.G.S. § 8C-1, Rule 705, and pursuant to *State v. Allen*, 322 N.C. 176, the witness was properly cross-examined about other diagnoses contained within psychiatric reports upon which she relied, although she ultimately formed a differing diagnosis.

Am Jur 2d, Expert and Opinion Evidence §§ 212, 227-255.

18. Criminal Law § 1326 (NCI4th)— first-degree murder—sentencing—instructions—reasonable doubt and preponderance of the evidence

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury in accord with the pattern jury instructions with respect to aggravating circumstances and the statutory questions required for the death sentence, and on preponderance of the evidence with respect to mitigating circumstances. Although defendant contends that the sentence "Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you . . ." diminishes the State's burden of proof, the jury could not have viewed or construed the words "fully satisfies" in

such a manner as to lessen the State's burden of proof or leave the matter entirely to the subjective judgment of each juror. "By the preponderance of the evidence" is the correct burden of proof for establishing the existence of mitigating circumstances and the use of the word "satisfy" denotes a burden of proof consistent with a preponderance of the evidence.

Am Jur 2d, Trial §§ 1370 et seq.

19. Criminal Law § 1343 (NCI4th)— first-degree murder—sentencing—especially heinous, atrocious, or cruel aggravating circumstance—not vague and overbroad

The especially heinous, atrocious or cruel aggravating circumstance for first-degree murder is not vague and overbroad.

Am Jur 2d, Criminal Law §§ 598, 599.

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

20. Criminal Law § 1326 (NCI4th)— first-degree murder sentencing—instructions—mitigating circumstances

There was no error in the use of the pattern jury instructions defining mitigating circumstances in a first-degree murder sentencing proceeding. The instruction did not improperly focus on matters which would reduce the culpability of the killing rather than focusing on both the killing and defendant himself.

Am Jur 2d, Trial §§ 1237, 1250.

21. Criminal Law § 1321 (NCI4th)— first-degree murder—sentencing—instructions—failure to agree on sentence

There was no error in a first-degree murder sentencing hearing where the trial court refused to instruct the jury that the court would impose a life sentence if the jury failed to agree on a sentencing recommendation. N.C.G.S. § 15A-2000(b).

Am Jur 2d, Trial § 1445.

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

The trial court did not err in a first-degree murder sentencing hearing in its instructions on nonstatutory mitigating circumstances. The U.S. and N.C. Constitutions do not require that

jurors accept whatever a defendant chooses to proffer as being mitigating.

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1077.

23. Jury § 141 (NCI4th)— first-degree murder—sentencing—jury selection—questions concerning parole eligibility

There was no error in a first-degree murder sentencing proceeding where the trial court refused to allow defendant to question potential jurors on *voir dire* concerning their attitudes or understanding regarding parole eligibility and to inform potential jurors that defendant would be ineligible for parole for twenty-seven years.

Am Jur 2d, Jury §§ 206, 207.

24. Criminal Law § 1371 (NCI4th)— first-degree murder—sentencing—proportionality review—not unconstitutionally vague and arbitrary

The standards set for the proportionality review mandated by N.C.G.S. § 15A-2000(d)(2) are not vague and arbitrary. The makeup of the pool of cases used for review was first explained in *State v. Williams*, 308 N.C. 47 (1983), and the purpose, methodology and focus of the review was clarified there and more recently in *State v. Bacon*, 337 N.C. 66 (1994). Counsel for any capitally tried defendant should well know from the case law the manner in which proportionality review is undertaken.

Am Jur 2d, Criminal Law §§ 628, 629.

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

A sentence of death for first-degree murder was not disproportionate where the jury's finding of each aggravating circumstance was supported by the evidence and the jury did not sentence defendant to death while under the influence of passion, prejudice, or any other arbitrary factor. Defendant schemed and plotted his attack upon an old and defenseless man who had welcomed defendant into his home and given him food and aid; defendant lurked outside the house waiting for night to fall before he forced his way inside and mercilessly terrorized and tortured a man who only the day before had tried to help him; and defendant's ability to appreciate the criminality of his conduct was not found to be impaired.

Am Jur 2d, Criminal Law § 628.

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

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Davis (James C.), J., at a resentencing proceeding held at the 11 January 1993 Criminal Session of Superior Court, Rockingham County, upon defendant's conviction of first-degree murder. Heard in the Supreme Court 9 January 1995.

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

James R. Glover and Ann B. Petersen for defendant-appellant.

LAKE, Justice.

This appeal marks the third time this case has been before this Court for sentencing review. The defendant, Perrie Dyon Simpson, confessed to the 27 August 1984 murder and robbery of Jean E. Darter, a ninety-two-year-old retired Baptist minister. On 4 March 1985, defendant entered pleas of guilty to the first-degree murder of Reverend Darter, robbery with a dangerous weapon, and conspiracy to commit murder. In the intervening years, defendant has received three capital sentencing proceedings pursuant to N.C.G.S. § 15A-2000, and each of the three juries, after hearing the evidence and arguments of counsel, has recommended a sentence of death.

Defendant appealed to this Court as of right from his first judgment and sentence of death, and he was allowed to bypass the Court of Appeals as to the judgments and sentences for the additional offenses. Upon review, this Court found no error in the judgments and sentences for robbery with a dangerous weapon and conspiracy to commit murder and found no error in the conviction of defendant for first-degree murder. However, this Court found prejudicial error in the capital sentencing proceeding and remanded to the trial court for a new sentencing proceeding for the first-degree murder. *State v. Simpson*, 320 N.C. 313, 357 S.E.2d 332 (1987), *cert. denied*, 485 U.S. 963, 99 L. Ed. 2d 430 (1988).

Following his second capital sentencing proceeding and the recommended sentence of death and judgment accordingly, defendant

again appealed as of right to this Court. Based on the ruling of the United States Supreme Court in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), this Court vacated defendant's sentence of death and remanded for a third capital sentencing proceeding. *State v. Simpson*, 331 N.C. 267, 415 S.E.2d 351 (1992).

At the third capital sentencing proceeding, as in the two previous proceedings, the State presented evidence tending to show that on 27 August 1984, ninety-two-year-old Reverend Jean E. Darter was murdered in his Reidsville home. Reverend Darter's daughter, Doris Darter Faircloth, testified she tried to telephone her father the night of his murder but was unable to reach him. Faircloth and her husband decided to drive to Reverend Darter's house, and when they arrived, they noticed that the only light turned on was in the bathroom. Mr. and Mrs. Faircloth unlocked the back door and went to the bathroom to see if Reverend Darter had fallen and hurt himself. He was not in the bathroom. Mrs. Faircloth went to her father's bedroom and saw him lying across the bed. "I knew that he was dead because he was so still." Mr. Faircloth turned the bedroom light on, and what they saw was "so horrible that I seemed not to be able to see it all collectively. I saw it in bits and pieces." Mrs. Faircloth noticed a strap around her father's neck, "and it was tied to the bedpost and then I looked at his eyes and by that time I said somebody did this to him." Because the telephone cords had been cut, Mr. and Mrs. Faircloth called the police from a neighbor's telephone.

Mrs. Faircloth testified her father was an avid gardener and at the age of ninety-two, was still very active. He continued to study and still preached occasionally. "His health was remarkable for his age. His mind was very alert." Reverend Darter wore glasses and had injured his back jumping out of a fishing boat a few years before his death. He wore a back brace to maintain his active life when his back gave him pain.

Detective Sergeant Ronnie Ellison responded to the Faircloths' call for help. When he entered Reverend Darter's house, he observed there were no signs of forced entry, and that the cords on the telephones in the hall and in the bedroom had been cut. Mobile Crime Laboratory Operator W.F. Lemmons with the State Bureau of Investigation ("SBI") identified, collected, and preserved evidence at the murder scene. He conducted a walk-through of the house to determine the housekeeping habits of Reverend Darter and to help identify anything out of place. Lemmons' inspection revealed that

although Reverend Darter kept the inside of the house neat and clean, in one bedroom, the sheets and covers were wadded up, the dresser drawers were pulled out, and the contents dumped onto the floor. He noticed there was a bundle of knives lying in the kitchen sink, and that both the freezer and refrigerator doors were cracked open. The food inside was beginning to thaw. In a room just off of the kitchen was a storage area where Lemmons found a carton of glass Tab bottles; one bottle was missing. In the bathroom, Lemmons observed a pack of razor blades in the sink. Lemmons also discovered a writing pad with the names "Lisa Marie Johnson" and "Curtis Anthony Parker" written on it.

In another bedroom, Lemmons found Reverend Darter lying on the bed, with his feet on the floor. Two belts were wrapped around Reverend Darter's neck. The outer belt was the largest and thickest, and it was tied to the bedpost. The inner belt was broken. Reverend Darter's face was bloated and bloody. He had glass in his left eye, and a design composed of many small circles and dots was imprinted on the Reverend's left cheek. Both of the Reverend's arms were cut open from his elbows to his wrists. Blood was on the bed and had run down the side of the bed and formed a puddle on the floor; there was blood on the walls and window blinds. Also on the bed were the contents of two dresser drawers, shattered glass, the Reverend's broken glasses, his false teeth, a razor blade, and the neck of a glass Tab bottle. Directly under Reverend Darter's elbow was a photo album entitled, "My Grandchildren."

Agent Walter L. House, also with the SBI, was a member of the Darter murder investigation team. He testified that the Faircloths turned over to him Reverend Darter's telephone bill. According to the bill, a long-distance telephone call had been made from Reverend Darter's house to a telephone in Greensboro on 26 August 1984. Agent House and Captain Eddie Lambeth determined the telephone number belonged to a woman named Ruby Locklear. House and Lambeth visited her and asked if she knew anyone in Reidsville. Locklear replied that the only person who ever called from Reidsville was a man named Perrie Dyon Simpson and that he called her when he wanted to reach his father. Agent House also testified that eight latent fingerprints found in the Darter house matched the defendant's.

The police learned there was an outstanding warrant for defendant in Greensboro for simple assault, so defendant was arrested on 21 September 1984. Defendant was advised of his *Miranda* rights and

agreed to talk with officers about the Darter murder. He signed a written statement to the effect that he had read about the Darter murder but knew nothing about it. Defendant stated he had never met or seen Reverend Darter and had never been inside Reverend Darter's house. Defendant was then transported to Greensboro for a bond hearing on the assault charge. In Greensboro, police asked defendant if they could talk some more about the Darter murder, and defendant agreed.

During this questioning period, defendant made a sixteen-page written statement confessing his involvement in the murder. Defendant confessed that on 26 August 1984, he and his pregnant, sixteen-year-old girlfriend, Stephanie Eury, went for a walk to look for some money. Stephanie went to the front door of Reverend Darter's house and rang the doorbell. She told Reverend Darter she was hungry, so he brought her a diet soft drink and gave the defendant a glass of milk. Stephanie asked if they could come inside, so the three went into the front living room. Stephanie told the Reverend that she and defendant were traveling to Florida and had gotten stuck in Reidsville. The Reverend suggested they contact the Salvation Army or the police. Stephanie asked Darter if he could give them some money, and Reverend Darter gave her four dollars, explaining that was all the money he had in cash. Defendant told police that he and Stephanie "noticed the preacher had a nice home." After getting permission to use the telephone, defendant called Ruby Locklear in Greensboro to see if she had seen defendant's father. When defendant got off of the telephone, he heard Stephanie tell the Reverend her name was "Lisa" and defendant's name was "Curtis Anthony." Defendant watched the Reverend write these names down on a pad of paper. Defendant told the police that before he and Stephanie left the house, the Reverend gave them some sponge cake and peaches to take with them. Defendant admitted that "Reverend Darter was real friendly to us and was very helpful."

The next day, 27 August 1984, defendant said that he and Stephanie "both talked about going back to preacher Darter's house to get some money. Stephanie and I decided we would go back to Darter's house and we would not come back empty-handed no matter what." Defendant told police that he and Stephanie walked around outside waiting for it to get dark. Once it was dark enough, the two walked to Reverend Darter's house, looking around to make sure no one saw them. They rang the doorbell, and when Reverend Darter answered the door, they forced their way inside. Reverend Darter ran to the telephone, but defendant "pulled the preacher's hands off the

telephone." Defendant told Stephanie to cut the telephone cords, and in the meantime, he was "struggling with Preacher Darter holding onto the preacher's arms to control him and force him back in his bedroom so he would tell me where some money was." Defendant held the Reverend down on the bed, with his hands around his neck, telling him he wanted money "or else," but the Reverend told defendant he did not have any money.

The Reverend told defendant that if he was killed, he knew he was going to heaven. Defendant told the police, "this frustrated me and I grabbed him tighter around the throat." Defendant reached across the bed and got a belt and "looped it around his neck and tightened the belt." While he held the belt tight, defendant rummaged through two dresser drawers Stephanie had dumped onto the bed. Not finding anything he wanted, defendant drew the "belt more tight around his neck and I told the preacher he had better tell us where some more money was but the preacher could not talk because he was choking." When the first belt broke, defendant got another, thicker belt "and looped this leather belt around the preacher's neck and tightened up on this leather belt. Then I called Stephanie to bring me something in the bedroom to kill this preacher with."

When defendant did not receive any weapon to his liking, he called for Stephanie to come and hold the belt while he "went in the kitchen and looked for some device to beat the old preacher and finish him off." He picked up a full pop bottle and then decided to put it back and get an empty bottle. He returned to the bedroom, pulled tight on the belt, and "hit the old preacher hard three times with this bottle and on the third blow the soft drink bottle broke." Defendant then decided to tie the end of the belt to the bedpost, and he went into the bathroom and got a double-edged razor blade. "I held this double-edged razor blade between my right index finger and right thumb and then I sliced the preacher's arms from the biceps all of the way down the under side of the forearms to the wrist. I cut both of the preacher's arms." Stephanie gathered a bag of food, a porcelain lamp, a radio, and boxes of Kleenex and packed them in a plastic laundry basket. "The last thing we did before leaving the preacher's house was to turn off all the lights except the bathroom light."

Agent House further testified that after defendant made his confession, defendant read the statement out loud checking for mistakes. When defendant came to a portion of the statement where he had used profanity, he laughed.

Pathologist Michael James Shkrum performed an autopsy on Reverend Darter and testified the Reverend sustained blunt-trauma injuries to his face causing swelling and bruising. The bone between the eye socket and the brain was fractured, the cheek and the jaw bone were broken, and the Reverend's tongue was torn. Strangulation bruises appeared on the neck. It was Dr. Shkrum's opinion that Reverend Darter died from ligature strangulation, and that it would have taken several minutes for his heart to stop beating. It was Dr. Shkrum's further opinion that Reverend Darter experienced pain. Dr. Shkrum also testified that because Reverend Darter sustained bruising around his face, his heart was still beating when those injuries were inflicted.

The defendant testified on his own behalf and presented evidence tending to show that after his birth, he went directly from the hospital into the foster-care system. Joan Landreth, a social worker, testified that the Guilford County Department of Social Services was granted custody of defendant when he was ten days old. Ms. Landreth was directly responsible for the defendant's placement when he was nine years old. She testified that by the time defendant reached the age of eighteen, he had been placed with a number of foster-care families. However, defendant's older brother, Daryl, continuously lived with their maternal grandmother, Althea Kermen. Ms. Landreth testified that defendant was allowed to visit with his grandmother and brother, but that Ms. Kermen repeatedly turned defendant back over to the care of the foster-care system. Throughout his childhood, defendant experienced problems with recurring skin rashes and slurred speech.

Dr. Claudia Coleman conducted a psychological examination of defendant and reviewed defendant's social history records compiled by the Department of Social Services ("DSS"). She testified that in her expert opinion, defendant suffered from severe mental and emotional disturbances. Specifically, Dr. Coleman diagnosed defendant as suffering from attention deficit/hyperactivity disorder ("ADHD") and from a "mixed personality" disorder. Dr. Coleman concluded that based upon the DSS records, defendant began to exhibit these mental and emotional disturbances at an early age, probably prior to his fifth birthday, and that the defendant's frequent movement between various foster families aggravated his ADHD. Further, Dr. Coleman testified that at the time of the murder, defendant had the emotional age of a twelve to fourteen year old, and that while defendant was able to plan the robbery and was aware that his actions were wrong, defend-

ant's disorders nevertheless left him without the capacity to stop his actions.

The jury found the existence of the two aggravating circumstances submitted: (1) the murder was committed by the defendant while he was engaged in the commission of a robbery; and (2) the murder was especially heinous, atrocious, or cruel. One or more jurors additionally found the following statutory and nonstatutory mitigating circumstances: (1) the murder was committed while defendant was under the influence of a mental or emotional disturbance; (2) defendant aided in the apprehension of another capital felon; (3) defendant's mental or emotional age at the time of the murder was mitigating; (4) defendant's development was adversely affected by the lack of permanence in his life as a result of the frequent changes in placement with foster-care families and schools; (5) defendant was taken from the care of his grandmother while his brother was allowed to remain in her care; (6) defendant experienced a mental or emotional disturbance at an early age; (7) defendant's mental or emotional disturbance affected his ability in school; (8) defendant's mental or emotional disturbance affected his ability to sustain employment; (9) defendant's behavior improved during times when he was in a structured environment; (10) defendant confessed to his involvement in the murder prior to his arrest; (11) defendant did not minimize his culpability in the murder; (12) defendant voluntarily consented to a search of his property for evidence of the robbery and murder; and (13) defendant voluntarily pled guilty to murder, armed robbery, and conspiracy to commit murder.

The jury found beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, and it further found that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. The trial court entered judgment in accordance with the jury's recommendation of death. It is from this judgment and commitment of death that defendant currently appeals. For the reasons stated herein, we conclude that the capital sentencing proceeding was free from prejudicial error and that the sentence of death is not disproportionate.

JURY SELECTION ISSUES

[1] In his first assignment of error, defendant contends the trial court committed reversible error and he was denied due process when the trial court, relying upon *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761

(1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983), sustained the State's objections to certain questions to prospective jurors purportedly designed to identify if any of them would always vote for the death penalty when the murder was premeditated. Defendant argues that this asserted prohibition violated *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992) and *State v. Conner*, 335 N.C. 618, 440 S.E.2d 826 (1994). In addition, defendant contends that the trial court abused its discretion by unduly restricting his ability to determine whether prospective jurors could properly consider aggravating and mitigating circumstances in accord with our law.

In *Morgan*, the United States Supreme Court in essence held that a defendant is entitled, upon request, to inquire of a prospective juror whether he or she would automatically vote for the death penalty. *Morgan*, 504 U.S. at 736, 119 L. Ed. 2d at 507. The Court further provided that general fairness and "follow the law" questions alone were insufficient to detect those jurors who would automatically impose the death penalty without regard for the evidence, noting that "[a]s to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed." *Id.* at 735, 119 L. Ed. 2d at 506. When such latent biases are unprobed and "even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.* at 729, 119 L. Ed. 2d at 503. However, we have held that such error is harmless where other questioning reveals, with sufficient specificity and assurance, whether the juror will consider mitigation and will consider both sentencing options. *See State v. Price*, 334 N.C. 615, 618, 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).

In *Conner*, decided subsequent to this third sentencing proceeding, this Court expanded *Morgan*, holding that while the specific question approved in *Morgan* was phrased in terms of whether prospective jurors would *always* or *automatically* vote for the death penalty in every case of first-degree murder, "the tenor of the language and the rationale in *Morgan* suggest that the wording of the question should not necessarily be limited to this specific inquiry but that a broader question should be permitted to assure a fair and impartial, qualified jury." *Conner*, 335 N.C. at 644, 440 S.E.2d at 841.

Thus, this Court held that the following questions were permissible *Morgan* inquiries:

> Is your support for the death penalty such that you would find it difficult to consider voting for life imprisonment for a person convicted of first degree murder?
>
> Would your belief in the death penalty make it difficult for you to follow the law and consider life imprisonment for first degree murder?

Conner, 335 N.C. at 643, 440 S.E.2d at 840. This Court went on to hold that three questions previously found inappropriate in *Taylor* were now acceptable. *Id.* at 645, 440 S.E.2d at 841. These questions were:

> [I]f the State convinced you beyond a reasonable doubt that the defendant was guilty of premeditated murder and you had returned that verdict guilty, do you think then that you would feel that the death penalty was the only appropriate punishment?
>
> . . . [I]f you had sat on the jury and had returned a verdict of guilty of first degree murder, would you then presume that the penalty should be death?
>
> . . . At the first stage of the trial and because of that you voted guilty for first degree murder, then do you think that you could at that time consider a life sentence or would your feelings about the death penalty be so strong that you couldn't consider a life sentence?

Taylor, 304 N.C. at 265, 283 S.E.2d at 772.

Initially, with respect to the life-qualifying *Morgan* questions, defendant complains that the trial court abused its discretion by the manner in which it controlled the *voir dire* and by refusing defendant's request to give each of two panels of prospective jurors a general explanation of the capital sentencing procedure under North Carolina law. The trial court gave very few preselection instructions to the prospective jurors collectively but in accord with the defendant's request, allowed individual, sequestered *voir dire*. Throughout the *voir dire* of each juror, the trial court deferred to the attorneys to explain the sentencing process but frequently would intervene to explain or expand on the law or to probe a juror's understanding or response. Generally, the district attorney gave the prospective juror an overview of the sentencing process, including the finding and weighing of aggravating and mitigating circumstances. In most situa-

tions throughout the *voir dire*, the district attorney, after asking if the juror could consider death as an appropriate sentence for first-degree murder, would ensure that the juror could also consider life imprisonment as a possible sentence. The trial court, either prior to or during the defense *voir dire*, would ask the juror if he or she could consider both a verdict of life and a verdict of death after hearing the evidence and instructions of the trial court.

The district attorney also advised each potential juror that defendant had previously pled guilty to first-degree murder, robbery with a dangerous weapon, and conspiracy to commit murder; that the issue of defendant's guilt had been established; that the jury would decide what sentence should be imposed; that the only sentencing options were life imprisonment or the death penalty; and that the trial court was required to impose the sentence recommended by the jury. Additionally, at the outset, each juror was asked questions concerning his or her personal background, knowledge of a list of witnesses and familiarity with the case. Following these general background questions, the district attorney asked each juror to express his or her opinion about the death penalty.

During defense *voir dire* on this point, defendant's attorney attempted to ask each juror a series of questions as to whether he or she considered a life sentence an appropriate and sufficient penalty for a person who kills another intentionally and deliberately, or "intentionally and premeditated," or if the juror believed a sentence of death should be given in all cases of "premeditated murder." This line of questioning, with very few exceptions, did not use the term "first-degree murder," but rather was framed in terms of "cold-blooded, premeditated murder," "premeditated murder," or "intentionally and deliberately." The trial court sustained the State's objections to most, but not all, of these and similar questions, apparently relying on this Court's holding in *Taylor*.

Defendant contends the denial of this type of question was error under *Morgan* and *Conner*, notwithstanding the fact that the trial court did not have the benefit of *Conner* for this jury selection, and defendant further contends this error cannot be harmless beyond a reasonable doubt under N.C.G.S. § 15A-1443(b) since the trial court refused to preliminarily instruct the jurors as to the nature of a capital sentencing proceeding. Defendant reasons that without such an instruction, a juror's expressed "ability to return a life sentence verdict if [the juror] felt life was the appropriate sentence does not pre-

clude a predisposition that life is never the appropriate sentence for premeditated murder." However, in *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984), this Court held that it was not necessary for a juror to understand the process of a capital sentencing proceeding before he or she could be successfully challenged for cause on the basis of answers during jury *voir dire*. *Accord State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988).

"The trial court has the duty to control and supervise the examination of prospective jurors." *State v. Green*, 336 N.C. 142, 164, 443 S.E.2d 14, 27, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994). Regulation of the extent and manner of inquiries during *voir dire* rests largely in the trial court's discretion. *Id.*; *Mu'Min v. Virginia*, 500 U.S. 415, 114 L. Ed. 2d 493, *reh'g denied*, 501 U.S. 1269, 115 L. Ed. 2d 1097 (1991). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Green*, 336 N.C. at 164, 443 S.E.2d at 27.

This Court has held that *voir dire* serves the dual purpose of ascertaining whether grounds exist for challenge for cause and of enabling counsel for the State and for the defendant to exercise intelligently their peremptory challenges. *State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988). However, we have held that the parties should not be able to elicit in advance what the jurors' decision will be under a certain set of facts. This type of "staking out" is improper. *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995); *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992), *cert. denied*, —— U.S. ——, 122 L. Ed. 2d 684, *reh'g denied*, —— U.S. ——, 123 L. Ed. 2d 503 (1993). In order for a question on *voir dire* to be constitutionally required to be allowed, the inability to ask the question must render the defendant's trial fundamentally unfair. *Mu'Min*, 500 U.S. at 425-26, 114 L. Ed. 2d at 506.

Throughout the *voir dire* in the instant case, the questions and responses of counsel and the rulings by the trial court were generally consistent. The examination of Paul Stokes, the first juror seated, is typical with one exception. After the preliminaries, the district attorney explained the sentencing process, including the finding and weighing of aggravating and mitigating circumstances, and determined that Mr. Stokes could consider both the death penalty and life imprisonment in a first-degree murder case. When passed to the defendant, Mr. Stokes again had the process explained to him, includ-

ing the balancing of aggravating and mitigating circumstances, and he was asked whether he believed that every person who had committed "premeditated murder" should receive the death penalty. The State did not object to the question, and he responded, "Not necessarily." The trial court sustained objections to the following questions: (1) "Do you think that a sentence to life imprisonment is a sufficiently harsh punishment for someone who has committed cold-blooded, premeditated murder?" and (2) "Do you think that before you would be willing to consider a death sentence for someone who has committed cold-blooded, premeditated murder, that they would have to show you something that justified that sentence?" The objections to these questions were properly sustained because of their form. *See State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995).

In contending he was not allowed to ask the jurors life-qualifying *Morgan* questions, defendant points specifically to the *voir dire* of six prospective jurors: jurors Houchins, Ware, Atkins, Moore, Blackwell and Lawrence. Juror Houchins' *voir dire* by the State proceeded, in part, as follows:

> Q. In this matter the defendant in a previous session of court entered pleas of guilty to murder in the first degree and robbery with a dangerous weapon and conspiracy to commit murder. Is there anything about the nature of any one or more of these offense[s] that so offends or otherwise effects [sic] you that you could not sit on a jury in this case?
>
> A. No.
>
> Q. Do you understand, Ma'am, because of previous findings of guilt there is no longer any question of his guilt or innocence. He is guilty of both [sic] offenses. Do you understand that?
>
> A. Yes, I understand that.
>
> Q. Does that bother you or upset you in any way?
>
> A. No.
>
> Q. Do you understand that the only question before this jury then will be what sentence is appropriate in this case?
>
> A. Yes, sir.
>
> Q. Do you understand, Ma'am, that the only sentences that the jury can consider are life imprisonment and death?

A. Yes, sir.

Q. Knowing that those are the only sentences available to the jury does that bother you or effect [sic] you in any way?

A. No.

. . . .

Q. Then do you believe also . . . that in some cases of murder in the first degree life imprisonment is the appropriate sentence?

A. In some cases.

Q. Do you believe as a juror you can fairly consider both sentences after you have heard all of the evidence and after you have been instructed by the Court?

A. Yes.

During the course of juror Houchins' *voir dire*, the trial court asked her: "If based upon the evidence that is presented and the law which the Court will give to you, if you felt that life imprisonment was an appropriate sentence in this case would you be able to come back into court and render a decision of life imprisonment?" Juror Houchins answered, "Yes." She was accepted by both sides and was the third juror seated.

The *voir dire* of the other five prospective jurors followed much the same pattern and format, with minor variations.

Juror Ware was the fourth juror seated and, like the jurors before her, was asked by the trial court, "Could you sit as a juror and hear all of the evidence, the law which I will give you about the case and if you thought it was appropriate could you render a verdict of life imprisonment?" She answered, "Yes, I could." Juror Ware also volunteered that she "would go by the Court's ruling and before I would judge a case I would have to see it, you know." The defendant also questioned her as to whether she had an open mind as to penalty, to which she replied, "Yes, I do have an open mind."

The sixth juror accepted by both sides and seated was juror Atkins. The State questioned, "Are you saying, sir, that you believe there are certain cases where the death penalty is not appropriate?" He answered, "Yes, I do." Further, juror Atkins responded affirmatively to the question, "What you are saying then is the factors surrounding the crime are matters that you think should be taken into

consideration?" The trial court, just as it had done with the preceding jurors, asked if juror Atkins could return a recommendation of life imprisonment if he felt it appropriate, and juror Atkins responded he could.

The eighth juror seated, juror Moore, was asked by the trial court if she too could consider life imprisonment, and she responded she could. She was also questioned, "Could you withhold making a decision until all [the evidence] is in and you are in the jury room?" Her response was, "Yes, sir."

Juror Blackwell, the ninth juror seated, replied as follows to defendant's question concerning what his feelings were on the penalty for first-degree murder: "I would have to hear the evidence on the first-degree murder. I can't say until I have heard the evidence." The trial court stated, "[I]f I understand you correctly, is that [sic] before you would ever make up your mind in this case, about which is the appropriate sentence that you are to hear everything that comes from the witness stand before you would ever decide the case?" Juror Blackwell responded, "That is right. Thank you."

The *voir dire* of juror Lawrence, the eleventh juror seated, was similar. The trial court inquired whether he could recommend life imprisonment if he felt life imprisonment was the appropriate punishment, based on the evidence and law, and after deliberating with his fellow jurors. He responded, "Yes, sir."

Upon a full review of the jury *voir dire*, it is apparent and we hold that each seated juror, through individual, sequestered examination, was made abundantly aware of the nature of the proceedings; that the issue of defendant's guilt had been established with his plea of guilty to first-degree murder; that the jury would decide the sentence to be imposed with the only options being life imprisonment or the death penalty; and further that each juror understood the sentencing process, including the finding and weighing of aggravating and mitigating circumstances. The majority of defendant's questions which were sustained were argumentative, were incomplete statements of the law, or were impermissible staking-out questions, and while the prospective jurors were not allowed to say how they would deal with "premeditated murder," they were required to state whether they could consider both a sentence of life imprisonment and a sentence of death with respect to first-degree murder. See *Skipper*, 337 N.C. at 19, 446 S.E.2d at 261. Each individual juror answered affirmatively and positively that he or she could consider a sentence of life impris-

onment in this first-degree murder case. While some of the questions which defendant attempted to ask were proper under *Morgan* and *Conner*, we conclude that any error in excluding them was rendered harmless through the examination by the trial court, the State and further examination by the defendant revealing that each "prospective juror was willing to consider a life sentence in the appropriate circumstances." *Conner*, 335 N.C. at 644-45, 440 S.E.2d at 841.

We find that the *voir dire* in the instant case was fully sufficient to serve its purpose of enabling counsel for the State and the defendant to determine whether grounds exist for challenge for cause and to exercise peremptory challenges intelligently. *Allen*, 322 N.C. at 190, 367 S.E.2d at 633. We conclude that the *voir dire* of each seated juror consisted of questions which reveal the essence of a *Morgan* inquiry, and that the State has shown any error to be harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988).

[2] Defendant next argues under this assignment of error that the trial court impermissibly imposed further limits upon him, in violation of the rationale of both *Morgan* and *Conner*, by sustaining objections to a variety of questions to potential jurors on *voir dire* relating to whether they could properly consider aggravating and mitigating circumstances. The defendant contends these rulings by the trial court violated his basic due process right to be tried by a fair and impartial jury.

Defendant sets forth twenty-five questions to which the trial court sustained the State's objections. It is defendant's sole contention that each of these twenty-five questions was improperly disallowed under *Morgan* and *Conner*. Several representative questions include:

> Q. Do you think that the punishment that should be imposed for anyone in a criminal case in general should be effected [sic] by their mental or emotional state at the time that the crime was committed?
>
> Q. . . . If you were instructed by the Court that certain things are mitigating, that is they are a basis for rendering or returning a verdict of life imprisonment as opposed to death and were those circumstances established you must give them some weight or consideration, could you do that?
>
> Q. Mr. Lawrence, in this case if there was evidence to support, evidence to show that the defendant was under the influence of a

mental or emotional disturbance at the time of the commission of the murder and if the Court instructed you that was a mitigating circumstance, if proven, that must be given some weight, could you follow that instruction?

Q. . . . If the Court advises you that by the preponderance of the evidence that if you are shown that the capability of the defendant to conform his conduct to the requirements of the law was impaired at the time of the murder, and the Court instructed you that was a circumstance to which you must give some consideration, could you follow that instruction?

Q. Do you believe that a psychologist or a psychiatrist can be successful in treating people with mental or emotional disturbance[s]?

Q. Do you personally believe, and I am talking about your personal beliefs, that if by the preponderance of evidence, that is evidence that is established, that a person who committed premeditated murder was under the influence of a mental or emotional disturbance at the time that the crime was committed, do you personally consider that as mitigating, that is as far as supporting a sentence of less than the death penalty?

Q. Now if instructed by the Court and if it is supported by the evidence, could you take into account the defendant's age at the time of the commission of the crime?

Q. Do you believe that you could fairly and impartially listen to the evidence and consider whether any mitigating circumstances the judge instructs you on are found in the jury consideration at the end of the case?

Upon review of each of these questions, we find that the majority were properly sustained as to form or as attempts to stake out or determine what kind of verdict a juror would render under certain named circumstances not yet in evidence. *See Skipper*, 337 N.C. at 23, 446 S.E.2d at 262; *State v. Yelverton*, 334 N.C. 532, 542, 434 S.E.2d 183, 188 (1993). However, assuming *arguendo*, that some of these questions should have been allowed under *Morgan*, any error in excluding them was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b). The trial court permitted questioning, for example, as to whether these jurors had any background or experience with mental problems in their families, or whether they had any bias against or problem with any mental health professionals, or whether they had

any experience with foster care. The trial court permitted adequate leeway in sufficient areas of questioning to enable the defendant to discern any prospective juror who harbored a latent bias against any type of evidence which defendant proposed to present in mitigation. The trial court, therefore, did not abuse its discretion in sustaining the objections to the questions specifically referenced. This assignment of error is overruled.

[3] In a related assignment of error, defendant contends that the trial court's excusal for cause of five potential jurors because of their opinions about the death penalty deprived defendant of his due process rights to a fair and impartial jury. Defendant contends these jurors were improperly excused in that their answers on *voir dire* showed they did not meet the standard for excusal under *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985), and defendant again asserts these rulings by the trial court were exacerbated by its refusal to give prospective jurors general, preliminary instructions as to the nature of a capital sentencing proceeding.

A prospective juror may properly be excused for cause when his or her views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52; *accord Green*, 336 N.C. at 158, 443 S.E.2d at 24. We have not added the further requirement that a trial court explain the process of a capital sentencing proceeding to a prospective juror before an excusal for cause can be proper. As noted above, in *Maynard*, 311 N.C. 1, 316 S.E.2d 197, we held that "[a]n understanding of the *process* under which this ultimate conclusion is reached should not affect one's *beliefs* as to whether he or she can, under any circumstances, vote to impose the death penalty." *Id.* at 9, 316 S.E.2d at 202; *accord Wilson*, 322 N.C. at 128, 367 S.E.2d at 596.

We have held that "a prospective juror's bias may, in some instances, not be provable with unmistakable clarity [and,] [i]n such cases, reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially." *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). Jury selection is within the sound discretion of the trial court. *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). We have further held that excusals for cause may properly include persons who equivocate or who state that although they

believe generally in the death penalty, they indicate that they personally would be unable or would find it difficult to vote for the death penalty. *See State v. Gibbs*, 335 N.C. 1, 436 S.E.2d 321 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994).

Upon review of the *voir dire* of each of these five potential jurors in light of the above principles, it is clear that all were properly excused for cause. Juror Bowman acknowledged that she did not know how she felt about the death penalty, that she did not know whether she could return a death sentence, and she even stated that she felt it would be impossible to return such a sentence. She then stated that she was undecided about her feelings, that she did not wish to judge the defendant, and that because she was undecided about her feelings on the death penalty, she could not be fair to either the defendant or the State. It is clear from this examination that this juror could not have followed the law.

The next challenged excusal was that of juror Weston, who stated that while she felt the punishment should fit the crime, she believed her profession as a health-care provider would affect her judgment. She stated she did not believe she could return a sentence of death even if it was appropriate. She concluded that under no circumstances could she vote for the death penalty. It is abundantly clear from this *voir dire* that this juror would not be able to follow the law.

Juror Lee stated that while she believed in the death penalty, she did not believe she could vote for the imposition of the death penalty. She admitted she could not follow the law and could not personally vote to impose the death penalty.

Juror Hatcher stated that she had personal beliefs against the death penalty and thought she would automatically vote against the imposition of the death penalty. When questioned by the trial court, she stated unequivocally that she would not vote for the death penalty under any circumstances.

Finally, juror Wyatt stated that although she believed there were times when the death penalty could be needed, she did not want to be the one making that decision. She stated she would have a problem returning a death sentence even if she thought the evidence and the law supported such sentence. She equivocated as to whether she could return such a sentence, and after stating it would be hard for her to return a death sentence, she concluded she really felt she could not vote for the death penalty under any circumstances. Defense

counsel attempted to rehabilitate this juror, but she stated she would stand by what she had said to the judge, that she did not think she could give the death penalty.

It is abundantly clear from the responses of each of these jurors that their personal beliefs substantially impaired their ability to follow the law under the *Witt* standard, and the trial court correctly allowed the challenge as to each for cause. This assignment of error is overruled.

SENTENCING ISSUES

In his next assignment of error, defendant argues that the trial court erred by not peremptorily instructing the jury on the statutory and nonstatutory mitigating circumstances which he contends were uncontroverted. Defendant submitted a general request for a peremptory instruction as to all mitigating circumstances. There was no separate request as to each. The mitigating circumstances submitted to the jury were composed of five statutory circumstances, sixteen nonstatutory circumstances, and the catchall circumstance.[1] The trial court gave a peremptory instruction only on the statutory mitigating circumstance that defendant "aided in the apprehension of another capital felon." N.C.G.S. § 15A-2000(f)(8) (Supp. 1994). We conclude that with respect to the other statutory mitigating circumstances submitted, it was not error for the trial court to refuse to peremptorily instruct, since the evidence relating to these circumstances was not uncontroverted. With respect to the nonstatutory mitigating circumstances, the proffered peremptory instruction called for an incorrect application of the law, and the trial court properly refused to give it.

The trial court is required to give a peremptory instruction, if the defendant so requests, when evidence showing that the mitigating circumstance exists is uncontroverted. *See State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979). The five statutory mitigating circumstances submitted to the jury were whether: the defendant had no significant history of prior criminal conduct; the murder was committed while the defendant was under the influence of a mental or emotional disturbance; the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law

1. Of the five statutory mitigating circumstances, two were found to exist by one or more members of the jury. Of the sixteen nonstatutory mitigating circumstances, eleven were found to exist by one or more members of the jury. The catchall mitigating circumstance was not found to exist by any member of the jury.

was impaired; the age of defendant at the time of the murder was mitigating; and the defendant aided in the apprehension of another capital felon.

[4] Regarding the statutory mitigating circumstance that defendant had no significant history of prior criminal activity, the record of the case reveals that defendant's previous criminal convictions consisted of carrying a concealed weapon, contributing to the delinquency of a minor, and larceny. We have held "it is not merely the number of prior criminal activities, but the nature and age of such acts that the trial court considers in determining whether by such evidence a rational juror could conclude that this mitigating circumstance exists." *State v. Artis*, 325 N.C. 278, 314, 384 S.E.2d 470, 490 (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). It is clear from this evidence of defendant's record that in considering the nature of the offenses and the age of the acts, the jury had ample basis to find that defendant's prior criminal activity was significant. It was, therefore, proper for the trial court to leave the determination of this statutory mitigating circumstance to the jury rather than to give a peremptory instruction.

[5] Regarding the circumstances of whether the murder was committed while the defendant was under the influence of a mental or emotional disturbance and whether defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, defendant maintains that the testimony of his psychological expert, Dr. Claudia Coleman, as well as his evaluation at Dorothea Dix Hospital, point, without contradiction, to the conclusion that these two mitigating circumstances exist. We are not so persuaded.

Defendant's detailed, written confession shows he was able to contemplate and plan the robbery and murder of Reverend Darter over a two-day period. After he had determined to kill Reverend Darter, he waited until dark to approach the house and once inside, instructed that the drapes be closed and that the telephone lines be cut. Defendant was able to select and choose his various murder weapons. Furthermore, Dr. Coleman, on cross-examination by the State, indicated that defendant's actions showed a plan, rather than impulse, to rob and kill Reverend Darter. Although Dr. Coleman diagnosed defendant as suffering from ADHD, this diagnosis was made several years after the murder, and cross-examination of this witness

revealed that at least three other mental health professionals who evaluated defendant did not share Dr. Coleman's opinion that defendant had ADHD. With respect to the N.C.G.S. § 15A-2000(f)(6) mitigator, defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, we note defendant concedes his evidence shows he did have capacity to understand the wrongfulness of his conduct and requested that only his capacity to conform his conduct be submitted to the jury. Thus, the record reflects the evidence overall is sufficient to put in controversy the existence of the mitigating circumstances that defendant suffered from a mental or emotional disturbance at the time of the murder, and that his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. The trial court correctly refused to give a peremptory instruction as to these mitigating circumstances.

[6] Regarding the age of defendant as a mitigating circumstance, the jury was instructed that while defendant was twenty-one at the time of the murder, the mitigating effect of his age must be evaluated in light of "all of the facts and circumstances which you find from the evidence." It is clear from this instruction that the jury was directed to consider and evaluate for mitigating effect defendant's chronological age in light of all the evidence of record, including that relevant to his age and maturity. The evidence here shows that at the time of the murder, defendant was soon to become a father, he had held several employment positions, he had a criminal background, and he was over the age of majority. From this background, if found from the evidence and evaluated in light of "all of the facts and circumstances," a reasonable juror could conclude that the defendant was immature, or that he was mature beyond his years. As this Court held in *State v. Turner*, 330 N.C. 249, 268-69, 410 S.E.2d 847, 858 (1991), the jury was not required to accept that defendant's age had mitigating value where the evidence showed defendant was twenty-two years old, had a bad childhood, had maintained employment, and had a previous criminal history.

Where defendant's age is requested as a mitigating circumstance and is submitted to the jury, it is the province of the jury, upon evaluation in light of all other facts and circumstances found from the evidence, to determine whether defendant's age should be "found" as a circumstance of mitigating value. *See State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577

(1991). Here the jury concluded it should not, and so did not, "find" this circumstance to exist. "Because the legislature has determined that the statutory circumstance has mitigating value, the effect of a peremptory instruction on a *statutory* mitigating circumstance is to remove the question of whether the circumstance has mitigating value." *Id.* at 60, 381 S.E.2d at 669. The requested peremptory instruction as to age was properly denied.

Therefore, as to four of the five statutory mitigating circumstances submitted, we hold that the trial court properly denied defendant's request for a peremptory instruction. The trial court gave a peremptory instruction on the fifth circumstance.

[7] We next consider whether it was error for the trial court to refuse to peremptorily instruct the jury upon the nonstatutory mitigating circumstances. At the charge conference, defendant proffered the following peremptory instruction: "([S]ince all of the evidence shows that) (read the mitigating circumstance) I hereby instruct you that you must (answer this mitigating factor 'yes' and—if peremptorily instructed) consider this factor in the defendant's favor in mitigation against the death penalty." We conclude that the proffered instruction was wholly inappropriate for nonstatutory mitigating circumstances. We have stated:

> [A]s to a proffered *nonstatutory* mitigating circumstance—unlike statutory ones—the jurors must first find whether the proffered circumstance exists factually. Jurors who find that a nonstatutory mitigating circumstance exists are then to consider whether it should be given any mitigating weight. Thus, a juror may find that a nonstatutory mitigating circumstance exists, but may give that circumstance no mitigating value.

Green, 336 N.C. at 173, 443 S.E.2d at 32 (citations omitted). Jurors must remain free to assign no mitigating value to a nonstatutory mitigating circumstance should they so choose, even if they find the circumstance exists in fact. In contrast, defendant's proposed instruction *required* jurors to assign some amount of mitigating value to the nonstatutory mitigating circumstances.

We conclude that defendant's proposed instruction called for an incorrect application of the law with respect to nonstatutory mitigating circumstances, and the trial court correctly refused to give it. This assignment of error is overruled.

[8] In his next assignment of error, defendant argues that the trial court denied him due process of law by declining to instruct the jury, according to his proposed instruction, that statutory mitigating circumstances proven by a preponderance of the evidence must be given some mitigating weight. Defendant argues this failure could have resulted in a finding by a juror that a statutory mitigating circumstance did not have mitigating value, thus depriving him of due process of law and the right to be free from cruel and unusual punishment.

Defendant's proposed instruction reads in part, "I will inform you as to whether that mitigating factor is a statutory mitigating circumstance and by law must be considered in the defendant's favor in mitigation of punishment if found to be proven . . . ." Assuming *arguendo*, that this proffered instruction is a correct statement of law, there is no error in the trial court's refusal to give defendant's exact instruction, since the trial court gave the proposed instruction in substance. *See Hill*, 331 N.C. at 420, 417 S.E.2d at 782.

The record shows that the trial court described each statutory mitigating circumstance submitted and instructed the jurors that "[i]f one or more of you finds by a preponderance of the evidence that this circumstance exists, you would so indicate by having your foreman write, 'yes,' in the space provided after this mitigating circumstance on the 'Issues and Recommendation' form." The trial court defined a "mitigating circumstance" in part as one "which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders." Jurors were further instructed that they "must weigh [in Issue Three] the aggravating circumstances against the mitigating circumstances," and in the instructions on Issue Four, they were told, "you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by one or more of you."

We find that the instructions given by the trial court imparted, in substance, the essence of defendant's proposed instruction. The instructions sufficiently informed the jurors that any statutory mitigating circumstance found to exist by one or more of them in Issue Two must be given weight in the determination of whether the aggravating circumstances outweigh the mitigating circumstances and whether the aggravating circumstances, so weighed against the mitigating circumstances, are sufficiently substantial to warrant the

imposition of the death penalty. Moreover, the instructions given are identical to the instructions we found to be free from error in *State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). As we noted in *Daniels*, "[t]hese instructions are in accord with the pattern jury instructions. We conclude that the instructions here were given in accordance with the law and that the jury was able to follow the instructions as they were given." *Id.* at 275, 446 S.E.2d at 318. So, too, do we conclude in the present case. This assignment of error is overruled.

[9] In defendant's next assignment of error, again relating to his age, defendant contends the trial court erred by refusing to give an instruction proffered by him on the statutory mitigating circumstance of age. N.C.G.S. § 15A-2000(f)(7).

The defendant requested the following instruction be given to the jury:

> The statutory mitigating circumstance relating to the age of the defendant is not limited to the defendant's chronological age at the time of the murder. You must also consider the defendant's mental or emotional age at the time of the offense.

We find that this requested instruction is an incorrect statement of the law, and therefore, it was not error for the trial court to refuse to give it. We have held that " '[a]ny hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances.' " *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)). Rather than encouraging the jury to look at varying conditions and circumstances in its consideration of whether the defendant's age is mitigating, defendant's proposed instruction more narrowly defined age by confining consideration to only mental and emotional age along with chronological age. Inasmuch as the proffered instruction dictated a set formula for determining whether the defendant's age had mitigating value, the trial court correctly declined to give this instruction and opted instead to instruct from the pattern jury charge permitting a broader consideration.

The trial court's charge on age was as follows:

> The fourth possible mitigating circumstance is consider whether the age of the defendant at the time of this murder is a

> mitigating factor. All of the evidence shows that the defendant's age was twenty-one at the time of the murder. 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.

This instruction does not limit the mitigating circumstance solely to chronological age. Rather, this instruction informs the jury that the mitigating effect of age is to be considered in light of "all of the facts and circumstances you find from the evidence." It permits the jury to consider such factors as the defendant's mental and physical maturity, experience, and prior criminal history as well as his chronological age in determining whether age is mitigating. *See Oliver*, 309 N.C. at 370, 307 S.E.2d at 333. We conclude the charge given did not limit inappropriately the mitigating concept of age as did defendant's proffered instruction. This assignment of error is overruled.

[10] Defendant next argues the trial court erred by several exclusions of allegedly relevant mitigating evidence, thus depriving him of his due process right to be free from cruel and unusual punishment.

Our capital punishment statute allows for evidence to be admitted at the separate sentencing proceeding which the trial court deems "relevant to sentence" or "to have probative value," including matters related to aggravating or mitigating circumstances. N.C.G.S. § 15A-2000(a)(3).

> The circumstances of the offense and the defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation; however, the ultimate issue concerning the admissibility of such evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation.

State v. Pinch, 306 N.C. 1, 19, 292 S.E.2d 203, 219, *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. Robinson*, 336 N.C. 78, 443 S.E.2d 306, *and by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988).

Under this assignment of error, defendant first contends that the exclusion of testimony concerning the events necessitating defendant's placement in the foster-care system and his biological parents' refusal to allow his adoption into a permanent and stable family was error.

Social worker Joan Landreth testified for defendant that according to DSS records, defendant was placed in foster care when he was ten days old. The trial court, however, would not permit Landreth to testify that the reason precipitating defendant's placement in foster care was his mother's physical abuse of defendant's older brother.

We find that while certainly tragic, any abuse defendant's brother received at the hands of their mother has no relevance to the mitigation of defendant's crime. *See Robinson*, 336 N.C. at 115, 443 S.E.2d at 324 (father's treatment of defendant's sisters is not relevant to mitigation of defendant's crime). Thus, the trial court correctly excluded the evidence, as it was not relevant to sentencing. N.C.G.S. § 15A-2000(a)(3).

Landreth also was not permitted to testify that defendant's biological parents refused to allow him to be adopted. She was not allowed to testify about the conversations she had with defendant concerning adoption. Here again, the reasoning behind defendant's continued placement in the foster-care system, that his parents refused to allow his adoption, is irrelevant to defendant's sentencing proceeding. What is of import, however, is the *effect* this continued placement had upon defendant's life. We note that one or more jurors found as a nonstatutory mitigating circumstance that "the defendant's development was adversely affected by the lack of permanence in his life that was the result of frequent changes of placement in different foster homes and frequent changes in schools." This circumstance was not found in a vacuum, but rather from evidence before the jury, and it reflects the relevant fact of how the lack of permanence in defendant's life negatively affected him. We find no error in the exclusion of the proffered evidence.

[11] Second, defendant argues Landreth was improperly kept from rendering an expert opinion on defendant's emotional or mental disturbance. He also contends pertinent rebuttal evidence was improperly disallowed.

Landreth earned a bachelor's degree in education and had taken a few courses in psychology. At the sentencing proceeding, the trial court accepted her as an expert in matters of child placement and permanency planning. Landreth was not allowed to testify that defendant had suffered from an emotional or mental disturbance since childhood, that he was so afflicted at the time of the murder, and that his disorders stemmed, in part, from his untreated hyperactivity and his frequent movement between foster families.

Assuming, without deciding, that it was error for the trial court to exclude this testimony, we conclude that the excluded testimony would have been merely cumulative. The record of the case reveals that defendant was allowed to present the same evidence through Dr. Coleman, defendant's expert witness, who was accepted by the trial court as an expert in clinical, forensic and neuropsychology. Dr. Coleman testified that, in her expert opinion, defendant began suffering from ADHD at the age of five, and that his ADHD was severe at the time of the murder. She further related to the jury that defendant's situation in foster care had a negative impact on his ADHD. Therefore, since defendant successfully elicited the same testimony through another witness clearly qualified in the field, we conclude that any error in excluding Landreth's testimony was harmless beyond a reasonable doubt.

[12] Defendant further contends he was not allowed to present evidence in rebuttal to the State's contentions that defendant was an aggressive and dangerous person. During the course of Landreth's testimony, defendant sought to ask if she was "at any time afraid or fearful of being harmed by Perry [sic] Simpson when alone with him." Landreth was able to answer that she was not, but the trial court sustained the State's objection and instructed the jury not to consider the answer. The jury is assumed to have followed this instruction. However, our further review of the record reflects that the information would have been cumulative. Landreth was then allowed to testify that she would drive defendant back and forth to summer school, that "Perry [sic] was a very enjoyable child to be with," and that he "had a terrific sense of humor for a young person." From this evidence, it is quite clear that Landreth was not only unafraid of defendant, but rather enjoyed his company when they were together. Since defendant received the benefit of at least the equivalent of the excluded testimony, we conclude any error was harmless beyond a reasonable doubt.

[13] Third, defendant argues that several portions of Dr. Coleman's testimony were improperly excluded. Although accepted as an expert in clinical, forensic and neuropsychology, the trial court refused to allow Coleman to testify concerning her opinion as to whether most people who commit violent crimes suffer from mental or emotional disorders. We conclude that whether or not other defendants, or criminals in general, suffer from mental or emotional disorders has no relevance to the jury's determination of this particular defendant's sentence. N.C.G.S. § 15A-2000(a)(3).

[14] Likewise, the trial court refused to allow Dr. Coleman to testify as to what the proper treatment for defendant's ADHD would be. Defendant's offer of proof reveals that Dr. Coleman was of the opinion that defendant required a highly structured environment, along with medication, to alleviate his ADHD. Here again, any error was harmless beyond a reasonable doubt, since the excluded evidence would have been cumulative. The jury heard evidence through Dr. Coleman that people with ADHD need structure and consistency, and that medication was often necessary in severe cases. She classified defendant as having severe ADHD. Thus, defendant did receive the benefit of the excluded testimony.

Dr. Coleman was further prevented from testifying as to whether defendant's condition would improve if he was to continue living in prison. Even assuming the trial court erred in refusing this testimony, the error was harmless beyond a reasonable doubt, as there was testimony before the jury showing that defendant's behavior improved when he was in a structured environment. Indeed, one or more jurors found the nonstatutory mitigating circumstance that "defendant's behavior has improved during times when he was in a structured environment." The excluded testimony would have been cumulative.

[15] Fourth, defendant argues it was error for the trial court to disallow evidence that his accomplice, Stephanie Eury, received a life sentence. We have held that a jury is not entitled to consider, as mitigating, a codefendant's sentence for the same offense. *State v. Ward*, 338 N.C. 64, 449 S.E.2d 709 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 1013 (1995). We decline to depart from this precedent and reiterate that such information deals with matters unique to another person and does not in any way reflect upon defendant's character, record, or background. It is, accordingly, irrelevant as to sentencing. *Lockett v. Ohio*, 438 U.S. 586, 604 n.12, 57 L. Ed. 2d 973, 990 n.12 (1978).

[16] Fifth, defendant asserts that because the State was allowed to argue that the jury should weigh his conviction of robbery with a dangerous weapon as an aggravating circumstance in favor of the death penalty, he should have been allowed to show in rebuttal that he received a forty-year sentence as punishment for his robbery conviction. Defendant acknowledges he is aware of our holding in *State v. Robinson*, 336 N.C. at 106, 443 S.E.2d at 319, that a defendant may not introduce evidence of sentences imposed for offenses arising out of the same transaction as the murder, as such evidence puts before the

jury the irrelevant issue of parole. We were not persuaded in *Robinson* that same-transaction sentencing evidence was available to a defendant in order to rebut the State's use of the attendant crimes as evidence of aggravating circumstances. *Id.* However, defendant urges that *Simmons v. South Carolina*, 512 U.S. ——, 129 L. Ed. 2d 133 (1994), requires us now to reverse our holding in *Robinson*. We do not find that *Simmons* dictates such a result, since under the facts of that case, the defendant was clearly not eligible for parole. *Simmons* is, therefore, inapplicable to the facts here. We conclude that *Robinson* remains determinative of this issue.

After careful consideration, we find each of defendant's arguments under this assignment of error to be without merit.

[17] In his next assignment of error, defendant contends the trial court erred by permitting the State to improperly cross-examine Dr. Coleman concerning the diagnoses of other mental health professionals. These diagnoses were contained within reports upon which Dr. Coleman relied. This cross-examination, defendant argues, resulted in a violation of his constitutional right to confrontation.

At this third capital sentencing proceeding, Dr. Coleman testified she was contacted concerning an evaluation of defendant in 1989, some five years after the murder. It was Dr. Coleman's opinion that defendant suffered from ADHD at the time of the murder, and that he had in fact been so afflicted since childhood. On cross-examination, Dr. Coleman was asked if she reviewed defendant's prior medical and psychiatric evaluations. She replied that she had, and she also indicated that she had relied on the information contained within these evaluations in formulating her own diagnosis. The State proceeded to question Dr. Coleman concerning the fact that while she had diagnosed defendant as having ADHD, no other psychiatrist who previously evaluated defendant had reached the same determination. Defendant claims this is an impermissible attempt to put before the jury substantive evidence without allowing the defendant the chance to challenge the adverse information.

Rule 705 of the Rules of Evidence provides in part:

> 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.

N.C.G.S. § 8C-1, Rule 705 (1992). In *Allen*, 322 N.C. 176, 367 S.E.2d 626, we considered the application of Rule 705 to a situation analogous to the one presently before us. In *Allen*, the defense's expert witness relied upon material in a prior psychiatric report, yet the expert witness disagreed with the ultimate diagnosis in this report and formed his own. We reasoned that cross-examination by the State concerning the previous, differing diagnosis was proper, as Rule 705 provides for cross-examination on the underlying facts and data used by an expert in reaching his expert opinion. As the record disclosed, the expert did indeed rely upon the prior report though he rejected the diagnosis, and cross-examination as to the different diagnosis was proper. *Id.* at 183, 367 S.E.2d at 629-30.

Turning to the instant case, we find *Allen* dispositive of this issue. It was not necessary, as defendant argues, for Dr. Coleman to rely on the actual, differing diagnosis. Pursuant to Rule 705, Dr. Coleman was properly cross-examined about other diagnoses contained within psychiatric reports upon which she relied, although she ultimately formed a differing diagnosis. This assignment of error is overruled.

[18] In defendant's next assignment of error, he contends the trial court erred by instructing the jury in accord with the pattern jury instructions on reasonable doubt, with respect to aggravating circumstances and the statutory questions required for a death sentence, and on preponderance of the evidence, with respect to mitigating circumstances.

The trial court instructed the jury on reasonable doubt as follows:

> A reasonable doubt members of the jury is a doubt based upon reason and common sense arising out of some or all of the evidence that has been presented or the lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you . . . .

Defendant contends that the last sentence of the charge on reasonable doubt diminishes the State's burden of proof and enables jurors to find aggravating circumstances and issues required for a death sentence by evidence less than that required by the "beyond a reasonable doubt" standard. It is the words "fully satisfies" that defendant finds particularly offensive, and he contends their presence renders the

entire charge vague and subjective such that it violates the North Carolina and United States Constitutions.

This particular instruction, including the last sentence, has been found to pass constitutional muster many times by this Court. *State v. Jones*, 336 N.C. 490, 445 S.E.2d 23 (1994); *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), *cert. denied*, —— U.S. ——, 122 L. Ed. 2d 136, *reh'g denied*, —— U.S. ——, 122 L. Ed. 2d 776 (1993). We perceive no way in which the jury could have reasonably viewed or construed the words "fully satisfies" within this instruction in such a manner as to lessen the State's burden or leave "the matter entirely to the subjective judgment of each juror." Defendant's argument does not persuade us to change our previous holdings.

With respect to the charge on preponderance of the evidence, defendant complains the trial court erred in instructing the jury as follows:

> Now the defendant has the burden of persuading you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence, taken as a whole must satisfy you—not beyond a reasonable doubt, but simply satisfy you—that any mitigating circumstance exists.

Defendant asserts this instruction is both subjective and vague. Defendant proposes instead that the jury should have been instructed, in accord with the pattern instruction for civil cases, that defendant bore his burden by the "greater weight of the evidence" and by evidence that makes a fact "more likely than not to exist."

We have previously held that "by the preponderance of the evidence" is the correct burden of proof for establishing the existence of mitigating circumstances. *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 292 (1995). We have also previously determined that a trial court's use of the word "satisfy" "denotes a burden of proof consistent with a preponderance of the evidence." *Payne*, 337 N.C. at 533, 448 S.E.2d at 109. This argument does not offend the Due Process Clause, is without merit, and is overruled.

PRESERVATION ISSUES

[19] Defendant brings forward four issues for preservation purposes. First, defendant argues that the definition of the aggravating circum-

stance that the murder was "especially heinous, atrocious, or cruel," N.C.G.S. § 15A-2000(e)(9), is vague and overbroad, both on its face and as applied. We have consistently rejected this argument. *State v. Ingle*, 336 N.C. 617, 445 S.E.2d 880 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 222 (1995).

[20] Second, defendant contends the trial court erred by using the pattern jury instruction defining mitigating circumstances in that the pattern instruction improperly focused on matters which would reduce the culpability of the killing, instead of focusing on both the killing and defendant himself. We have previously rejected this claim. *Robinson*, 336 N.C. at 121, 443 S.E.2d at 327.

[21] Third, defendant asserts that the trial court erred by refusing to instruct the jury that, pursuant to N.C.G.S. § 15A-2000(b), if it failed to agree on a sentencing recommendation within a reasonable amount of time, the trial court would impose a life sentence. We have consistently held that such an instruction is improper, as it tends to encourage jurors to avoid their responsibility to try to reach a unanimous recommendation, if that can be done without injury to the conscience. *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991); *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986); *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985).

[22] Fourth, defendant contends that the trial court's instructions on the nonstatutory mitigating circumstances were violative of the North Carolina and United States Constitutions as they limited the jury's consideration of mitigation. We have rejected this argument before, as the Constitutions do not require that jurors accept whatever a defendant chooses to proffer as being, in fact, mitigating. *Robinson*, 336 N.C. at 117, 443 S.E.2d at 325.

[23] Defendant also presents another issue which he should have treated as a preservation issue. Defendant contends the trial court improperly refused to allow him to question potential jurors on *voir dire* concerning their attitudes or understanding regarding parole eligibility and to inform the potential jurors that defendant would be ineligible for parole for twenty-seven years. "[E]vidence about parole eligibility is not relevant in a capital sentencing proceeding because it does not reveal anything about defendant's character or record or about any circumstances of the offense." *Payne*, 337 N.C. at 516, 448 S.E.2d at 99; *accord State v. Miller*, 339 N.C. 663, 455 S.E.2d 137, *reh'g*

denied, 340 N.C. 118, 458 S.E.2d 183, *cert. denied*, — U.S. —, — L. Ed. 2d —, 64 U.S.L.W. 3247 (1995). Despite defendant's argument to the contrary, *Simmons v. South Carolina* "does not affect our position on this issue when, as here, the defendant remains eligible for parole if given a life sentence." *Miller*, 339 N.C. at 676, 455 S.E.2d at 144.

Upon careful review of these preservation issues, we find no reason to alter or reverse our previous holdings and conclude that each issue is altogether without merit.

[24] Finally, defendant asserts that the standards set by this Court for proportionality review, mandated by N.C.G.S. § 15A-2000(d)(2), are vague and arbitrary to the extent they deprive defendant of his constitutional rights "to notice, effective assistance of counsel, due process of law and to be free from cruel and unusual punishment." This broad assertion is basically encompassed in the argument that, while not constitutionally mandated, our statutorily required review creates "a liberty interest" which is entitled to procedural due process against arbitrary application. *Board of Pardons v. Allen*, 482 U.S. 369, 96 L. Ed. 2d 303 (1987). Defendant argues that, in several respects, the manner in which this Court conducts proportionality review is arbitrary "or undefined" in that it allows for the application of different standards to each case. Defendant requests that we delay proportionality review in this case until after we schedule and conduct a hearing on proposals for this Court's "creation of guidelines for its proportionality review of death cases."

Defendant suggests several deficiencies, including assertions that cases remanded for new sentencing in which life sentences were then returned are not included in the pool of cases; that it is unclear whether the Court is making factual findings or relying on findings made by the jury; that cases involving premeditated murders are treated in some instances as more serious than felony murders; that the Court looks only at aggravating and not mitigating circumstances; and that, hypothetically, if the Court makes certain assumptions when considering a case in the pool, then that arbitrarily skews the balance against defendant. Upon consideration, we find all of the deficiencies defendant argues apply to be without merit.

This Court first explained the makeup of the pool of cases used for review in *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983), and we there clarified the purpose, methodology

and focus of the review, i.e., the equivalency of sentences in roughly "similar cases," considering both the crime and the defendant. It has long been clear that this Court does more than merely reweigh the aggravating and mitigating circumstances found by the jury, but searches the record for the nuances of each particular case. *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). We recently clarified the pool at length in *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995), where we determined that cases in which the sentence of death was affirmed by this Court on direct appeal, in which a post-conviction proceeding resulted in a ruling that the State could not prosecute the defendant for first-degree murder or in a retrial at which the defendant is acquitted or found guilty of a lesser-included offense, would no longer be in the pool. We have further determined that cases in which a life sentence is given on resentencing will be included in the pool for review. *Id.* Therefore, the pool is not arbitrarily skewed in favor of death-affirmed cases.

It would appear defendant seeks to change our established and well-defined procedure for review into a precise set of "guidelines" for statistical review, the very process which we expressly declined to follow in *Williams*, wherein we said:

> We do not propose to attempt to employ mathematical or statistical models involving multiple regression analysis or other scientific techniques, currently in vogue among social scientists, which have been described as having "the seductive appeal of science and mathematics." The factors to be considered and their relevancy during proportionality review in a given capital case are not readily subject to complete enumeration and definition. Those factors 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 (citation omitted). Counsel for any capitally tried defendant should well know from our case law the manner in which we undertake proportionality review.

Defendant presents no basis to find this Court's standards or procedures for proportionality review deficient in any respect. We conclude there is substantially less basis for any such assertions now than when they were first raised and rejected by this Court in *Pinch*, 306 N.C. 1, 292 S.E.2d 203.

This assignment of error is overruled.

PROPORTIONALITY REVIEW

[25] Having found no error in the sentencing phase, it is now our duty to consider 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 trial court submitted two aggravating circumstances to the jury: that the murder was committed while defendant was engaged in the commission of a robbery, 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). The jury found both aggravating circumstances to exist. We conclude that the jury's finding of each of the aggravating circumstances was supported by the evidence. We further conclude that the jury did not sentence defendant to death while under the influence of passion, prejudice, or any other arbitrary factor.

We now turn to our final statutory duty and determine whether the sentence of death in this case is excessive or disproportionate. One purpose of proportionality review "is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Another is to guard "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 in the pool, defined in *State v. Williams*, 308 N.C. at 79-80, 301 S.E.2d at 355 and *State v. Bacon*, 337 N.C. at 106-07, 446 S.E.2d at 563-64, as those that "are roughly similar with regard to the crime and the defendant." *Lawson*, 310 N.C. at 648, 314 S.E.2d at 503. Ultimately, whether the death penalty is determined to be disproportionate "rest[s] upon the 'experienced judgments' of the members of this Court." *Green*, 336 N.C. at 198, 443 S.E.2d at 47.

This Court has determined that the sentence of death was disproportionate in seven cases: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v.*

Hill, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). The present case is, however, distinguishable from each.

In *State v. Benson*, the defendant robbed the victim and shot him in the legs. The victim died of cardiac arrest, and defendant was convicted of first-degree murder based solely upon the theory of felony murder. The only aggravating circumstance found by the jury was that the crime was committed for pecuniary gain. In determining the sentence to be disproportionate, this Court noted that it appeared defendant was simply attempting to rob the victim because he only fired at the victim's legs. 323 N.C. at 329, 372 S.E.2d at 523. By contrast, in the present case, defendant decided before he ever entered the house he would kill Reverend Darter and went about his purpose with the aid of belts, a bottle and a double-edged razor blade. Indeed, so gruesome was this murder that the jury found it was "especially heinous, atrocious, or cruel."

In *State v. Stokes*, the defendant, who was but seventeen, along with four other individuals robbed and beat the victim to death. Defendant was found guilty of first-degree murder under the theory of felony murder, and only one aggravating circumstance, that the crime was especially heinous, atrocious, or cruel, was found. This Court found the sentence of death disproportionate, in part, because only the defendant had received the death penalty. One of defendant's accomplices received a life sentence even though he "committed the same crime in the same manner." 319 N.C. at 27, 352 S.E.2d at 667. By contrast, in the present case, defendant's culpability was greater than that of his accomplice. It was defendant who wrapped two belts around Reverend Darter's neck; who beat the Reverend in the face with a glass bottle; and who, with a double-edged razor blade, sliced the Reverend's arms, seventeen inches on one arm and fourteen inches on the other. Although defendant's accomplice, Stephanie Eury, received a life sentence, she and defendant did not commit "the same crime in the same manner."

In *State v. Rogers*, the defendant was convicted of first-degree murder for mistakenly shooting the victim. Defendant had intended to shoot the victim's friend, with whom he was arguing. Only one aggravating circumstance was found, that "[t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or per-

sons." 316 N.C. at 234, 341 S.E.2d at 731. By contrast, in the present case, this killing was not a mistake, nor was it committed during an argument. Defendant took great care to wait until it was dark outside before he and his accomplice approached the victim's house. Defendant even took the precaution of ordering his accomplice to cut the telephone lines so that Reverend Darter could not call for help.

In *State v. Young,* the defendant, after drinking heavily all day, stabbed and robbed a man in order to buy more liquor. Defendant had two accomplices with him. The Court noted that in armed robbery cases where death is imposed, the jury has found the aggravating circumstance that the defendant was engaged in a course of conduct that included the commission of violence against another person and/or that the crime was especially heinous, atrocious, or cruel. 312 N.C. at 691, 325 S.E.2d at 194. Neither of these circumstances was found by the jury in *Young.* By contrast, in the present case, the jury found that Reverend Darter's murder was especially heinous, atrocious, or cruel.

In *State v. Hill,* the defendant shot a police officer while engaged in a struggle near defendant's automobile. This Court found the death sentence disproportionate based, in part, on the speculative nature of the evidence surrounding the murder and the apparent lack of motive. 311 N.C. at 479, 319 S.E.2d at 172. By contrast, in the present case, the evidence shows it was indeed the defendant who viciously murdered a ninety-two-year-old man for a lamp, a radio, a bag of food, boxes of Kleenex, and a plastic laundry basket.

In *State v. Bondurant,* the defendant pointed a gun at the victim and taunted him for some two to three minutes before finally shooting him. Of importance to the Court in finding the death sentence disproportionate was that defendant immediately secured medical attention for the victim, directing the driver of the car to the hospital. 309 N.C. at 694, 309 S.E.2d at 182-83. By contrast, in the present case, defendant did not seek medical attention for the retired preacher. Instead, defendant left Reverend Darter to die in his blood, tied to his bed.

In *State v. Jackson,* the defendant flagged down the victim's car, telling his companions that he intended to rob the victim. The victim was later found dead with two gunshot wounds to the head. This Court found the death sentence disproportionate because there was "no evidence of what occurred after defendant left with McAulay [the

victim]." 309 N.C. at 46, 305 S.E.2d at 717. By contrast, in the present case, the defendant confessed that, in fact, he killed Reverend Darter.

We are aware that juries have imposed life sentences in several robbery-murder cases. This fact nevertheless "does not automatically establish that juries have 'consistently' returned life sentences in factually similar cases." *Green*, 336 N.C. at 198, 443 S.E.2d at 47. This Court too has long rejected a mechanical or empirical approach to comparing cases that are superficially similar. *Robinson*, 336 N.C. at 139, 443 S.E.2d at 337.

We find that this case is similar in many respects to one case in particular in which we have found the sentence of death proportionate—*State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542. In *Bacon*, defendant plotted with his lover, Bonnie Sue Clark, to kill her estranged husband so they could share a total of $130,000 in life insurance proceeds. The two lured the victim into a car, and as they drove down the street, defendant stabbed the victim sixteen times with a knife he had earlier placed on the floor. Clark, who was driving the car, pulled into a parking lot, and defendant hit her head against the car window and instructed her to say that she and her husband had been robbed. Defendant then went home, showered and had a drink. *Bacon*, 337 N.C. at 108, 446 S.E.2d at 565. At the capital sentencing proceeding, the jury found the one aggravating circumstance submitted—that the murder was committed for pecuniary gain. One or more members of the jury also found the existence of nine mitigating circumstances—that defendant had no significant history of prior criminal activity; acted under the domination of another person; had no history of violent behavior; had character, habits, mentality, propensities and activities indicating that he was unlikely to commit another violent crime; had committed the murder as a result of circumstances unlikely to recur; had established that his codefendant, Bonnie Sue Clark, had received a life sentence; had shown remorse since his arrest; and had a family who loved him, continued to visit him while he has been incarcerated, and would continue to do so. The jury refused to find, among others, that the murder was committed while defendant was under the influence of a mental or emotional disturbance; that his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law was impaired; and that his age had mitigating value. *Id.* at 82-83, 446 S.E.2d at 549. The Court concluded that the sentence of death was not disproportionate in light of the calculated and brutal nature of the murder, "all for half of

the victim's rather meager insurance proceeds." *Id.* at 116, 446 S.E.2d at 570.

Likewise, in the present case, defendant schemed and plotted his attack upon an old and defenseless man who had welcomed defendant into his home and given him food and aid. Defendant lurked outside the house waiting for night to fall before he forced his way inside and mercilessly terrorized and tortured a man who only the day before had tried to help him. Just as the defendant in *Bacon*, this defendant's ability to appreciate the criminality of his conduct was not found to be impaired. In light of the fact that the victim befriended the defendant only the day before his murder, and the utterly brutal manner in which defendant murdered this elderly man, we find this murder to be even more callous than the murder in *Bacon*.

We conclude that defendant received a fair sentencing proceeding, free from prejudicial error. Further, after comparing this case to similar cases in which the death penalty was imposed and considering both the crime and the defendant, we cannot hold, as a matter of law, that the sentence of death was disproportionate or excessive.

NO ERROR.

STATE OF NORTH CAROLINA v. ERNEST PAUL McCARVER

No. 384A92

(Filed 8 September 1995)

1. Jury §§ 119, 145 (NCI4th)— capital trial—jury selection—views about psychological testimony—exclusion of question—peremptory challenge—absence of prejudice—questioning of other jurors not chilled

Defendant was not prejudiced when the trial court sustained the State's objection to defense counsel's question to a prospective juror in a capital trial as to whether he could consider psychological testimony as mitigating where defendant peremptorily challenged the juror and did not exhaust his peremptory challenges. Moreover, the trial court's ruling did not chill defendant's subsequent inquiry as to jurors' attitudes about psychological testimony where the record indicates that defendant was permitted

to question at least five other potential jurors about psychological evidence, and four of the five jurors were questioned after defendant used his peremptory challenge to excuse this juror.

Am Jur 2d, Jury §§ 199, 210.

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

Effect of accused's federal constitutional rights on scope of voir dire examination of prospective jurors—Supreme Court cases. 114 L. Ed. 2d 763.

2. Constitutional Law § 343 (NCI4th)— capital trial—special venire—excusal and deferral of jurors by district court—no right to presence by defendant

Defendant's constitutional and statutory rights were not violated when a district court judge excused and deferred persons selected for a special venire chosen specifically for defendant's capital trial outside the presence of defendant and his counsel since the pretrial screening process delegated to the district court by N.C.G.S. § 9-6(b) is not a part of the capital trial, and defendant's capital trial had not commenced and his unwaivable right to be present had not attached at the time the district court excused and deferred the prospective jurors.

Am Jur 2d, Criminal Law §§ 695, 914.

3. Criminal Law § 456 (NCI4th); Jury § 64 (NCI4th)— capital trial—informing jury of previous trial—no denial of fair trial

The prosecutor's statement during the jury selection process in a capital trial that "there has been a previous trial of this matter" did not tend to diminish the jurors' sense of responsibility for their verdict by suggesting that the verdict might be reviewed and thus did not deny defendant his right to a fair trial where the prosecutor's statement was made without elaboration as to how the new trial came about and with no comment on the result of the prior trial.

Am Jur 2d, Jury § 280; Trial § 574.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial

violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

4. Jury § 36 (NCI4th)— capital trial—rescission of order for special venire—no denial of constitutional or statutory rights

The trial court's rescission of its prior order which required that a special venire be summoned in Mecklenburg County to try defendant's capital case did not violate defendant's constitutional rights to a fair trial, due process and freedom from cruel and unusual punishment or his statutory right to a complete recordation of the proceedings in a capital case where the court rescinded its order because administrative support and physical facilities were not available in Mecklenburg County due to the trial of another capital case; defendant did not have an unwaivable right of presence at the jury selection proceedings which took place prior to his case being called for trial; and there is no indication that defendant ever requested that pretrial matters be recorded.

Am Jur 2d, Jury § 113.

5. Criminal Law § 113 (NCI4th)— violation of discovery order—denial of mistrial, new capital sentencing hearing

The trial court did not abuse its discretion in denying defendant's motion for a mistrial in his first-degree murder trial based on the State's violation of a discovery order by failing to furnish to defendant a written statement from defendant's brother to a police officer that related to defendant's belief that the victim was responsible for defendant's parole being revoked where the prosecutor discovered the existence of the statement only a day before seeking to use it at defendant's capital sentencing hearing, since the prosecution's conduct did not amount to such a serious impropriety as to make it impossible for defendant to receive a fair and impartial verdict. Furthermore, the trial court did not err in the denial of defendant's motion for a new capital sentencing hearing because the prosecutor asked defendant's brother about the statement during cross-examination at the sentencing hearing where the trial court sustained defendant's objection and instructed the jury to disregard any reference to the statement.

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

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements

as to statements made by defendants or other nonexpert witnesses—modern cases. 33 ALR4th 301.

6. Constitutional Law § 313 (NCI4th)— no impasse between defendant and counsel—no tactical decisions contrary to defendant's wishes

The record in this capital trial does not show "an absolute impasse" between defendant and his defense team concerning trial tactics and that the trial court allowed defense counsel to make important tactical decisions that were contrary to defendant's wishes where defendant asked to speak to the court outside the presence of the jury; defendant then consulted privately with defense counsel, who thereafter stated that defendant "will not speak"; defense counsel then indicated that defendant's mental state was such that counsel was concerned that defendant might walk out of the proceeding and delay its progression; defense counsel informed the court that counsel "will not let [defendant] run this case" and that defendant "does not control the defense, he can make suggestions"; and at no time did defendant voice any complaints to the trial court as to the tactics of his defense counsel.

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

7. Criminal Law § 793 (NCI4th); Homicide § 583 (NCI4th)— instructions—acting in concert—mens rea

The trial court's instructions in a first-degree murder case did not allow the jury to apply the principle of acting in concert to convict defendant of specific intent crimes, including the underlying felony supporting felony murder, if it found that another perpetrator had the requisite *mens rea* to commit them. Rather, the instructions as a whole made it clear that defendant could have acted either alone or with another to commit the felony and that, in order to convict defendant, defendant himself must have had the requisite *mens rea*.

Am Jur 2d, Homicide § 507; Trial § 1255.

8. Homicide § 493 (NCI4th)— instructions—premeditation and deliberation—inference from lack of provocation—no expression of opinion—supporting evidence

The trial court's instruction that premeditation and deliberation may be inferred from a lack of provocation did not constitute an improper expression of opinion that the absence of provoca-

tion had been proven. Furthermore, this instruction was supported by the evidence tending to show that the victim was going about his ordinary duties at a cafeteria when he was accosted by defendant and his companion, grabbed by the neck, choked, thrown to the floor, and then stabbed to death.

Am Jur 2d, Homicide § 501.

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.

9. Criminal Law § 1329 (NCI4th)— capital sentencing—outcome determinative issues—unanimous "yes" or "no" answers

Any issue which is outcome determinative as to the sentence a defendant in a capital trial will receive—whether death or life imprisonment—must be answered unanimously by the jury; that is, the jury should answer Issues One, Three, and Four on the standard form used in capital sentencing proceedings either unanimously "yes" or unanimously "no." The requirement of jury unanimity for either "yes" or "no" answers for Issues One, Three, and Four ensures that the jury properly fulfills its duty to deliberate *genuinely* for a reasonable period of time in its efforts to exercise guided discretion in reaching a unanimous sentencing recommendation, as required by the Constitution of North Carolina and by our death penalty statute. Therefore, the trial court did not err by refusing to instruct the jury to answer "no" to Issue Three, thus recommending a sentence of life imprisonment, if it could not unanimously agree as to whether the mitigators were sufficient to outweigh the aggravators and by orally informing the jury in response to its inquiry that it must be unanimous before answering either "yes" or "no" to Issue Three.

Am Jur 2d, Criminal Law § 609; Trial §§ 1753, 1760.

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

10. Criminal Law § 1329 (NCI4th)— capital sentencing—misleading issues form—harmless error

Assuming that Issue Three on the form used in this capital sentencing proceeding and the trial court's initial instructions could be interpreted as improperly directing the jury to answer "no" to Issue Three if unable to reach unanimity, this error was harmless beyond a reasonable doubt because it was favorable to the defendant.

Am Jur 2d, Appellate Review § 743; Criminal Law § 609; Trial §§ 1753, 1760.

11. Criminal Law § 1321 (NCI4th)— capital sentencing—inability to reach unanimous verdict—instruction not required

Questions by the jury after it had begun deliberations in a capital sentencing proceeding did not constitute an inquiry as to what the result would be if the jury failed to reach a unanimous decision but merely sought guidance as to the procedure for giving an answer to Issue Three because the printed Issues and Recommendation as to Punishment form could be read as requiring the jury to answer that issue "no" if a single juror disagreed with the other eleven. Therefore, the trial court was not required to instruct the jurors that their inability to reach a unanimous verdict should not be their concern but should simply be reported to the court.

Am Jur 2d, Trial §§ 1109, 1110, 1441 et seq.

12. Criminal Law § 680 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—peremptory instruction—pattern instruction inappropriate

The trial court did not err by refusing to give the peremptory instruction set forth in N.C.P.I.—Crim. 150.11 for nonstatutory mitigating circumstances for which the factual predicate was uncontroverted since this pattern instruction is inappropriate for nonstatutory mitigating circumstances. The instruction given by the trial court complied with the requirement that, in order for a juror to find a nonstatutory mitigating circumstance, the juror must determine not only that the evidence supports the factual basis for the circumstance but also that the circumstance has mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599, 628.

13. Criminal Law § 109 (NCI4th)— personality test—defendant's inability to complete—expert's use in formulating opinion—discovery and cross-examination

Although defendant's expert did not score a personality test administered to defendant or interpret the entire test because defendant wasn't able to perform at a level that was scorable, the State was entitled to pretrial discovery of the test and to cross-examine defendant's expert about the test where the expert considered the answers defendant gave on the test and his inability to complete the test in formulating her opinion on defendant's psychological makeup. N.C.G.S. § 15A-905(b).

Am Jur 2d, Depositions and Discovery § 466.

Right of prosecution to pretrial discovery, inspection, and disclosure. 96 ALR2d 1224.

Right of prosecution to discovery of case-related notes, statements, and reports—state cases. 23 ALR4th 799.

14. Criminal Law § 1349 (NCI4th)— capital sentencing—statutory mitigating circumstance—request irrelevant

Whether defendant requested the submission of a statutory mitigating circumstance in a capital sentencing proceeding is of no importance because the trial court must submit the circumstance if it is supported by substantial evidence.

Am Jur 2d, Criminal Law §§ 598, 599, 628.

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

The trial court did not err by failing to submit the "no significant history of prior criminal activity" mitigating circumstance to the jury in a capital sentencing proceeding where the evidence tended to show that defendant had been convicted in 1981 of three counts of worthless checks and in 1984 of eight counts of felonious larceny and one count of forgery; at the age of four years, defendant and his brother were being hoisted into open windows by their parents to assist in the parents' burglary enterprise; after their parents were sent to prison, defendant and his brother, while living with their grandmother, began to steal to provide for their own subsistence; defendant contended that he abused drugs; and shortly before defendant murdered the victim

in this case, he talked to a coworker about his plan to write worthless checks for gold which he would pawn for cash.

Am Jur 2d, Criminal Law §§ 598, 599, 628.

16. Criminal Law § 1338 (NCI4th)— capital sentencing—aggravating circumstance—murder to avoid arrest—sufficient evidence

There was sufficient evidence in a capital sentencing proceeding to support the trial court's submission of the aggravating circumstance that the murder was committed to avoid a lawful arrest where the evidence showed that defendant robbed the victim and killed him to eliminate a witness who defendant felt would testify against him because "he had testified against him and sent him to prison before." Furthermore, the trial court's instruction that the jury should find this circumstance if it found beyond a reasonable doubt that defendant's purpose in killing the victim was "to avoid his arrest and that such arrest was lawful" was of sufficient particularity to enable the jury to understand the law and apply it to the evidence presented and thus did not constitute plain error.

Am Jur 2d, Criminal Law §§ 598, 599, 628; Trial § 841.

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.

17. Criminal Law § 1314 (NCI4th)— capital sentencing—defendant's prison record—exclusion of repetitious testimony

In a capital sentencing proceeding in which defendant's psychologist testified that defendant's prison record contained only one significant violation involving two homemade knives or "shanks" found in his locker, the trial court did not deny defendant a fair hearing by sustaining the State's objection to a question to the psychologist as to whether it was common for inmates in maximum security to have shanks where the witness had already answered this question by her testimony that defendant's violation was "not uncommon" among inmates in maximum custody facilities.

Am Jur 2d, §§ 598, 599.

18. Criminal Law § 1326 (NCI4th)— capital sentencing—mitigating circumstances—burden of proof—instructions—use of "satisfies"

The trial court's instruction that jurors could find a mitigating circumstance if the evidence "satisfies any one of you" of its existence did not increase defendant's burden of proof and was not plain error.

Am Jur 2d, Criminal Law § 628; Trial §§ 1441 et seq.

19. Criminal Law § 1323 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—instructions—mitigating value

The trial court did not err by instructing the jury to find and consider only the nonstatutory mitigating circumstances one or more jurors found to exist and to have mitigating value.

Am Jur 2d, Criminal Law § 628; Trial §§ 1441 et seq.

20. Criminal Law § 1325 (NCI4th)— capital sentencing—instructions—mitigating circumstances found by other jurors

The trial court did not err by failing to instruct the jury in a capital sentencing proceeding that the entire jury as a whole must consider and weigh any mitigating circumstances found by any juror in reaching its answers to Issue Three and Issue Four.

Am Jur 2d, Criminal Law § 628; Trial §§ 1441 et seq.

21. 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 defendant was convicted under theories of premeditation and deliberation and felony murder; the jury found as aggravating circumstances that the murder was committed while defendant was engaged in the commission of an armed robbery and that it was committed for the purpose of avoiding or preventing a lawful arrest; defendant planned and executed the robbery and murder of the seventy-one-year-old victim, who had befriended defendant when defendant worked at the cafeteria

where the crimes occurred; and defendant killed the victim so that the victim could not testify against him.

Am Jur 2d, Criminal Law § 628.

Justice FRYE concurring in part and dissenting in part.

Justice WHICHARD joins in this concurring and dissenting opinion.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Freeman, J., at the 8 September 1992 Special Criminal Session of Superior Court, Cabarrus County. Defendant's motion to bypass the Court of Appeals as to his robbery with a dangerous weapon conviction was allowed by the Supreme Court 8 February 1994. Heard in the Supreme Court 12 September 1994.

Michael F. Easley, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

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

MITCHELL, Chief Justice.

Defendant was indicted for the 2 January 1987 murder and robbery with a dangerous weapon of Woodrow F. Hartley. He was tried capitally at the 18 April 1988 Criminal Session of Superior Court, Cabarrus County, and was found guilty of both crimes. The jury recommended a sentence of death for the murder, and the trial court sentenced defendant accordingly. The trial court sentenced defendant to forty years in prison for the robbery with a dangerous weapon conviction. On appeal, this Court ordered a new trial on both charges, concluding that prejudicial error occurred when jurors were excused during the capital trial as a result of unrecorded bench conferences between the trial court and jurors in the absence of defendant and his counsel. *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991).

Defendant's second trial occurred at the 8 September 1992 Special Criminal Session of Superior Court, Cabarrus County, before a jury selected from a special venire from Rowan County. Defendant was again convicted of murder in the first degree and robbery with a

dangerous weapon. In a capital sentencing proceeding, the jury recommended and the trial court ordered a sentence of death for the murder conviction. The trial court also imposed a sentence of forty years' imprisonment for robbery with a dangerous weapon. Defendant now appeals to this Court.

Evidence presented by the State and defendant at the guilt-innocence and sentencing phases of defendant's trial tended to show the following facts and circumstances: Woodrow F. Hartley was killed on 2 January 1987. An autopsy revealed that Hartley suffered from a bruised neck, a scrape on his chin, a skin tear on his wrist, and three knife wounds to the chest. Dr. Robert L. Thompson, a forensic pathologist, testified that Hartley was alive at the time his neck was injured and that his death was caused by a stab wound which made a one-half inch incision in his aorta. Additionally, Dr. Thompson testified that Hartley had several fractured ribs on his left side which appeared to be caused by something consistent with a person's knees pressed against the ribs.

While working at K & W Cafeteria in Concord, North Carolina, defendant and his brother, Lee McCarver, met and were befriended by Woodrow Hartley. Defendant was sporadically employed at the cafeteria from September 1977 through June 1984. Defendant's usual job was to wash dishes.

On 1 March 1984, defendant was placed on probation for his conviction of eight counts of felonious larceny and one count of forgery. Shortly thereafter, defendant was sent to prison for violating his probation. Defendant believed that Woodrow Hartley, James O'Neal, or defendant's father was responsible for his probation being revoked.

In September 1986, defendant was employed by Shearin Roofing Company in Monroe. While employed with the roofing company, defendant often sought ways to get money. Defendant told coworkers about an old man who worked at K & W Cafeteria who would be an easy target to rob because he always arrived early in the morning to open the cafeteria. Additionally, defendant said the old man had a lot of money on him, especially near payday.

On the evening of 1 January 1987, defendant borrowed a knife from a fellow employee. Early the following morning, defendant and Jimmy Rape drove to Concord in defendant's brown Pontiac. At some time between 4:15 and 4:20 a.m. on Friday, 2 January 1987, defendant

was observed by a police officer traveling toward the Carolina Mall in Concord.

From his past employment, defendant was aware that the victim came to work early in the morning. On 2 January 1987, defendant and Rape entered through the rear entrance of the K & W Cafeteria shortly after Hartley arrived at 5:00 a.m. Defendant walked up to Hartley and talked to him for a few minutes. Rape grabbed Hartley from behind in a headlock and attempted to strangle him. Rape released Hartley, who was then grabbed by defendant in a headlock. When defendant let him go, Hartley fell to the ground. Defendant took a knife from his pants pocket and stuck it into Hartley's chest several times. Hartley died within minutes.

Gene Blovsky, an employee of the cafeteria, observed defendant's automobile parked near the back door of the cafeteria. He saw defendant emerge from behind a wall; defendant was carrying a knife, which he attempted to hide in his right hand. Next, Blovsky saw Hartley lying on the floor in the hallway with a spot of blood on his wrist. Blovsky saw another man near Hartley, realized what had happened, became frightened, and ran out the door. Blovsky then observed defendant and Rape as they left the cafeteria and drove off slowly in defendant's automobile.

Defendant and Rape went to David Shearin's residence at 7:00 a.m. on 2 January 1987 to receive their work assignments. Before going to their assigned job site, defendant and Rape pawned a 1902 silver dollar, which had been taken from the victim, for seven dollars at a Monroe pawn shop. Defendant and Rape were arrested by Monroe police at their assigned job site.

After the arrest, defendant and Rape were transported to the Concord Police Department in separate vehicles. Detective Dennis Andrade read defendant his rights. When asked whether he would answer questions without an attorney, defendant responded that he would and signed a waiver. Detective John Hatley was present with Detective Andrade when defendant gave his statement.

Initially, defendant did not give information pertaining to the murder of Hartley at the K & W Cafeteria. Detective Andrade then informed defendant that the police knew everything and that defendant's brother, Lee, had told the police that he had passed defendant while driving his automobile to the K & W Cafeteria. After speaking with his brother, defendant confessed to murdering Hartley.

Several days after defendant confessed to the crime, defendant's brother, Lee, was interviewed by Detective Andrade. Lee stated that after defendant had killed Hartley, defendant told Lee that he was going to the Kannapolis K & W Cafeteria to kill James O'Neal. Defendant said he felt that O'Neal was responsible for his probation being revoked.

Dr. Faye Sultan, a clinical forensic psychologist, testified as an expert regarding her examination and evaluation of defendant. Dr. Sultan's testimony was that defendant was diagnosed as suffering from borderline intellectual functioning with the intellectual and emotional capability of a ten- or twelve-year-old. Defendant had a history of acute depression throughout his life, leading to a diagnosis of dysthymia. Defendant had a substance and alcohol abuse disorder stemming from his childhood experiences. Additionally, defendant was diagnosed as having a personality disorder that was a direct consequence of sexual abuse as a child and a total lack of nurturing. Dr. Sultan also testified that defendant suffered from a mental and emotional disorder that affected his conduct and impaired his capacity to appreciate the criminality of his conduct and that he had a history of passive orientation and nonviolence. Dr. Sultan felt that defendant functioned well in a structured environment as demonstrated by his record while in custody. Additionally, Dr. Sultan testified that defendant suffered greatly from having been emotionally neglected.

On the murder charge, the jury was instructed that it could find defendant guilty of first-degree murder, guilty of second-degree murder, or not guilty. On the robbery charge, the jury was instructed that it could return a verdict of guilty of robbery with a dangerous weapon or not guilty. The jury returned verdicts of guilty of first-degree murder (under theories of premeditation and deliberation and of felony murder) and guilty of robbery with a dangerous weapon.

In seven assignments of error, defendant contends that errors made by the trial court during the jury selection and guilt determination phases entitle him to a new trial. As to each of these assignments of error, defendant contends that both his federal and state constitutional rights were violated. While defendant couches all of his assignments of error in constitutional terms, many of them involve only a question of whether a particular statute or rule of law was followed by the trial court in its rulings. As to each of these assignments of error, a determination that the particular statutes or rules of law have

not been violated resolves any possible question of a constitutional violation.

[1] In defendant's first assignment of error, he contends that the trial court committed reversible error in sustaining objections to his questions of a prospective juror regarding the juror's views about defendant's mental impairments and psychiatric testimony. Defendant argues that his questions were proper under the law and were designed to enable him to select an impartial jury and make intelligent use of his peremptory challenges. Defendant contends that the restrictions on his inquiries violated his federal and state constitutional rights to due process of law and freedom from cruel and unusual punishment. We conclude that the trial court did not unduly restrict defendant's inquiries regarding the juror's views; therefore, defendant's federal and state constitutional rights were not violated.

It is well established that both the State and defendant are entitled to a fair and unbiased jury. "[T]he primary purpose of the *voir dire* of prospective jurors is to select an impartial jury." *State v. Lee*, 292 N.C. 617, 621, 234 S.E.2d 574, 577 (1977).

The focus of defendant's argument is the *voir dire* examination of potential juror Danny Burton by defense counsel. The following colloquy occurred:

> MR. GROSSMAN: I'm not sure I understand now. Let me make sure I understand. I believe you said that everybody who commits first degree murder—
>
> JUROR BURTON: Premeditated.
>
> MR. GROSSMAN: . . . premeditated murder should receive the death penalty—
>
> JUROR BURTON: Yes.
>
> MR. GROSSMAN: . . . period.
>
> JUROR BURTON: Period.
>
> MR. GROSSMAN: No matter what they show as the mitigating factors.
>
> JUROR BURTON: Okay, I understand that. No, that shouldn't. I understand what you're saying now.
>
> MR. GROSSMAN: Can you explain why you've sort of changed? Maybe you don't understand. Maybe I don't understand, that's not unusual either.

JUROR BURTON: Well, it's just my opinion that a premeditated murder should be—you know—is a capital crime which should be punishable by death; but there are extreme circumstances, I reckon, or mitigating factors that would say, you know, that it's not justified punishment.

MR. GROSSMAN: Let me ask you this: Would you be able to consider—we asked this question earlier—what type of mitigation would you require in order to consider a life sentence?

MR. KENERLY: Objection.

THE COURT: Sustained.

MR. GROSSMAN: Would you be able to consider psychological testimony about Mr. McCarver himself as mitigating?

MR. KENERLY: Objection.

THE COURT: Sustained.

Using one of his peremptory challenges, defendant excused Burton. At the end of the selection process for the twelve regular jurors and the two alternate jurors, defendant had four peremptory challenges remaining. Thus, defendant cannot show prejudice as it relates to sustaining the objections as to questions asked of juror Burton. *State v. Conner*, 335 N.C. 618, 633, 440 S.E.2d 826, 834 (1994) (no prejudicial error in not allowing defense counsel to question potential juror who was challenged peremptorily where defendant failed to exhaust peremptory challenges); *State v. Avery*, 315 N.C. 1, 21, 337 S.E.2d 786, 797 (1985) (no prejudicial error or abuse of discretion in refusing to allow defense counsel to elicit information from juror where defendant did not exhaust his peremptory challenges).

Defendant further argues that the trial court tended to keep all inquiries about psychological testimony out of the selection process and that the trial court's ruling in regard to juror Burton chilled subsequent inquiry as to potential jurors' attitudes on psychological testimony through the remainder of the selection process. Defendant's assertions are unsupported by the record. The record indicates that defendant was permitted to question at least five other potential jurors about psychological evidence. Four of the five jurors were questioned after defendant used his peremptory challenge to excuse Burton. Thus, we conclude that defendant's inquiry as to jurors' attitudes about psychological testimony was not chilled by the trial court's ruling and that defendant has not shown prejudicial error in

the jury selection process. Defendant was able to select a fair and impartial jury; thus, we reject defendant's first assignment of error.

[2] By his second assignment of error, defendant contends that the trial court committed error by denying his motion to quash the venire after the district court had excused many prospective jurors outside the presence of defendant and his counsel. Specifically, defendant argues that by excusing twenty-three prospective jurors and deferring seven prospective jurors prior to the jury *voir dire*, the district court violated three of defendant's important protections: (1) his unwaivable state constitutional right to be present at each stage of the capital proceeding, (2) his federal constitutional right to due process of law, and (3) a statutory right to a complete recordation of the jury selection proceedings in a capital case. We find no merit in defendant's contentions.

Each of defendant's contentions assumes that the actions of the trial court occurred during a stage of his capital trial. Here, however, the actions complained of occurred prior to the commencement of defendant's capital trial. Thus, the statute and cases cited by defendant do not apply. Defendant did not have a right to be present when the district court judge in Rowan County excused the prospective jurors; therefore, his statutory right and constitutional rights were not violated.

Because of the publicity surrounding this case, the trial court determined that a jury should be selected from Rowan County and that the jury would be transported every day from Rowan to Cabarrus County. Superior Court Judge James C. Davis signed an order directing the selection of a special venire from Rowan County, and the names for the special venire were drawn during the month of August 1992. Defendant and his counsel were not present when the names for the special venire were drawn or when the district court judge in Rowan County excused twenty-three jurors and deferred seven during the screening process, which was completed on 28 August 1992. However, defendant made no requests to attend either of those proceedings.

On 2 September 1992, defendant filed a written motion to quash the venire on the basis that neither defendant nor his counsel had been present when the district court judge excused and deferred persons selected for the venire. Defendant's case was called for trial on 8 September 1992. Before jury *voir dire* for the trial started, defendant's motion was heard; after arguments, it was denied.

A similar situation was before this Court in *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992). In *Cole*, the presiding superior court judge heard excuses from members of a venire who had been summoned to serve for a session of court that started on 17 July 1989. The report of the case does not indicate that defendant made any request to be present during the screening process. The presiding superior court judge questioned individual members of the venire at the bench, off the record and out of the presence of defendant and defendant's counsel. The record indicated that the judge "excused those or deferred those that seemed appropriate." *Id.* at 274, 415 S.E.2d at 716. The remaining members of the venire were administered the oath and dismissed until the next day, 18 July 1989, when the defendant's case was called for trial. We held that it was error to excuse jurors after an unrecorded bench conferences on 19 July 1989 because the defendant's capital trial had commenced and his unwaivable right of presence had attached. However, we rejected the defendant's argument that the trial court committed error by dismissing members of the venire *prior to trial* and out of defendant's presence. We explained our reasoning as follows:

> In this case, it was not error for the court to excuse prospective jurors after the unrecorded bench conferences on 17 July 1989. The defendant's trial had not commenced at that time. The jurors were not excused at a stage of the defendant's trial and the defendant did not have the right to be present at the conferences.

Id. at 275, 415 S.E.2d at 717.

Likewise, in this case, defendant's capital trial had not begun at the time the potential jurors were excused or deferred by the district court judge. Since defendant's capital trial had not commenced, defendant's unwaivable right of presence had not attached. *Id.*

Defendant distinguishes *Cole* from this case by arguing that the jury venire in *Cole* was not picked for a specific trial; while, in this case, the venire was picked specifically for defendant's trial. Essentially, defendant argues that the trial actually began when the district court judge heard excuses pursuant to the authority granted under N.C.G.S. § 9-6(b). Defendant does not cite, and we are unable to find, any authority for the proposition that a capital trial begins prior to the calling of the case for trial. Furthermore, the selection process authorized by N.C.G.S. § 9-6(b) is essentially a pretrial screening process which is delegated to the district court, rather than a part of the capital trial. The district court has no authority to con-

duct a capital trial; only the superior court has such authority. We decline to extend the unwaivable right to be present at every stage of a capital trial to pretrial jury selection matters.

[3] In his third assignment of error, defendant contends that the trial court erred in permitting the prosecutor to inform jurors that defendant had been previously tried and that corrective appellate review would be available in this case. Defendant argues that this error tended to diminish the jury's responsibility, thereby denying defendant his federal and state constitutional rights to a fair trial, due process of law, and freedom from cruel and unusual punishment. We conclude that the prosecutor's statements did not tend to diminish the jury's responsibility in this capital case; therefore, defendant's state and federal constitutional rights were not violated.

During the jury selection process, the prosecutor made the following statement:

> Two other things that you are going to realize is that there has been a previous trial of this matter; and this is a new trial. The information that will be presented, you'll be hearing for the first time. Can you try this case based upon the evidence that is taken and the law that you receive instruction on and make a decision based on that and not be concerned about any other proceedings that [a]ffected Mr. McCarver? If you have any doubts about your ability to do that, if you'd raise your hand.

Defendant did not object to this statement by the prosecutor. Nevertheless, defendant now contends that this statement tended to diminish the jurors' sense of responsibility for their verdict by suggesting that the verdict might be reviewed. We do not agree.

The prosecutor's comment about a previous trial was made without elaboration as to how the new trial came about and with no comment on the results of the prior trial. Clearly, the jurors' understanding of their responsibilities was not diminished by the prosecutor's statement, and no fundamental right to a fair trial was denied. *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. Simpson*, 331 N.C. 267, 415 S.E.2d 351 (1992). This assignment of error is without merit.

[4] In his fourth assignment of error, defendant argues that the trial court erred in rescinding its prior order which required that a special venire be summoned in Mecklenburg County for the purpose of selecting a jury to try defendant's case. Defendant contends that his

state and federal constitutional rights to a fair trial, due process of law, and freedom from cruel and unusual punishment were violated. Additionally, defendant contends that his statutory right to a complete recordation of the proceedings in a capital case was violated. We reject defendant's contentions.

The trial court rescinded its special venire order prior to the commencement of defendant's trial. As stated in response to defendant's second assignment of error, defendant did not have an unwaivable right of presence at the jury selection proceedings which took place prior to his case being called for trial. Additionally, defendant's statutory right to a recordation of the capital trial was not violated by the pretrial order.

The record in this case discloses that the trial court rescinded its order for a special venire from Mecklenburg County because administrative support and physical facilities were not available in Mecklenburg County due to the trial of another capital case. Thus, no abuse of discretion appears. Further, there is no indication that defendant ever requested that pretrial matters be recorded. Accordingly, we reject this assignment of error.

[5] By his fifth assignment of error, defendant argues that the trial court committed reversible error in denying his motion for the disclosure of material evidence in the possession of the prosecutor. Defendant further argues that the trial court committed error in denying his motions for a mistrial or, in the alternative, a new sentencing hearing. Defendant contends a mistrial should have been granted based on the prosecution's use of an undisclosed statement of defendant that substantially prejudiced him by permitting the prosecutor to rely on an improper argument for motive at the guilt determination phase of the trial. Defendant contends that the trial court's error violated his federal and state constitutional rights to a fair trial, due process of law, and freedom from cruel and unusual punishment. We conclude that no error was committed by the trial court; thus, defendant's state and federal constitutional rights were not violated.

Pursuant to N.C.G.S. § 15A-903(a)(2), defendant made a pretrial request for voluntary discovery, seeking in part the disclosure of any statement made by defendant regardless of the person to whom the statement was made. Defendant simultaneously made a motion, pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), and *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976), for the disclosure of exculpatory information, including matters which sug-

gested a lessened culpability of defendant with respect to guilt or punishment. The prosecution responded that all such matters had been disclosed. The trial court denied defendant's motion for the disclosure of exculpatory information; however, the trial court made it clear that if anything became available to the State, the State must immediately notify the defense both by telephone and in writing.

Under N.C.G.S. § 15A-910, when a party fails to comply with a discovery order, the trial court may grant a continuance or a recess, prohibit the violating party from introducing the nondisclosed evidence, or enter any other appropriate order. Because the trial court is not required to impose any sanctions for abuse of discovery orders, what sanctions to impose, if any, are within the trial court's discretion. *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983); *State v. Braxton*, 294 N.C. 446, 242 S.E.2d 769 (1978).

At the capital sentencing proceeding, Lee McCarver testified for defendant. He was cross-examined by the State about a statement he had made five years earlier to police. Lee indicated that he did not recall the statement. Defendant objected and moved to strike the question; the objection was allowed, and the jury was instructed to disregard the question.

Outside the presence of the jury, defendant moved for a mistrial or a new capital sentencing proceeding. In the ensuing discussion between counsel and the trial court, it was determined that the State had in its possession a written statement from Lee McCarver to an officer of the Concord Police Department that had not come to the prosecutor's attention until the preceding day. Lee's statement related to defendant's belief that Hartley was responsible for defendant's parole being revoked. The statement had not been furnished to defendant prior to trial. The trial court denied both the motion for a mistrial and the motion for a new capital sentencing proceeding.

In *State v. Blackstock*, this Court concluded that "[a] mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Blackstock*, 314 N.C. 232, 243, 333 S.E.2d 245, 252 (1985). Whether to grant a motion for mistrial is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion. *State v. Ward*, 338 N.C. 64, 92-93, 449 S.E.2d 709, 724 (1994), *cert. denied*, — U.S. —, — L. Ed. 2d —, 63 U.S.L.W. 3833 (1995). In this case, we conclude that the prosecution's conduct did not amount to

such a serious impropriety as to make it impossible for defendant to receive a fair and impartial verdict. For this reason, we conclude that the trial court's denial of defendant's motion for a mistrial did not amount to a manifest abuse of discretion reversible on appeal.

As for the trial court's refusal to grant a new capital sentencing proceeding, we again find no error. Defendant has failed to show any abuse by the State of the discovery order or any abuse of discretion by the trial court. The prosecutor discovered the existence of Lee McCarver's statement only a day before seeking its admission. Even if we were to assume some culpability on the part of the prosecutor for not immediately bringing the statement to the attention of defendant, the trial court sustained defendant's objection and instructed the jury to disregard any reference to the statement. Jurors are presumed to follow a 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, *petition for cert. filed*, (No. 94-9360, 19 May 1995). Consequently, defendant has failed to show any prejudice from these statements. This assignment of error is without merit.

[6] In his sixth assignment of error, defendant contends that the trial court erred in allowing defense counsel to make important tactical decisions about this case without allowing defendant's wishes to control in violation of this Court's opinion in *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991). We do not believe that *Ali* applies here, and we reject defendant's argument.

During the State's cross-examination of Lee McCarver, defendant asked to speak to the trial court outside the presence of the jury. Before addressing the trial court, defendant spoke privately with defense counsel, who, after the discussion, stated that defendant "will not speak." Defense counsel then said that Lee McCarver's testimony "had a profound effect upon [defendant]." Concerned that his client might walk out of the proceeding and delay its progression, defense counsel stated:

> Two or three times this morning [defendant] wanted me to stop the trial and I refused. Frankly, I was on the edge of my seat wondering if [defendant] would simply get up and walk out. I'm not saying he's violent or anything like that, but he's just having a hard time hearing it.

> I would like the Court to know that, if I may. I will not let [defendant] run this case. He knows that. He does not control the defense, he can make suggestions. But if his state is so bad, Your Honor, I may stand up at a point and say, "May we have a short recess?"

Defendant also points to the fact that he was not consulted in the peremptory excusal of prospective juror Cindy Grant.

In *Ali*, this Court held that "when counsel and a fully informed criminal defendant client reach an absolute impasse as to . . . tactical decisions, the client's wishes must control." *Ali*, 329 N.C. at 404, 407 S.E.2d at 189. Although defense counsel in the present case may have employed a better choice of words in describing the situation at the time, we find no indication in the record of "an absolute impasse" between the client and the defense team as it concerned trial tactics. At no time did defendant voice any complaints to the trial court as to the tactics of his defense team. Accordingly, we conclude that defense counsel acted properly, and we reject this assignment of error.

[7] In his seventh assignment of error, defendant contends that the trial court committed constitutional error in its jury instructions on the principle of acting in concert. Defendant argues that these instructions allowed the jury to apply the principle of acting in concert to convict defendant of specific-intent crimes if it found that another perpetrator had the requisite *mens rea* to commit them and that the instructions did not require jurors to determine whether defendant ever formed the specific intent required to commit the underlying felony supporting felony murder. We find no error in the trial court's jury instructions.

At the jury instruction conference and before the jury began its deliberation, the trial judge inquired as to whether there were any objections to his giving pattern jury instructions on acting in concert. Defendant did not object to the instructions nor did he request additional instructions or corrections. The trial court gave the pattern jury instructions. Since defendant did not object at trial to these instructions, this issue is before this Court for review only for "plain error." *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

In *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994), this Court recently addressed the doctrine of acting in concert. This Court stated:

> Under the doctrine of acting in concert, where a single crime is involved, one may be found guilty of committing the crime if he is at the scene acting together with another with whom he shares a common plan to commit the crime, although the other person does all the acts necessary to effect commission of the crime. Under this doctrine, where multiple crimes are involved, when two or more persons act together in pursuit of a common plan, all are guilty only of those crimes included within the common plan committed by any one of the perpetrators. As a corollary to this latter principle, one may not be criminally responsible as an accomplice under the theory of acting in concert for a crime which requires a specific intent, unless he, himself, is shown to have the requisite specific intent. . . . In other words, one may not be found guilty of a crime requiring a specific intent under the acting in concert doctrine unless the crime was part of the common purpose or the specific intent on the part of the one sought to be charged is independently proven.

Id. at 346, 451 S.E.2d at 147 (citations omitted). We conclude that the instructions in this case were in compliance with the doctrine stated in *Abraham.*

In this case, the trial court gave the following instructions:

> *Members of the jury, for a person to be guilty of a crime it is not necessary that he himself do all the acts necessary to constitute the crime. If one or more persons act together with a common purpose to commit a robbery with a dangerous weapon, each of them is held responsible for the acts of the others done in the commission of that crime.*
>
> So members of the jury, I charge that if you find from the evidence, beyond a reasonable doubt, that on or about the date in question the defendant, *acting either by himself or acting together with Jimmy Rape*, had in his possession a dangerous weapon, and took and carried away property from the person or in the presence of a person without his voluntary consent by endangering or threatening his life with the use or threatened use of a dangerous weapon, the defendant knowing that he was not entitled to take the property and intending to deprive that person of its use permanently, it would be your duty to return a verdict of guilty of robbery with a dangerous weapon.

At another point, the trial court gave the following instruction:

> So finally I charge that if you find from the evidence and beyond a reasonable doubt that on or about the date in question the defendant, *acting either by himself or acting together with Jimmy Rape*, had in his possession a dangerous weapon, and took and carried away the property from the person or in the presence of a person without his voluntary consent by endangering or threatening their life with the use or threatened use of a dangerous weapon, the defendant knowing that he was not entitled to take the property, and intended to deprive that person of its use permanently; and if you further find, beyond a reasonable doubt, that while committing the crime of robbery with a dangerous weapon, the defendant killed the victim, and that the defendant's act was a proximate cause of the victim's death, it would be your duty to return a verdict of guilty of first degree murder under the felony murder rule.

Specifically, defendant contends that the italicized portions of the above instructions allowed the jury to convict him of crimes regardless of whether defendant himself had the requisite specific intent required to commit the crime. We find no merit in defendant's argument.

A review of the instructions as a whole indicates that the jury was not misled to believe that it could convict defendant based on the intent of his confederate; rather, the instructions made it clear that defendant could have acted either alone or with another to commit the felony. Additionally, the instructions made clear that in order to convict defendant, defendant himself must have had the requisite *mens rea*. We conclude that the instructions in this case were in conformity with the acting in concert doctrine as set forth in *Abraham*; therefore, the trial court did not commit error, much less plain error.

[8] In his final assignment of error relating to the guilt determination phase, defendant argues that the trial court committed error in instructing the jury that premeditation and deliberation could be inferred from a lack of evidence of provocation. According to defendant, this instruction misled the jury, was not supported by the evidence or applicable legal authorities, impermissibly shifted the burden of proof, and constituted an inappropriate expression of judicial opinion on the evidence, thereby denying defendant his federal and state constitutional rights to a fair trial and due process of law. We reject defendant's contention.

The trial court gave the following jury instruction:

> [N]either premeditation nor deliberation is usually susceptible of direct proof. They may be proved by proof of circumstances from which they may be inferred, such as[] lack of provocation by the victim, conduct of the defendant before, during, or after the killing; threats and declarations of the defendant, use of grossly excessive force, infliction of lethal wounds after the victim is felled, brutal or vicious circumstances of the killing, or the manner in which or means by which the killing was done.

Defendant did not object to the instruction. Thus, our review is for plain error only.

We note that defendant concedes that the trial court followed the pattern jury instructions in giving this instruction. Furthermore, the instruction was consistent with previous decisions of this Court which have stated that "[p]remeditation and deliberation may be inferred from 'lack of provocation on the part of the deceased.' " *State v. Weathers*, 339 N.C. 441, 451, 451 S.E.2d 266, 272 (1994) (quoting *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991)). This Court has also previously stated that the trial court's "mere recital" of circumstances from which premeditation and deliberation may be inferred "cannot be construed as an expression of an opinion that any of them have been proven." *State v. Stevenson*, 327 N.C. 259, 264, 393 S.E.2d 527, 529 (1990) (rejecting defendant's argument that instruction could be understood by the jury as an opinion of the court that the absence of provocation had been proven).

Additionally, from our review of the record, we conclude that the challenged instruction was justified by the evidence in this case. In this case, the evidence shows that there was no provocation by the victim. The evidence was that the victim, Mr. Hartley, was going about his ordinary duties when he was accosted by defendant and his companion, grabbed by the neck, choked, thrown to the floor, and then stabbed. This assignment of error has no merit.

[9] In his first assignment of error concerning his capital sentencing proceeding, defendant contends that the trial court committed reversible error during his capital sentencing proceeding by refusing to instruct the jury that it did *not* need to be unanimous in order to answer "no" to Issue Three on the "Issues and Recommendation as to Punishment" form. He contends that, as a result, the instructions irreparably prejudiced him by reducing the State's burden of proof, improperly coerced a verdict, and deprived him of his federal and state constitutional rights. We disagree.

Issue Three on the written Issues and Recommendation as to Punishment form given the jury in this case reads as follows:

> DO YOU UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT THE MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND BY ONE OR MORE OF YOU IS, OR ARE, INSUFFICIENT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND UNANIMOUSLY BY YOU IN ISSUE ONE?

After deliberating for several hours, the jury sent a written inquiry to the trial court regarding Issue Three. The note read, "Must there be twelve votes, 'Yes,' or twelve votes, 'No,' to reach a unanimous decision?" After conferring with counsel, the trial court gave the following instruction:

> The answer to that is, Yes, it must be a unanimous twelve person decision as to any answer you reach to that issue, whether it be Yes or whether it be No. It must be a unanimous twelve person decision.

Defendant requested that the trial court amend its instruction in this regard to direct the jury to answer "no"—thus recommending a sentence of life imprisonment—if it could not unanimously agree as to whether the mitigators were insufficient to outweigh the aggravators. The trial court denied this request.

In a capital sentencing proceeding, any jury recommendation requiring a sentence of death or life imprisonment must be unanimous. N.C. Const. art. I, § 24; N.C.G.S. § 15A-2000(b) (Supp. 1994). The policy reasons for the requirement of jury unanimity are clear. First, the jury unanimity requirement "is an accepted, vital mechanism to ensure that *real* and *full* deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." *McKoy v. North Carolina*, 494 U.S. 433, 452, 108 L. Ed. 2d 369, 387 (1990) (Kennedy, J., concurring) (emphasis added). Second, the jury unanimity requirement prevents the jury from evading its duty to make a sentence recommendation. If jury unanimity is not required, then a jury that was uncomfortable in deciding life and death issues simply could "agree to disagree" and escape its duty to render a decision. This Court has refused to make any ruling which would tend to encourage a jury to avoid its responsibility by any such device. For example, we have expressly stated that a jury instruction that a life sentence would be imposed if a jury could not unanimously agree should never be given because it would be "tantamount to 'an

open invitation for the jury to avoid its responsibility and to disagree.' " *State v. Smith*, 305 N.C. 691, 710, 292 S.E.2d 264, 276 (quoting *Justus v. Commonwealth*, 220 Va. 971, 979, 266 S.E.2d 87, 92 (1980), *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983)). The jury may not be allowed to arbitrarily or capriciously take any such step which will require the trial court to *impose or reject* a sentence of death. *State v. Pinch*, 306 N.C. 1, 33, 292 S.E.2d 203, 227, *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). Thoughtful and *full* deliberation in an effort to achieve unanimity has only a salutary effect on our judicial system: It tends to prevent arbitrary and capricious sentence recommendations.

Since the sentence recommendation, *if any*, must be unanimous under constitutional and statutory provisions, and particularly in light of the overwhelming policy reasons for a unanimity requirement, we conclude that any issue which is *outcome determinative* as to the sentence a defendant in a capital trial will receive—whether death or life imprisonment—must be answered unanimously by the jury. That is, the jury should answer Issues One, Three, and Four on the standard form used in capital cases either unanimously "yes" or unanimously "no."[1]

In this case, the trial court submitted to the jury a written "Issues and Recommendation as to Punishment" form, which was slightly modified by the trial court from the standard form presented in the North Carolina Pattern Jury Instructions. N.C.P.I.—Crim. 150.10 app. (1993). The form submitted read:

ISSUE ONE

DO YOU UNANIMOUSLY FIND FROM THE EVIDENCE, BEYOND A REASONABLE DOUBT, THE EXISTENCE OF ONE OR MORE OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES?

ANSWER: _____.

. . . .

1. Issue Two addresses mitigating circumstances and, whether answered "yes" or "no," is not determinative of the outcome—death or life imprisonment. Under the original capital sentencing scheme of N.C.G.S. § 15A-2000, this Court had required the jury to be unanimous to find any mitigating circumstances. That requirement was found unconstitutional in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), solely as it applied to *mitigating* circumstances.

IF YOU WRITE, "YES", IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES" IN THE SPACE AFTER ISSUE ONE AS WELL.

IF YOU WRITE "NO" IN ALL THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE "NO" IN THE SPACE AFTER ISSUE ONE.

. . . .

IF YOU ANSWERED ISSUE ONE "NO", SKIP ISSUES TWO, THREE, AND FOUR, AND *INDICATE LIFE IMPRISONMENT* UNDER "RECOMMENDATION AS TO PUNISHMENT," ON THE LAST PAGE OF THIS FORM.

IF YOU ANSWERED ISSUE ONE "YES", PROCEED TO ISSUE TWO.

ISSUE TWO

DO YOU FIND FROM THE EVIDENCE THE EXISTENCE OF ONE OR MORE OF THE FOLLOWING MITIGATING CIRCUMSTANCES?

ANSWER: _____.

. . . .

IF YOU ANSWERED ISSUE TWO "YES", THEN ANSWER ISSUE THREE.

IF YOU ANSWERED ISSUE TWO "NO", THEN SKIP ISSUE THREE AND ANSWER ISSUE FOUR.

ISSUE THREE

DO YOU UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT THE MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND BY ONE OR MORE OF YOU IS, OR ARE, INSUFFICIENT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND UNANIMOUSLY BY YOU IN ISSUE ONE?

ANSWER: _____.

IF YOU ANSWER ISSUE THREE "NO", THEN *INDICATE LIFE IMPRISONMENT* UNDER "RECOMMENDATIONS AS TO PUNISHMENT".

IF YOU ANSWER ISSUE THREE "YES", THEN PROCEED TO ISSUE FOUR.

ISSUE FOUR

DO YOU UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND UNANIMOUSLY BY YOU IN ISSUE ONE IS, OR ARE, SUFFICIENTLY SUBSTANTIAL TO CALL FOR THE IMPOSITION OF THE DEATH PENALTY WHEN CONSIDERED WITH THE

MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND BY ONE OR MORE OF YOU?

ANSWER: _____.

IF YOU ANSWER ISSUE FOUR "NO", *INDICATE LIFE IMPRISONMENT* UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM.

IF YOU ANSWER ISSUE FOUR "YES", INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT".

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "LIFE IMPRISONMENT" OR "DEATH" IN THE BLANK IN THE FOLLOWING SENTENCE:

WE, THE JURY, UNANIMOUSLY RECOMMEND THAT THE DEFENDANT, _____, BE SENTENCED TO _____.

(Emphasis added.)

If unanimity is required *only* when the jury answers "yes" for Issue Three, as defendant suggests, then the jury must be instructed to answer "no"—and *to end the case* by recommending life imprisonment—in two situations: (1) when the jury unanimously agrees to answer "no," and (2) when the jury is not unanimous. Both the form given the jury and the jury instructions direct the jury that if it answers "no" to Issue Three, it must recommend life imprisonment. This instruction, if not coupled with an instruction requiring unanimity, conflicts with the Constitution of North Carolina and with the language of our death penalty statute and will force juries to recommend life imprisonment when they are *not unanimous*. Allowing nonunanimous juries to reach final sentence recommendations of life imprisonment is in direct contradiction to our statutory requirement that "the sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors." N.C.G.S. § 15A-2000(b); *see Green*, 336 N.C. 142, 443 S.E.2d 14.

The requirement of jury unanimity for either "yes" or "no" answers for Issues One, Three, and Four ensures that the jury *properly* fulfills its duty to deliberate *genuinely* for a *reasonable* period of time in its efforts to exercise guided discretion in reaching a unanimous sentencing recommendation, as required by the Constitution of North Carolina and by our death penalty statute itself. The legislature

intended just such a unanimity requirement and intended that should the jury be unable to agree unanimously as to any issue ultimately dispositive of life or death, the jury simply should report that fact to the trial court. It would then be the trial court's duty to impose a sentence of life imprisonment. *See* N.C.G.S. § 15A-2000(b) ("If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment . . . ."). The statutory scheme established by the legislature has the pronounced advantage of providing that a life sentence shall be entered *by the trial court* if the jury is unable to reach unanimity as to any of the dispositive issues. However, it does so without encouraging any juror to vote for death or life without honestly deliberating with the other jurors, simply because he or she has been informed that he *alone* may *require* that a sentence of life be entered by holding out against the other eleven jurors.

The defendant bases his argument on the language used in the printed "Issues and Recommendation as to Punishment" form drawn from the North Carolina Pattern Instructions and used in this case. N.C.P.I.—Crim. 150.10 app. Defendant argues that language used on the form requires that a negative response to Issue Three must be given when the jury cannot come to a unanimous decision as to the proper sentence. Although Issue Three on the form and the trial court's initial instructions on the issue may be subject to such interpretation, we will not allow such strained syntax and semantics to determine serious issues of law.

As discussed above, Issue Three as well as Issue One and Issue Four are ultimately dispositive of the jury's recommendation as to whether the defendant must live or die. *See McKoy v. North Carolina*, 494 U.S. at 463, 108 L. Ed. 2d at 398 (Scalia, J., dissenting) (Issues Three and Four are "ultimately dispositive"). If a jury answers any of those three issues "no," it *must* recommend a life sentence. If a jury answers all three of those issues "yes," it *must* recommend a sentence of death. *State v. Robbins*, 319 N.C. 465, 515, 356 S.E.2d 279, 308-09, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). The answers to all three of those ultimately dispositive issues leading to any such recommendation must be reached by unanimous decision, whether the jury answers "yes" *or* "no." N.C.G.S. § 15A-2000(b). If we do not require unanimity for a *jury* decision of any issue "ultimately dispositive" as to its recommendation that a defendant live or die, we will violate both our Constitution and our capital punishment statute. Further, we will render capital sentencing proceedings in North

Carolina arbitrary and capricious by allowing the *unguided* discretion of a *single juror* voting "no" to decide the sentence (life imprisonment) the defendant must receive.

If a jury is unable to agree as to Issue One, Issue Two, or Issue Three after a reasonable time, the *trial court* will of course be required to acknowledge that fact and itself enter a judgment of imprisonment for life. N.C.G.S. § 15A-2000(b). The *jury* should not be made aware of this state of the law, however, as to inform the jury that its failure to agree on determinative issues will result in a sentence of life imprisonment would be an open invitation to the jury—or a single juror—to avoid its responsibility to *fully* deliberate and to force a recommendation of life by the simple expedient of disagreeing. *State v. Smith*, 305 N.C. at 710, 292 S.E.2d at 276. Thus, it has been our law that even when the jury specifically asks what the ultimate result will be if it fails to reach unanimity, the trial court may only inform the jurors that their inability to reach unanimity "should not be their concern but should simply be reported to the court." *State v. Smith*, 320 N.C. 404, 422, 358 S.E.2d 329, 339 (1987). Here, however, the jury made no such express or specific inquiry, and no such additional instruction was required. *Id.*

[10] For the foregoing reasons, we conclude that the trial court did not err in its oral answer to the jury's questions when it stated that the jury must be unanimous before answering either "yes" or "no" to Issue Three—a dispositive issue with regard to the decision of whether the defendant must live or die. Further, the fact that Issue Three on the form used in this case, and the trial court's initial instructions on that issue, could be read as improperly directing that the jury answer "no" if unable to reach unanimity did not amount to prejudicial error. Assuming that the jury understood Issue Three on the written form to require it to answer "no" if it could not reach unanimity, such an erroneous instruction was favorable to the defendant; the jury would have thought that only one juror need have voted "no" to require that the jury answer the issue "no" and a sentence of life be entered. Such an error favorable to a defendant is clearly harmless beyond a reasonable doubt. *See State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982) (improper instruction on self-defense which was advantageous to defendant held harmless beyond reasonable doubt). For the foregoing reasons, this assignment of error is without merit.

[11] In a related assignment of error, defendant contends that the trial court committed reversible error by instructing the jury to

resume deliberations in an effort to render a unanimous decision without offering the jury any specific way to report an inability to achieve unanimity.

After the jury asked in a written question, "Must there be twelve votes, 'Yes,' or twelve votes, 'No,' to reach a unanimous decision?" the following colloquy occurred:

> THE COURT: The answer to that is, Yes, it must be a unanimous twelve person decision as to any answer you reach to that issue, whether it be Yes or whether it be No. It must be a unanimous twelve person decision.
>
> Does that answer your question?
>
> JUROR BASINGER: Yes, sir.
>
> One more question, if I may ask. If there is not a unanimous decision, what steps are taken then as to the paper? Unless I'm reading it wrong—the reason that I'm asking because the way that the question is stated I might look at it totally different than juror number one would look at it and that's the reason we came out to ask because we want to be sure of what we were reading.
>
> THE COURT: Well, the answer is that it must be unanimous twelve person decision. If what you're saying is—you understand that it can't be a majority vote, it must be a unanimous twelve person decision. So I'm going to ask you to continue deliberations with that instruction in mind. Does that answer your question?
>
> JUROR BASINGER: Yes, sir.

Defendant contends the jury's question was an inquiry as to what the result would be if the jury failed to reach a unanimous decision. *See Smith*, 320 N.C. 404, 358 S.E.2d 329. We have held "that *upon inquiry by the jury* the trial court must inform the jurors that their inability to reach a unanimous verdict should not be their concern but should simply be reported to the court." *Id.* at 422, 358 S.E.2d at 339. This is not such a case.

We must examine the question posed by the jury in the context of the trial court's instructions to determine if it truly is an "inquir[y] into the result of its failure to reach a unanimous verdict." *Smith*, 320 N.C. at 422, 358 S.E.2d at 339 (emphasis omitted). The jury's confusion in this case, as discussed above, concerned the phraseology used on the printed Issues and Recommendation as to Punishment form.

After being instructed that it must be unanimous for either "yes" or "no," the jury, through its foreman, asked *how* to answer the confusing Issues and Recommendation form: "[W]hat steps are taken then as to the paper?" A moment later, the jury, through its foreman, reiterated its initial confusion caused by the form: "[B]ecause the way that the question is stated I might look at it totally different than juror number one would look at it . . . ." The questions by the jury did not constitute an inquiry into the results should it fail to reach unanimity. Instead, it appears that during their course of deliberations, the jurors noticed the inconsistency in the trial court's proper instructions and the printed Issues and Recommendation as to Punishment form; the form can be read as requiring that if a *single juror* disagrees with the other eleven, Issue Three must be answered "no." The jury merely sought guidance as to the procedure for giving an answer to Issue Three. The jury did not ask what would happen if it could not come to a unanimous decision.

Because the jury did not inquire into the result should it not be able to come to a unanimous decision, the *Smith* instruction was not warranted. Therefore, defendant's assignment of error is without merit.

[12] In his next assignment of error, defendant contends that the trial court committed reversible error by refusing to give peremptory instructions on those mitigating circumstances for which the factual predicate was uncontroverted.

The trial court instructed the jury on each nonstatutory mitigating circumstance as follows:

> If any one or more of you find by a preponderance of the evidence that this circumstance exists, and also is deemed mitigating, you would so indicate by having your foreman write, "Yes," in the space provided after this mitigating circumstance on the form. If none of you find the circumstance to exist, or if none of you deem it to have mitigating value, you would so indicate by having your foreman write, "No," in that space.

During the charge conference, defendant specifically requested that North Carolina Pattern Instruction 150.11 be read to the jury. In part, it reads:

> [A]s to this mitigating circumstance, I charge you that if one or more of you finds the facts to be as all the evidence tends to show, you will answer "Yes" as to Mitigating Circumstance

> Number (read number) on the "Issues and Recommendation" form.

N.C.P.I.—Crim. 150.11 (1991).

Defendant's proposed instruction would not have been a proper peremptory instruction in the context of this case. In *Green*, 336 N.C. 142, 443 S.E.2d 14, this Court held that N.C.P.I.—Crim. 150.11 is not a proper peremptory instruction to be used with regard to a nonstatutory mitigating circumstance. We said that

> before a juror "finds" a *nonstatutory* mitigating circumstance, he or she must make two preliminary determinations: (1) that the evidence supports the factual existence of the circumstance, *and* (2) that the juror deems the particular circumstance to have mitigating value in the case in question.

Id. at 174, 443 S.E.2d at 33. The instructions actually given in the present case conform to the requirements of *Green*. Therefore, we find that defendant's assignment of error is without merit.

[13] In his next assignment of error, defendant contends that the trial court committed reversible error in permitting the prosecutor to cross-examine defendant's expert about the results of a personality test upon which she did not rely and in requiring defendant to disclose the results of the test. Pursuant to the State's request for discovery, the court ordered defendant to produce any and all results of physical and mental examinations in defendant's possession. Defendant specifically objected to the production of individual answers to one test in particular, the Minnesota Multiphasic Inventory Test (MMPI), because defendant did not complete the test and did not intend to introduce its results. Moreover, defendant contends that his expert did not rely on the test in forming her expert opinion on defendant's psychological makeup. Defendant's expert, Dr. Sultan, testified that defendant "wasn't able to perform at a level that was scorable, and so no interpretation of that test is possible . . . ." Dr. Sultan went on to say that "[n]o interpretation beyond the fact that it is not scorable is appropriate. And that is the interpretation of every psychologist who has administered it to him."

N.C.G.S. § 15A-905, which governs the State's right to pretrial discovery in criminal cases, provides that in certain situations the State must be permitted to inspect and copy

> results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case . . . which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial, when the results or reports relate to his testimony.

N.C.G.S. § 15A-905(b) (1988). The issue in the present case is not whether this particular test was scorable, but whether the expert gleaned any information from the test, its answers, or even defendant's inability to complete a scorable test which related to the expert's testimony. If so, the test is both discoverable and a proper subject for cross-examination.

Although defendant's expert did not score or interpret the entire test, her testimony reveals that she considered the answers he gave and his inability to complete the test in formulating her final opinion of defendant. During direct examination, Dr. Sultan testified that defendant could not complete the test because it was "beyond his intellectual capacity." However, she then stated she was able to derive "some primitive kinds of information" about some "fundamental" information concerning defendant's personality. At this point in her testimony, she was referring to the MMPI and defendant's inability to comprehend the test. Yet, even though the test itself could not be scored, she did derive some "primitive" and "fundamental" information from it which went into the formation of her opinions. Consequently, the State was entitled to inspect and copy the test, which provided her with some "raw data," and to cross-examine her on that subject. This assignment of error is without merit.

[14] In another assignment of error, defendant argues that the trial court erred in allowing defense counsel to withdraw a request to submit the statutory mitigating circumstance that defendant had no significant history of prior criminal activity, a circumstance defendant contends was supported by the evidence. Defendant initially requested the submission of this statutory mitigating circumstance; however, after the trial court questioned the wisdom of defendant's request, defendant withdrew it. Defendant now asserts that the trial court should have submitted the circumstance because the evidence would support a rational jury's finding that defendant did not have a significant history of prior criminal acts.

Whether defendant requested submission of the statutory mitigating circumstance does not concern us here. A "trial court has no

discretion as to whether to submit statutory mitigating circumstances when evidence is presented in a capital case which may support a statutory circumstance." *State v. Skipper*, 337 N.C. 1, 44, 446 S.E.2d 252, 276 (1994), *cert. denied*, —— U.S. ——, 103 L. Ed. 2d 895 (1995). The trial court must submit the circumstance if it is supported by substantial evidence. The trial court is required "to determine whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity." *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988) (emphasis added).

[15] In the present case, evidence tended to show that defendant had been convicted on 1 May 1981 of three counts of worthless checks. He had also been convicted on 1 March 1984 of eight counts of felonious larceny and one count of forgery. Further, at the age of four years, he and his brother were being hoisted into open windows by their parents to assist in the parents' burglary enterprise. After their parents were sent to prison, defendant and his brother, while living with their grandmother, began to steal to provide for their own subsistence. Defendant also contended that he abused drugs. Shortly before defendant murdered the victim in this case, he talked to a coworker about his plan to write worthless checks for gold, which, in turn, he would pawn for cash.

We have previously held that similar histories barred the submission of "no significant history of prior criminal activity" as a mitigating circumstance. *See State v. Jones*, 336 N.C. 229, 247, 443 S.E.2d 48, 56-57 (1994) (defendant used illegal drugs, broke into a convenience store six or seven times, and broke into a pawn shop and stole guns), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 423 (1994), *reh'g denied*, —— U.S. ——, 130 L. Ed. 2d 676 (1995); *State v. Robinson*, 336 N.C. 78, 119, 443 S.E.2d 306, 326 (1994) (defendant used and dealt drugs, had pled guilty to a robbery, carried a pistol, and used another man's driver's license as identification), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995); *State v. Stokes*, 308 N.C. 634, 653-54, 304 S.E.2d 184, 196 (1983) (defendant engaged in five incidents of theft and possessed, used, and sold marijuana). Therefore, we conclude that the statutory mitigating circumstance of "no significant history of prior criminal activity" should not have been submitted in this case. Defendant's assignment of error is overruled.

[16] By another assignment of error, defendant contends that the trial court erred in overruling his objection to the submission of the aggravating circumstance that the murder was committed to avoid a

lawful arrest. Defendant argues that there was insufficient evidence to support the submission of this aggravating circumstance to the jury. We disagree.

The jury in a capital sentencing hearing is allowed to consider as an aggravating circumstance that "[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest." N.C.G.S. § 15A-2000(e)(4). Submission of the aggravating circumstance that the capital felony was committed to avoid or prevent a lawful arrest has been upheld in circumstances where a murder was committed to prevent the victim from capturing defendant and where a purpose of the killing was to eliminate a witness. *State v. Green*, 321 N.C. 594, 365 S.E.2d 587, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988).

In this case, the evidence tends to show that defendant robbed Mr. Hartley and killed him because defendant believed the victim would testify against him. Prior to the murder, defendant told Tony Jackson and David Shearin that he planned to rob an old man in a cafeteria in Concord's Carolina Mall who had testified against him on a prior occasion. Jackson testified that defendant said if Mr. Hartley saw him, defendant would have to kill Mr. Hartley because he had testified against defendant before and was certain to do so again. After the murder, defendant told Jackson that he stabbed Hartley because "he had testified against him and sent him to prison before."

The evidence was sufficient to support a rational jury's finding that one of defendant's purposes for the murder was the desire to eliminate a witness who defendant felt would testify against him. Therefore, the trial court properly submitted this aggravating circumstance in the defendant's capital sentencing proceeding.

Defendant also argues that the trial court erred in its instructions to the jury regarding this aggravating circumstance. The trial court instructed the jury with respect to this circumstance as follows:

> Now, a murder is committed for such purpose if the defendant's purpose at the time he kills is, by that killing, to avoid the arrest of himself or some other person and that arrest would have been lawful.
>
> If you find from the evidence and beyond a reasonable doubt that when the defendant killed the victim, it was in fact his purpose to avoid his arrest and that such arrest would have been lawful, you would find this aggravating circumstance . . . .

Defendant contends this instruction did not adequately define the circumstance or guide the jury in its evaluation of the evidence.

The record shows that defendant did not object to the instructions or request more specific instructions. This assignment of error is therefore barred by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, and defendant is not entitled to relief unless any error constituted plain error. *See State v. Odom*, 307 N.C. 655, 659-60, 300 S.E.2d 375, 378. To rise to a level of plain error, the error in the instructions must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). In other words, the error must be one "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

Having reviewed the trial court's instructions on the aggravating circumstance at issue, we find no plain error. The instructions given were of sufficient particularity to enable the jury to understand the law and apply it to the evidence presented. No more was required of the trial court. We therefore cannot say that the trial court committed plain error. This assignment of error is without merit.

Defendant next contends that the aggravating circumstance set out in N.C.G.S. § 15A-2000(e)(4) is overly broad and, therefore, unconstitutional. Defendant did not raise this issue in the trial court and therefore failed to preserve the question for appellate review. *State v. Brown*, 320 N.C. 179, 211, 358 S.E.2d 1, 23 (1987), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). This assignment of error is overruled.

[17] By another assignment of error, defendant contends that the trial court erred by excluding testimony that maximum security inmates commonly had homemade knives or "shanks" in their cells and that this exclusion denied defendant a fair sentencing hearing. Dr. Sultan testified that defendant's prison record contained only one significant violation, which involved two such knives found in his locker by prison officials. Comparing defendant's record to that of other inmates, Dr. Sultan testified that defendant's infraction was "very unremarkable." Dr. Sultan also testified that defendant's violation was "not uncommon" among inmates in maximum custody facilities. Later, defense counsel asked: "Is it common for inmates in

maximum security to have shanks?" The State objected, and the trial court sustained the objection.

Defendant argues the exclusion prevented the presentation of relevant mitigating evidence to the jury. We disagree. Assuming *arguendo* that Dr. Sultan's answer would have been relevant, she had already given testimony which answered that question. The trial court did not abuse its discretion by preventing defendant's question which called for repetitious testimony.

[18] In his next assignment of error, defendant contends that the trial court committed reversible error by refusing to instruct the jurors that "preponderance of the evidence," the burden of proof applicable to mitigating circumstances, means proof showing that it is more likely than not that a mitigating circumstance exists. The trial court instructed the jurors that they could find a mitigating circumstance if the evidence "satisfies any one of you" of its existence. Defendant contends that because the jury might have understood the term "satisfies" to mean a greater degree of proof than "more likely than not," the instruction was erroneous.

Defendant did not object to the instruction at trial, so our review is limited to one for plain error. We have previously addressed this same issue in *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995). There we held that the trial court's use of "satisfy" did not increase defendant's burden of proof. *Id.* Accordingly, we conclude there was no plain error and reject defendant's assignment of error.

[19] In his next assignment of error, defendant argues that the trial court committed reversible error by instructing the jury that it could refuse to consider mitigating evidence. In this case, the trial court told the jury to find and consider only the nonstatutory mitigating circumstances one or more jurors found to exist and to have mitigating value. A similar instruction was approved in *Green*, 336 N.C. 142, 443 S.E.2d 14, and we see no reason to overturn that decision now. Accordingly, we find no merit in defendant's assignment of error.

[20] In another assignment of error, defendant asserts that the trial court committed reversible error in the capital sentencing proceeding by failing to instruct that the entire jury as a whole must consider and weigh any mitigating circumstance found by any juror in reaching its answers as to Issue Three and Issue Four. We have rejected this very argument in *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). This assignment of error is without merit.

Defendant has also brought forward numerous other assignments of error presenting "preservation issues." As to each of these issues, defendant acknowledges with commendable candor that prior decisions of this Court require a ruling contrary to his contentions. He raises them for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving these issues for any necessary federal habeas corpus review. Having carefully examined each of those assignments of error, we conclude that they are without merit.

Proportionality Review

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. *See State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 354-55, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). It is our duty in this regard to ascertain (1) whether the record supports the jury's findings of the aggravating circumstances on which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Id.*

We have thoroughly examined the record, transcripts, and briefs in the present case. We conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

[21] We turn now to our final statutory duty of proportionality review. In conducting proportionality review, "we determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *Id.*

In essence, our task on proportionality review is to compare the case at bar with other cases in the pool which are roughly similar

> with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and the defendant's character, background, and physical and mental condition.

State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

In the present case, defendant was convicted of first-degree murder (under theories of premeditation and deliberation and of felony murder) and of robbery with a dangerous weapon. The jury found the aggravating circumstances that the murder was committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4), and that the murder was committed while defendant was engaged in the commission of a robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5).

The jury found as mitigating circumstances that (1) the offense was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (2) the capacity of defendant 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)(6); (3) defendant has a history of passive orientation and nonviolence; (4) defendant's intelligence quotient is in the lower range of borderline intellectual functioning, similar to that of a ten- to twelve-year-old; (5) defendant has been a good, dependable, hardworking employee; (6) defendant cooperated with law enforcement officers during his arrest and voluntarily gave a statement admitting his involvement and activity at an early stage of the criminal proceeding; (7) defendant does well in a structured setting and has done well in a structured setting; (8) defendant was and is emotionally neglected and has chronic feelings of deprivation, inadequacy, and anger and is uncomfortable and frightened by these feelings; (9) defendant suffers and has suffered from clinical depression throughout his life; (10) defendant was the victim of severe economic deprivation; (11) defendant was taught criminal behavior at a very early age by his parents and was forced by his parents to participate in criminal activity; (12) defendant was the victim of sexual abuse at a young age by an older male, which affected his feelings about men permanently; (13) defendant has been diagnosed as suffering from psychotic behavior; and (14) defendant has the capacity to love and loves his girlfriend, daughter, and brother.

In our proportionality review, we compare the present case with other cases in which this Court has ruled upon the proportionality

issue. This case is not particularly similar to any case in which this Court has found the death penalty disproportionate and entered a sentence of life imprisonment. Each of those cases is distinguishable from the present case.

In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), the evidence tended to show that the defendant hid in the bushes at a bank for about two hours waiting for the victim to make his nightly deposit. When the victim arrived at the bank, the defendant demanded the money bag. The victim hesitated, so the defendant fired a shotgun, striking him in the upper portion of both legs. The victim later died of cardiac arrest caused by the loss of blood from the shotgun wounds. The jury found only one aggravating circumstance—that the murder was committed for pecuniary gain. The defendant also pled guilty during the trial and acknowledged his wrongdoing before the jury.

Benson is easily distinguishable from the present case. In *Benson*, unlike the present case, some evidence tended to show that the defendant did not intend to kill the victim because he shot the victim in the legs rather than a more vital part of his body. In the present case, defendant purposefully stabbed the victim in the chest and killed him. He had previously stated that if the victim saw him, he would have to kill the victim so that he would not testify against defendant again. Also, unlike the situation in *Benson*, the jury here found two aggravating circumstances.

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 severely beat the victim, killing him. *Stokes* is also easily distinguishable from the present case because Stokes' codefendant, whom the majority of this Court seemed to believe equally culpable with Stokes, was sentenced to life imprisonment. In addition, the jury in *Stokes* found only one aggravating circumstance—that the murder was especially heinous, atrocious, or cruel—while the jury here found two aggravating circumstances.

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 Rogers was convicted was part of a course of conduct which included the commission of violence against another person or persons. In the present case, the jury found two aggravating circumstances—that the murder was committed for the purpose

of avoiding lawful arrest and that the murder was committed while defendant was engaged in the commission of a robbery with a dangerous weapon.

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 the victim 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 *Young*, the jury did not find the aggravating circumstance of witness elimination, a circumstance found in the case *sub judice*. The finding of this circumstance distinguishes the two cases because witness elimination is an attack upon the judicial system itself.

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. *Hill* is easily distinguishable from this case in which defendant robbed and killed an elderly cafeteria worker with the additional aggravating circumstance of witness eradication.

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 his 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. In contrast, the jury here found that the murder was committed for the purpose of avoiding lawful arrest and that the murder was committed during the commission of a robbery with a dangerous weapon.

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 questioning whether the victim believed he 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 jury in the present case found that defendant killed the victim to prevent him from testifying against him.

It bears noting that we have never found a death sentence to be disproportionate in witness-elimination cases. The reason is clear: "Murder can be motivated by emotions such as greed, jealousy, hate, revenge, or passion. The motive of witness elimination lacks even the excuse of emotion." *State v. Oliver*, 309 N.C. 326, 375, 307 S.E.2d 304, 335 (1983). The murder in the present case was nothing but cold and calculated. The only reason the victim was killed was to prevent him from testifying against defendant. The purposeful and deliberate killing of witnesses or possible witnesses strikes a blow at the entire public—the body politic—and directly attacks our ability to apply the rule of law and to bear witness against the transgressors of law in our society. *See Hill*, 311 N.C. 465, 319 S.E.2d 163 (Mitchell, J., dissenting) (murder of law enforcement officer is attack on entire public).

For the foregoing reasons, we conclude that each of the cases in which we have found the death penalty to be disproportionate is distinguishable from the present case. The present case bears little similarity to any of those cases.

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." *State v. McCollum*, 334 N.C. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895, *reh'g denied*, —— U.S. ——, 129 L. Ed. 2d 924 (1994). Although we review all of the cases in the pool when engaging in our statutorily mandated duty of proportionality review, we reemphasize here "that we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* "The Bar may safely assume that we are aware of our own opinions filed in capital cases arising since the effective date of our capital punishment statute, 1 June 1977." *Williams*, 308 N.C. at 81-82, 301 S.E.2d at 356. Here, it suffices to say that we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have consistently returned recommendations of life imprisonment.

In performing our statutory duty of proportionality review, it is also appropriate for us to compare the case before us to all other cases in the pool used for proportionality review. *Lawson*, 310 N.C. at 648, 314 S.E.2d at 503. However, the factors to be considered and their relevance during proportionality review in a given capital case "will be as numerous and as varied as the cases coming before us on appeal." *Williams*, 308 N.C. at 80, 301 S.E.2d at 355. "Therefore, the

fact that in one or more cases factually similar to this case, 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." *Green*, 336 N.C. at 198, 443 S.E.2d at 47.

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." *Williams*, 308 N.C. at 80-81, 301 S.E.2d at 356. Instead, we have held "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. Keel*, 337 N.C. 469, 502, 447 S.E.2d 748, 767 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 147 (1995). Also, "the fact that one, two, or several juries have returned recommendations of life imprisonment in cases similar to the one under review does not automatically establish that juries have 'consistently' returned life sentences in factually similar cases." *Green*, 336 N.C. at 198, 443 S.E.2d at 47.

Defendant here has cited a number of cases involving murders committed in the course of robberies. It suffices to say that we have examined all of the numerous cases cited by defendant. Where defendants have killed their victims as part of a planned witness elimination, some defendants have received life imprisonment and others have been sentenced to death. This murder was committed in the course of a robbery; equally important, it was a murder to eliminate a possible witness. In *State v. Robinson*, 339 N.C. 263, 451 S.E.2d 196 (1994), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 63 U.S.L.W. 3873 (1995); *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429 (1994); *McCollum*, 334 N.C. 208, 433 S.E.2d 144; *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 330 N.C. 501, 411 S.E.2d 806, *cert. denied*, —— U.S. ——, 120 L. Ed. 2d 913 (1992); *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984); *Lawson*, 310 N.C. 632, 314 S.E.2d 493; and *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980), juries imposed death penalties in

cases involving witness elimination. We cannot say that juries have consistently recommended life sentences in cases similar to the present case.

All of the evidence presented in the present case was to the effect that defendant planned and executed the robbery and murder of the seventy-one-year-old victim, Mr. Hartley, who had befriended defendant when defendant worked at the K&W Cafeteria. Defendant killed the victim so that the victim could not testify against him. All things considered, we do not find that this case presents any serious proportionality question. After 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. For the foregoing reasons, we conclude that the sentence of death entered in the present case is not disproportionate.

Having considered and rejected all of defendant's assigned errors, we hold that defendant's trial and capital sentencing proceeding were free of prejudicial error. Therefore, the sentence of death entered against defendant must be and is left undisturbed.

NO ERROR.

Justice FRYE concurring in part and dissenting in part.

I concur in the Court's decision finding no prejudicial error in defendant's trial and conviction of first-degree murder and robbery with a dangerous weapon. I dissent only as to the capital sentencing proceeding.

I find nothing in the North Carolina Constitution or in our death penalty statute requiring a jury in a capital sentencing proceeding to be unanimous in order to give a negative answer to an issue requiring a positive finding as a prerequisite to a recommendation that a person be sentenced to death. This is the effect of the majority's holding as to the first issue in the capital sentencing proceeding. I therefore dissent as to this issue.

The majority first relies upon Article I, Section 24 of the North Carolina Constitution for the proposition that any jury recommendation requiring a sentence of death or life imprisonment must be unanimous. This section simply says that:

> No person shall be convicted of any crime but by a unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.

N.C. Const. art. I, § 24. This section requires a unanimous verdict of a jury in open court in order to convict a person of a crime. In this case, as in all capital cases in North Carolina, we do not get to a capital sentencing proceeding until after a jury has convicted the defendant of the capital crime by a unanimous verdict in open court. The majority's proposition relates to any sentencing recommendation, not a conviction. Thus, I do not find the majority's conclusion to be supported by Article I, Section 24 of the North Carolina Constitution.

The majority cites N.C.G.S. § 15A-2000(b) in support of the same proposition. Note, however, that the proposition is stated in terms of any jury recommendation. The recommendation can be one of only two sentences: life imprisonment or death. Under N.C.G.S. § 15A-2000(b), the jury must hear the evidence, arguments of counsel, and instructions of the court before deliberating and delivering a sentence recommendation to the court. This sentence *recommendation* (life imprisonment or death) must be based upon the jury's *consideration* of:

> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exists; [and]
>
> (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exists[.]

N.C.G.S. § 15A-2000(b) (Supp. 1994). Thus, under N.C.G.S. § 15A-2000(b), before the jury may *recommend*, it must first *consider* whether any enumerated sufficient aggravating circumstances exist, whether any enumerated sufficient mitigating circumstances exist, and whether those mitigating circumstances outweigh the aggravating circumstances.

In order to facilitate the jury's *consideration* of the matters mandated by the statute, the court gives the jury four issues to answer. In order to facilitate the jury's *recommendation*, the court gives the jury one question to answer. For convenience, and to assist the jury in understanding and following the court's instructions, the court gives the jury a form to take into the jury room. It is labeled: Issues and Recommendation as to Punishment.

N.C.G.S. § 15A-2000(b) says that "[t]he sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned." Note again that the language of the statute is that the "sentence recommendation" must be unanimous. There is no express provision in N.C.G.S. § 15A-2000(b) requiring unanimity as to the jury's consideration of matters leading to its recommendation.

The majority next relies on a quote from Justice Kennedy's concurring opinion in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). In *McKoy*, the United States Supreme Court held that North Carolina's capital sentencing scheme's unanimity requirement as to mitigating circumstances "violates the Constitution by preventing the sentencer from considering all mitigating evidence." *Id.* at 435, 108 L. Ed. 2d at 376. Concurring in the judgment, Justice Kennedy said:

> Jury unanimity, it is true, is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community. Yet the unique interaction of the elements of the sentencing statute in issue here can allow the same requirement of unanimity to produce a capital sentence that lacks unanimous support of the jurors, and, more than this, is thought to be inappropriate by 11 of the 12.

Id. at 452, 108 L. Ed. 2d at 387. The second sentence of Justice Kennedy's concurring opinion makes it clear that, at least in some circumstances, requiring unanimity as to one of the issues the jury must consider in making a sentencing recommendation may result in a capital sentence thought to be inappropriate by some, if not most, of the jurors. Thus, I do not believe that, even if Justice Kennedy had spoken for a majority of the Supreme Court, his views would support the majority's rule set forth in this case that the jury must be unanimous to answer "no" to Issue Three.

The majority's ultimate rationale for requiring the jury to be unanimous to give a negative answer to Issue Three is that this requirement prevents the jury from evading its duty to make a sentence recommendation. I do not accept this rationale, and I find nothing in our Constitution, our capital sentencing statute, or our cases to support it. The cases cited by the majority require unanimity in the jury's rec-

ommendation as to sentence, and I agree with the rationale of those cases. However, they are not controlling on the question here which relates to an issue the jury must answer before making a recommendation as to sentence. I now consider defendant's argument.

For his first assignment of error in the sentencing phase of his trial, defendant contends that the trial court committed reversible error in giving an erroneous answer to a question by the jury and then refusing to instruct the jury that it did not need to be unanimous in order to give a negative answer to Issue Three on the written Issues and Recommendation as to Punishment form. I agree.

Under subsection (c) of N.C.G.S. § 15A-2000, if the jury recommends a sentence of death, the jury foreman is required to sign a writing on behalf of the jury setting out specific findings in support of the jury's recommendation. Subsection (c) provides:

> (c) Findings in Support of Sentence of Death.—When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:
>
> (1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
>
> (2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,
>
> (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

N.C.G.S. § 15A-2000(c) (Supp. 1994).

The language of this subsection is mandatory: "the foreman . . . *shall* sign a writing on behalf of the jury which writing *shall* show" the three requirements set out in this subsection. *Id.* (emphasis added). If the writing does not show that these requirements have been met, the jury may not recommend, and the judge may not impose, a sentence of death. Thus, unanimity is required in order for the jury to find the statutory requisites to the recommendation of a sentence of death, and unanimity is required for the recommendation itself. In short, while N.C.G.S. § 15A-2000(b) requires the jury recommendation to be unanimous, N.C.G.S. § 15A-2000(c) requires that both the jury's

recommendation of death and the findings in support thereof be unanimous.

In compliance with subsection (c) of N.C.G.S. § 15A-2000, Issue Three on the written Issues and Recommendation as to Punishment form submitted to the jury in this case was as follows:

> Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by one or more of you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found unanimously by you in Issue One?

The trial court correctly instructed the jury:

> If you unanimously find beyond a reasonable doubt—you'll notice, unanimously, twelve person decision—If you unanimously find beyond a reasonable doubt that the mitigating circumstances found are insufficient to outweigh the aggravating circumstances found, you would answer Issue Number Three, "Yes." *If you do not so find, or have a reasonable doubt as to whether they do, you would answer Issue Number Three, "No."*

(Emphasis added.)

After several hours of deliberation, the jury sent a question to the judge regarding Issue Number Three. The question read: "Must there be twelve votes, 'Yes,' or twelve votes, 'No,' to reach a unanimous decision?" After conferring with the parties, the judge had the jury return to the courtroom, and the following colloquy occurred between the judge and the foreman of the jury:

> THE COURT: The answer to that is, Yes, it must be a unanimous twelve person decision as to any answer you reach to that issue, whether it be Yes or whether it be No. It must be a unanimous twelve person decision.
>
> Does that answer your question?
>
> JUROR BASINGER: Yes, sir.
>
> One more question, if I may ask. If there is not a unanimous decision, what steps are taken then as to the paper? Unless I'm reading it wrong—the reason that I'm asking because the way that the question is stated I might look at it totally different than juror number one would look at it and that's the reason we came out to ask because we want to be sure of what we were reading.

THE COURT: Well, the answer is that it must be unanimous twelve person decision. If what you're saying is—you understand that it can't be a majority vote, it must be a unanimous twelve person decision. So I'm going to ask you to continue deliberations with that instruction in mind. Does that answer your question?

JUROR BASINGER: Yes, sir.

THE COURT: If you'll step back there and keep trying, please.

After the jury resumed deliberations and the court adjourned awaiting the jury verdict, defendant objected to the judge's instruction and indicated that if all the jurors do not agree on the answer to Issue Three, then the answer to that question is "No." Thus, a unanimous decision is not required to answer "no" to Issue Three. The colloquy continued:

THE COURT: The State need to respond to that?

MR. KENERLY: Your Honor, I think it's just a question of syntax. It's an awkwardly worded question. But if they're not unanimous then we would just say that they cannot answer that question, but not that they would answer it, No. They can only answer it Yes or No if they're unanimous in whichever way they decide.

MR. RUSSELL: Your Honor, if that was the case, we could just strike the word "unanimous" from Issue Three.

Your Honor, I know it's kind of convoluted but in more simple terms if they do not all agree, then they do not find Issue Number Three. If they do not all agree, they cannot answer Yes to Issue Number Three. But they don't all have to agree, No.

I believe that the foreman asked a follow-up question, what happens if we all do not agree or all cannot agree? I think that therein lies the answer. The answer is that if you don't agree unanimously, then the answer to the question is No.

THE COURT: That is a very interesting argument and I certainly see the logic in it, but I don't believe that's a correct statement of the law as it now exists. So until I see some definitive direction from a higher court, I would feel compelled to deny that motion or that request. I'll certainly note that objection for the record.

I believe that defendant's attorney correctly stated the law when he told the judge, "if they do not all agree, then they do not find Issue Number Three. If they do not all agree, they cannot answer Yes to Issue Number Three. But they don't all have to agree, No." Defendant's position is consistent with N.C.G.S. § 15A-2000(b) and

(c), the court's initial instruction in this case, and the instructions on the Issues and Recommendation as to Punishment form. Furthermore, defendant's position is not inconsistent with the federal or state constitutions, or any decision of this Court that I have been able to find.

The State contends that the question in this case is controlled by *State v. Green*, 336 N.C. 142, 443 S.E.2d 14 (1994). I find that *Green* is distinguishable from the instant case. In *Green*, the defendant was charged with first-degree murder of two persons. After deliberations, the jury asked: "Does [the jury] decision have to be unanimous on both recommendations?" *Id.* at 176, 443 S.E.2d at 35. This Court held that "[t]he trial court correctly informed [the] jury that any recommendation [it] made *as to sentencing* must be unanimous." *Id.* at 178, 443 S.E.2d at 35 (emphasis added). In *Green*, the jury was questioning whether it would have to be unanimous in its sentencing recommendations on each of the two murder charges. The correct answer was "yes"; the jury must be unanimous in its sentencing recommendation of life or death. However, the question in this case was not whether the sentencing recommendation must be unanimous but whether the jury must be unanimous in order to give a negative answer to Issue Three, an intermediate step the jury must take prior to reaching a unanimous sentencing recommendation. Accordingly, this case is not controlled by *Green*.

If the jury does not unanimously agree that the mitigating circumstances are insufficient to outweigh the aggravating circumstances, or if any member of the jury has a reasonable doubt as to whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances found by the jury, the answer to Issue Three is "no." To put it simply, *the jury must be unanimous to answer Issue Three "yes," but unanimity is not required to answer "no."*[1] "If the jury cannot, within a reasonable time, unanimously

1. The majority also seems to decide that the jury must be unanimous in order to answer "no" to Issues One and Four. As to Issue One, the majority's decision seems *contra* to (1) *State v. Kirkley*, 308 N.C. 196, 219, 302 S.E.2d 144, 157 (1983) ("The unanimity requirement is only placed upon the finding of whether an aggravating . . . circumstance exists."); (2) the North Carolina Pattern Jury Instruction, N.C.P.I.—Crim. 150.10 (1990) ("If you do not unanimously find beyond a reasonable doubt that one of these facts existed, you would answer Issue One-A 'No[.]' "); and (3) Justice Meyer's dissenting opinion in *State v. Hightower*, 331 N.C. 636, 648, 417 S.E.2d 237, 244 (1992) (Meyer, J., dissenting) ("I conclude that defendant is entitled to a new sentencing hearing based on the trial court's erroneous instruction that the jury could not reject the sole aggravating circumstance submitted unless the jurors *unanimously* agreed that the evidence presented did not prove the existence of the aggravating circumstance.").

agree to its sentencing recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation." N.C.G.S. § 15A-2000(b).

In this case, the jury was given two alternative instructions upon which to base its decision: the initial correct instruction required the jury to be unanimous in order to find that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, while the subsequent instruction erroneously required the jury to be unanimous in order to answer the question in the negative. When a jury is given two alternative instructions upon which to base its decision, one of which is improper, the matter must be remanded for a new proceeding. *See State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987). This result is required because the appellate court cannot determine upon which instruction the jury relied in reaching its decision and, therefore, assumes the jury relied on the erroneous, improper instruction. *Id.* This Court is "not at liberty to" assume upon which instructions defendant's sentencing jury relied. *State v. Belton*, 318 N.C. 141, 162, 347 S.E.2d 755, 768 (1986). "[T]he Court [construes] the ambiguity in favor of defendant." *Id.* This is especially true where, as here, the erroneous instruction is given in response to a question, from the jury, which indicates that the answer to the question may determine whether defendant is sentenced to life imprisonment or death. Since the jury may have relied on the erroneous instruction to make its recommendation of a sentence of death, I cannot find the error harmless beyond a reasonable doubt. I would thus find the error prejudicial, vacate defendant's sentence of death, and remand the case to Superior Court, Cabarrus County, for a new capital sentencing proceeding in accord with N.C.G.S. § 15A-2000.

Justice WHICHARD joins in this concurring and dissenting opinion.

IN RE MINOR CHARGED

[341 N.C. 417 (1995)]

IN THE MATTER OF A MINOR CHARGED IN THIS PROCEEDING 95-J-114	)))	ORDER

No. 90P95

(Filed 2 March 1995)

Upon consideration of the several petitions, motions and request filed by Petitioner in this matter, the following was entered and is hereby certified to the North Carolina Court of Appeals and to the District Court of Cumberland County:

> "The petitions, motions, and requests are allowed in part as follows: The portions of the 27 February 1995 order prohibiting the disclosure or publication of the juvenile's identity and photograph by the print and electronic media are vacated; except as herein specifically allowed, the petitions, motions, and requests are denied.
>
> Orr, J., not participating
>
> by order of the Court in conference, this the 2nd day of March 1995.
>
> s/Lake, Jr., J.
> For the Court"

BAILEY v. CELOTEX CORP.

No. 245P95

Case below: 118 N.C.App. 734

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

BATCHELDOR v. BOYD

No. 253P95

Case below: 119 N.C.App. 204

Petition by defendants (Barbara Burgin, Tommy G. Boyd, Jr., Carolyn Clayton, Robert M. Chafin and John Lyndon Chafin) for discretionary review pursuant to G.S. 7A-31 denied 7 September 1995. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 September 1995.

BERKELEY FEDERAL SAVINGS BANK v. TERRA DEL SOL, INC.

No. 271PA95

Case below: 119 N.C.App. 249

Petition by defendants (Terra Del Sol, Inc., Smith, Lindenwood, Ilex, Horizon, Foxfire, First Resort & Ranch Resorts) for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1995.

BRITTHAVEN, INC. v. N.C. DEPT. OF HUMAN RESOURCES

No. 196P95

Case below: 118 N.C.App. 379

Petition by petitioner (Britthaven) for discretionary review pursuant to G.S. 7A-31 denied 7 September 1995.

BROWN v. BROWN

No. 318P95

Case below: 119 N.C.App. 604

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

BUIE v. HIGH POINT ASSOCIATES LTD. PARTNERSHIP

No. 269P95

Case below: 119 N.C.App. 155

Petition by defendant (High Point Associates Limited Partnership) for discretionary review pursuant to G.S. 7A-31 denied 7 September 1995.

BUNCH v. N.C. CODE OFFICIALS QUALIFICATIONS BOARD

No. 304PA95

Case below: 119 N.C.App. 293

Petition by respondent (NC Code Officials) for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1995.

BURTON v. CITY OF DURHAM

No. 254P95

Case below: 118 N.C.App. 676

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 September 1995. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 September 1995.

DURHAM COUNTY EX REL. HOLLOWAY v. TILLEY

No. 308P95

Case below: 119 N.C.App. 604

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

GODWIN v. WALLS

No. 179PA95

Case below: 118 N.C.App. 341

Petition by defendant (Roger Brent Walls) for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1995.

IN RE WHITE

No. 154P95

Case below: 118 N.C.App. 337

Notice of appeal by defendant (substantial constitutional question) dismissed 7 September 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1995.

JOHNSON v. BAHLSEN, INC.

No. 174P95

Case below: 118 N.C.App. 337

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

JOHNSON v. CITY OF ROCKY MOUNT

No. 296P95

Case below: 119 N.C.App. 442

Petition by petitioner (Charles L. Johnson) for discretionary review pursuant to G.S. 7A-31 denied 7 September 1995.

NATIONWIDE MUTUAL INS. CO. v. DAVIS

No. 209P95

Case below: 118 N.C.App. 494

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

O'CARROLL v. ROBERTS INDUSTRIAL CONTRACTORS

No. 282P95

Case below: 119 N.C.App. 140

Petition by defendant (Texasgulf) for discretionary review pursuant to G.S. 7A-31 denied 7 September 1995.

PETTIGREW v. BURLINGTON INDUSTRIES

No. 249P95

Case below: 118 N.C.App. 735

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

SIMMONS v. PARKINSON

No. 315P95

Case below: 119 N.C.App. 424

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

STACY v. JEDCO CONSTRUCTION, INC.

No. 267P95

Case below: 119 N.C.App. 115

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

STATE v. COUNCIL

No. 301P95

Case below: 119 N.C.App. 442

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

STATE v. DEHART

No. 305P95

Case below: 119 N.C.App. 441

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

STATE v. EASTERLING

No. 278P95

Case below: 119 N.C.App. 22

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

STATE v. KEEL

No. 134A93-2

Case below: Superior Court 90CRS8033

Petition by defendant for writ of supersedeas dismissed 7 September 1995. Petition by defendant for writ of certiorari to review the decision of the Superior Court, Edgecombe County, dismissed 7 September 1995.

STATE v. KELLY

No. 200P95

Case below: 118 N.C.App. 589

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

STATE v. PARKER

No. 312P95

Case below: 119 N.C.App. 606

Motion by Attorney General for temporary stay allowed 31 July 1995.

STATE v. PATTERSON

No. 297P95

Case below: 115 N.C.App. 731

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

STATE v. PATTON

No. 255PA95

Case below: 119 N.C.App. 229

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1995.

STATE v. POE

No. 264P95

Case below: 119 N.C.App. 266

Petition by Attorney General for writ of supersedeas denied 7 September 1995. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 7 September 1995. Petition by defendant (Elbert Randolph Poe) for discretionary review pursuant to G.S. 7A-31 denied and temporary stay dissolved 7 September 1995.

STATE v. PRICE

No. 277P95

Case below: 118 N.C.App. 734

Petition by defendant (Pro Se) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 September 1995.

STATE v. PRICE

No. 166P95

Case below: 118 N.C.App. 212

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

STATE v. THOMAS

No. 375P95

Case below: 119 N.C.App. 708

Motion by Attorney General for temporary stay allowed 6 September 1995.

STATE v. WILSON

No. 201P95

Case below: 118 N.C.App. 616

Petition by the Attorney General for writ of supersedeas denied and stay dissolved 7 September 1995. Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied 7 September 1995. Motion by defendant for consideration of issues not addressed by Court of Appeals denied 7 September 1995.

TORRANCE v. AS & L MOTORS

No. 317P95

Case below: 119 N.C.App. 552

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

TREECE v. BERNTHAL

No. 248P95

Case below: 118 N.C.App. 737

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

TREXLER v. K-MART CORP.

No. 323PA95

Case below: 119 N.C.App. 406

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1995.

YOUNG v. WOODALL

No. 265PA95

Case below: 119 N.C.App. 132

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1995.

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

PETITION TO REHEAR

HAAS v. WARREN

No. 571PA93

Case below: 341 N.C. 148

Petition by defendants to rehear pursuant to Rule 31 denied 7 September 1995.

STATE OF NORTH CAROLINA v. ELTON OZELL McLAUGHLIN

No. 637A84(3)

(Filed 8 September 1995)

1. Jury § 226 (NCI4th)— first-degree murder—jury selection—rehabilitation denied

There was no error in a first-degree murder prosecution where defendant contended that the court did not give him an adequate opportunity to rehabilitate two prospective jurors. The first prospective juror stated that although he did not have any moral or religious objections to the death penalty, his religious views would make it hard for him to consider the issue of punishment, and nothing in the transcript tends to indicate that further questioning would have shown that he could have set aside his strong religious beliefs in order to apply the law according to the trial court's instructions. The second prospective juror clearly and unequivocally stated that she could not temporarily set aside her religious beliefs against the death penalty and defendant's attempts to rehabilitate her as a juror had already been fruitless and time-consuming.

Am Jur 2d, Jury § 279.

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

2. Criminal Law § 1347 (NCI4th)— first-degree murder—sentencing—course of conduct—evidence of other murders

The trial court did not err during a first-degree murder sentencing hearing by allowing the State to introduce evidence of other murders as evidence tending to show the aggravating circumstance that the murder was part of a course of conduct which included other crimes of violence against another person or persons. Defendant was sentenced to death for the murder of James Worley; the facts surrounding the subsequent murders of James Worley's wife and her daughter were sufficiently connected to his murder to be submitted to the jury for determination of whether they were, indeed, parts of the same course of conduct.

Am Jur 2d, Criminal Law §§ 598, 599.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that

defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-*Gregg* cases. 65 ALR4th 838.

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.

3. Criminal Law § 1337 (NCI4th)— first-degree murder—sentencing—previous conviction involving violence

The trial court did not err during a first-degree murder resentencing hearing by allowing into evidence defendant's stipulation that he had previously been convicted of a felony involving the use of violence. Defendant had stipulated in his original trial in 1984 that he had been convicted of involuntary manslaughter, that the act involved the use of violence, and that he intentionally shot and killed the victim; defendant filed a motion on 12 June 1992 to limit testimony concerning a 1975 conviction for involuntary manslaughter; that motion contained a stipulation; defendant sought at the beginning of his capital resentencing hearing to withdraw the motion and the stipulation; the court allowed the withdrawal; and the State sought to introduce the stipulation from the original trial during the resentencing hearing. This was not a stipulation as to a matter of law. Although the stipulation used the language "involved the use of violence," this language addressed the factual circumstances supporting the prior conviction rather than a legal standard.

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.

4. Criminal Law § 1363 (NCI4th)— first-degree murder—sentencing—nonstatutory mitigating circumstances—sentence of accomplice

The trial court did not err in a first-degree murder resentencing hearing by not admitting evidence to establish the nonstatutory mitigating circumstance that an accomplice had received only life imprisonment. Such evidence has consistently been held inadmissible under North Carolina law. The question of admissibility of a codefendant's sentence was not an issue in *Parker v. Dugger*, 498 U.S. 932, and that decision has no bearing on this case.

Am Jur 2d, Criminal Law §§ 598, 599.

5. Criminal Law § 442 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—jury's responsibility

There was no error in a first-degree murder resentencing hearing where the prosecutor repeatedly emphasized during his closing argument that defendant started the chain of events that resulted in the jury being called to hear the case. Although defendant contended that the argument unconstitutionally diminished the jury's sense of responsibility for its sentencing decision, it has previously been held that such an argument does not violate defendant's constitutional rights.

Am Jur 2d, Trial §§ 567-576.

6. Criminal Law § 452 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—definition of mitigating circumstances

There was no error in a first-degree murder resentencing hearing where the prosecutor told the jurors that mitigating circumstances are "things which [defendant] says make his crime less deserving of the death penalty" and that "[y]ou don't have to find [a mitigating circumstance] if you don't want to."

Am Jur 2d, Trial §§ 554 et seq.

7. Criminal Law § 452 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—weighing of aggravating and mitigating circumstances

There was no error in a first-degree murder resentencing hearing where defendant contended that the prosecutor misstated the manner in which the jury should evaluate the mitigat-

ing and aggravating evidence but the prosecutor, while placing a negative interpretation upon defendant's evidence, was properly addressing the process of weighing aggravating and mitigating circumstances.

Am Jur 2d, Trial §§ 554 et seq.

8. Criminal Law § 447 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—impact on victims

There was no error in a first-degree murder resentencing hearing where the prosecutor made comparisons between defendant's life and the life that his victims would never have. Although defendant argued that N.C.G.S. § 15A-2000 renders victim impact statements irrelevant in capital sentencing proceedings, there was nothing in the prosecutor's argument that would compel a trial court to intercede *ex mero motu*.

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.

9. Criminal Law § 463 (NCI4th)—first-degree murder—sentencing—prosecutor's argument—defendant as contract killer

There was no error requiring intervention *ex mero motu* in a first-degree murder resentencing hearing where defendant contended that the prosecutor argued without adequate evidentiary support that defendant was a contract killer, referred to defendant's legal rights, and referred to defendant as a mass murderer.

Am Jur 2d, Trial §§ 609 et seq.

10. Criminal Law § 1363 (NCI4th)— first-degree murder—sentencing—nonstatutory mitigating circumstances—subsumed in statutory circumstances

There was no error in a first-degree murder resentencing hearing where the trial court did not submit the requested nonstatutory mitigating circumstances that defendant was of low intelligence with poor judgment and limited insight, that defendant was under a pattern of substance abuse at the time of the commission of the crime, and that defendant's limited mental

capacity at the time of the trial significantly reduced his culpability for the offense. The trial court properly ruled that these proposed nonstatutory mitigating circumstances were subsumed in the mitigating circumstances set out in N.C.G.S. § 15A-2000(f)(2) and (f)(6), mental and emotional disturbance, and impaired capacity.

Am Jur 2d, Criminal Law §§ 598, 599.

11. Criminal Law § 680 (NCI4th)— first-degree murder—sentencing—nonstatutory mitigating circumstances—peremptory instructions—defendant's employment record

The trial court did not err in a first-degree murder resentencing hearing by failing to peremptorily instruct the jury with respect to a nonstatutory mitigating circumstance concerning defendant's employment record and that he was a productive member of society. If the evidence is controverted or not manifestly credible, the trial court should not give peremptory instructions. Here, the State pointed to evidence tending to show that defendant was responsible for four deaths in the community and was a confessed drug and alcohol abuser. Defendant's status as a productive member of society was anything but uncontroverted.

Am Jur 2d, Trial §§ 1441-1447.

12. Criminal Law § 680 (NCI4th)— first-degree murder—sentencing—nonstatutory mitigating circumstances—peremptory instructions—defendant's self-improvement and good record while incarcerated

The trial court did not err in a first-degree murder resentencing hearing by failing to peremptorily instruct the jury with respect to a nonstatutory mitigating circumstance concerning defendant's self-improvement while incarcerated. The State produced evidence that defendant had committed two major infractions while incarcerated and the defendant's evidence for the circumstance was therefore controverted. Defendant's evidence for the desirable nonstatutory mitigating circumstance concerning his "desirable prison record" was also controverted by evidence of possession of a weapon, an attempt to remove a flammable material from the prison kitchen with intent to use it to cause bodily harm, and a fistfight with another inmate.

Am Jur 2d, Trial §§ 1441-1447.

13. Criminal Law § 680 (NCI4th)— first-degree murder—sentencing—nonstatutory mitigating circumstances—peremptory instructions—assistance to other inmates

The trial court did not err in a first-degree murder resentencing hearing by not giving a peremptory instruction on the nonstatutory mitigating circumstance that defendant made significant efforts to be of assistance to other inmates in the prison to help them adjust to prison life where the evidence showed that he had been of assistance to only one inmate. While not controverted, the evidence was not manifestly credible.

Am Jur 2d, Trial §§ 1441-1447.

14. Criminal Law § 680 (NCI4th)— first-degree murder—sentencing—nonstatutory mitigating circumstances—peremptory instructions—defendant becoming cook in prison

There was no prejudicial error in a first-degree murder resentencing hearing where the trial court failed to give a peremptory instruction regarding the mitigating circumstance that defendant had achieved a position as a cook in the prison kitchen. Evidence as to this mitigating circumstance was both uncontroverted and manifestly credible and failing to give the peremptory instruction was therefore error. Assuming that the error rose to the level of a federal constitutional violation, overwhelming evidence supported the jury's findings of aggravating circumstances and the failure to give the peremptory instruction, which may have caused one or more jurors to fail to find as a mitigating circumstance that defendant worked as a cook in prison, was harmless beyond a reasonable doubt.

Am Jur 2d, Trial §§ 1441-1447.

15. Criminal Law §§ 1357, 1360 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—impaired capacity and emotional disturbance—poor judgment, limited insight, intoxicating substances

There was no plain error in a first-degree murder resentencing hearing where defendant contended that the trial court erred by failing to instruct the jury that it could find the statutory mitigating circumstances of emotional disturbance and impaired capacity based on defendant's poor judgment, limited insight, and consumption of intoxicating substances. Although defendant contends that the trial court was required to state all possible

conditions that tended to support a finding of either circumstance once it undertook to instruct the jury about specific conditions that would permit a finding that the two statutory mitigating circumstances existed, the jury was presented with all of the evidence and defendant outlined all of the circumstances he contended supported finding these mitigating circumstances during his closing argument. There was nothing in the instructions given to warrant reversal based on plain error.

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

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

16. Criminal Law § 1348 (NCI4th)— first-degree murder—sentencing—definition of mitigating circumstances

There was no error in a first-degree murder resentencing hearing where the jury returned after beginning deliberations, asked how mitigating circumstances were to be deemed of value, and defendant contended that the definition given unduly restricted the jury's consideration of relevant evidence by not reinstructing the jury to consider any other circumstances arising from the evidence which the jury deemed to have mitigating value. This was a reinstruction of the jury; reviewed in their entirety, the original instructions did not restrict the jury from considering all evidence which might have mitigating value.

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

17. Jury § 141 (NCI4th); Criminal Law § 1322 (NCI4th)— first-degree murder—sentencing—jurors' misconceptions concerning parole

The trial court did not err in a first-degree murder resentencing by excluding all references to parole eligibility during *voir dire*, the trial, and jury instructions.

Am Jur 2d, Trial §§ 1441-1447.

18. Criminal Law § 1321 (NCI4th)— first-degree murder—sentencing—unanimity

The trial court did not err in a first-degree murder resentencing hearing where, upon determining that the jury was divided eleven to one, the court gave an instruction which included the statement that the answer to Issue Number Four must be unanimous. A jury must be unanimous in deciding any sentence deter-

minative issue, and Issue Four is a sentence determinative issue. There was nothing coercive in the instructions when reviewed in context and in their entirety because the jurors merely stated that they were not unanimous and did not specifically inquire as to the consequence of inability to reach unanimity, and the trial court explicitly instructed the jurors that their inability to reach a unanimous recommendation should not be their concern, but should simply be reported to the court.

Am Jur 2d, Trial §§ 1437, 1445-1447.

19. Evidence and Witnesses § 1406 (NCI4th); Criminal Law § 1309 (NCI4th)— first-degree murder—sentencing hearing—codefendant taking Fifth—use of prior testimony

The trial court did not err in a first-degree murder resentencing hearing by allowing a codefendant's testimony from a prior trial to be read into evidence where the codefendant had asserted his privilege against self-incrimination. Whether this evidence was admissible under N.C.G.S. § 8C-1, Rule 804 is not controlling; defendant was not awarded a new trial but a new capital sentencing hearing. N.C.G.S. § 15A-2000(a)(3) expressly provides that evidence presented during the guilt determination phase of a capital case is competent and admissible as a matter of law during a capital sentencing proceeding.

Am Jur 2d, Evidence §§ 890-893, 896, 901-905, 920, 921.

Witness' refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions. 43 ALR3d 1413.

20. Constitutional Law § 340 (NCI4th)— first-degree murder—resentencing—use of codefendant's prior testimony—no violation of right to confrontation

There was no violation of defendant's constitutional right to confrontation in a first-degree murder resentencing hearing where a codefendant refused to testify and his testimony from the prior trial was admitted. Defendant was represented by counsel at his original trial and had ample opportunity to cross-examine the codefendant on the stand at that time; defendant did in fact extensively cross-examine the codefendant during the original trial; his motivation to cross-examine the codefendant then was the same as his motivation at the new capital sentencing proceeding leading to this appeal; and the codefendant simply

refused to answer any questions, as in *California v. Green*, 399 U.S. 149.

Am Jur 2d, Criminal Law §§ 720 et seq., 956 et seq.

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

A death penalty in a first-degree murder resentencing hearing was not disproportionate where the record fully supports the aggravating circumstances found by the jury, and there is no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration. Defendant had previously been convicted of three counts of first-degree murder for which he received one death sentence and two life sentences; during the resentencing, the jury considered the sentencing of defendant solely for the murder for which he had received the death penalty; the jury on resentencing found that defendant had been previously convicted of a felony involving the use of violence to the person and that the murder was committed for pecuniary gain; and the jury found as mitigating circumstances that defendant aided in the apprehension of another capital felon, defendant cooperated with law enforcement officers at an early stage, defendant has made substantial efforts to improve himself by participating in both religious studies and voluntary training courses, defendant has achieved a desirable and competitive position within the prison, defendant has made a significant effort to be of assistance to other inmates, defendant had achieved a desirable prison record, and defendant has consistently supported his child financially. The North Carolina Supreme Court has never found disproportionality in a case in which defendant was found guilty for the death of more than one victim. N.C.G.S. § 15A-2000(d)(2).

Am Jur 2d, Criminal Law §§ 609 et seq., 625 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.

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

Justice FRYE dissenting.

Justice WHICHARD joins in this dissenting opinion.

Appeal by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment sentencing him to death entered by Brooks, J., at the 8 February 1993 Criminal Session of Superior Court, Bladen County. Heard in the Supreme Court on 11 October 1994.

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

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

MITCHELL, Chief Justice.

Defendant Elton Ozell McLaughlin was convicted in 1984 of the first-degree murders of James Elwell Worley, Shelia Denise Worley, and Psoma Wine Baggett. He was sentenced to life imprisonment for the murders of Shelia Denise Worley and Psoma Wine Baggett and sentenced to death for the murder of James Worley. This Court found no error in the convictions and affirmed the sentences entered by the trial court. *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988). Subsequently, the Supreme Court of the United States vacated defendant's sentence of death for the murder of James Worley and remanded the case to this Court for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *McLaughlin v. North Carolina*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990). On remand, this Court determined that *McKoy* error had occurred and was not harmless beyond a reasonable doubt and remanded the case for a new capital sentencing proceeding. *State v. McLaughlin*, 330 N.C. 66, 408 S.E.2d 732 (1991). A new capital sentencing proceeding was conducted at the 8 February 1993 Criminal Session of Superior Court, Bladen County, and defendant was again sentenced to death.

A detailed review of the evidence introduced during defendant's original trial is set forth in the prior opinion of this Court, finding no error in that trial. *McLaughlin*, 323 N.C. 68, 372 S.E.2d 49. Further discussion of the evidence introduced during that trial is unnecessary here.

During the new capital sentencing proceeding, the State produced evidence that Shelia Denise Worley solicited defendant

McLaughlin to kill her husband, James Elwell Worley. After some initial hesitation, defendant agreed to kill Mr. Worley for $3,000. Defendant asked Eddie Carson Robinson to assist him in killing Mr. Worley. On the night of 25 March 1984, defendant and Robinson, aided by Ms. Worley, entered the house of Mr. Worley and killed him as he slept in his bed. In order to dispose of the body, the two men placed Mr. Worley in his car, drove it to a remote location, and set it on fire. After failing to receive payment for their services and after learning that Ms. Worley had talked to police concerning her husband's death, Robinson and defendant decided to kill Ms. Worley.

On 29 April 1984, while Ms. Worley and her two children were visiting defendant at his mobile home, defendant lured Ms. Worley to a hallway where Robinson struck her with a pipe. The two men dragged her to the bathroom and immersed her in a tub of water. The two men then placed Ms. Worley's body in the trunk of her car. They went back into defendant's mobile home for Ms. Worley's two sleeping children, four-year-old Psoma Wine Baggett and eighteen-month-old Alecia Baggett.

The evidence conflicted as to who suggested that four-year-old Psoma Baggett could identify them and should be killed. After the child asked for her mother, defendant struck her with the pipe. Robinson also struck Psoma with the pipe, while Alecia remained asleep in the car. Robinson drove Ms. Worley's car, containing the bodies of Ms. Worley and Psoma, to a bridge over White Creek. Upon arrival, defendant and Robinson put the car in drive and rolled it into the creek. Then they went down to the creek and put the bodies of Ms. Worley and Psoma in the water, leaving Alecia asleep in Ms. Worley's car. As the two men left to go home, they heard a child crying.

The State also produced evidence that defendant had been previously convicted of manslaughter. In that case, defendant's car was being chased by a car driven by Fred McNeil. After both cars crashed into a ditch, defendant emerged from his car and started shooting at McNeil. He shot McNeil, who fell and said, "Man, you got me." A witness to the incident testified that defendant then started shooting McNeil again, killing him. The State also presented evidence that defendant had two major infractions while incarcerated at Central Prison.

Defendant presented a number of experts who testified that he had a drug and alcohol problem, low intelligence, limited insight, and

poor judgment. Defendant also presented witnesses who testified as to his helpful and supportive nature, his honesty, and his job performance. Witnesses also testified about defendant's study of the Bible in prison. Defendant presented evidence that he was employed as a cook in the prison kitchen and had taken a cooking course sponsored by Wake Technical Community College. Finally, a fellow inmate testified that defendant had helped him adjust to prison life.

The jury found the existence of two aggravating circumstances and eight mitigating circumstances. As aggravating circumstances, the jury found that defendant had previously been convicted of a felony involving the use of violence to a person and that defendant committed the murder of James Worley for pecuniary gain. As a statutory mitigating circumstance, the jury found that defendant had aided in the apprehension of another capital felon. As nonstatutory mitigating circumstances, the jury found that (1) defendant had cooperated with law enforcement officers at an early stage of their investigation, (2) defendant was of good character and reputation in the community in which he lived and worked, (3) defendant had made substantial efforts to improve himself by participation in religious studies and voluntary training relative to his work in prison, (4) defendant had achieved a desirable position as a cook in prison, (5) defendant had made significant efforts to be of assistance to other inmates, (6) defendant had a desirable prison record of only two infractions, and (7) defendant consistently supported his child financially. The jury recommended a sentence of death, and the trial court sentenced defendant accordingly. Defendant appealed to this Court as a matter of right.

[1] Defendant first assigns as error the trial court's excusal of two prospective jurors. He contends that the trial court did not give him an adequate opportunity to rehabilitate them during the jury selection process. Prospective juror Otto Lovette stated that although he did not have any moral or religious objections to the death penalty, his religious views would make it hard for him to consider the issue of punishment in this case. Struggling to explain his religious "teachings," Lovette expressed doubt as to whether he could set aside his beliefs and follow the law. He indicated upon questioning by the prosecutor that his beliefs would interfere with his ability to decide whether defendant should live or die. During extensive questioning by defendant, Lovette reiterated his doubt as to his ability to surrender his "teachings."

Defendant argues that prospective juror Lovette's statements merely demonstrated his seriousness in approaching the issue of punishment in this case. Further, defendant contends the trial court prematurely excused Lovette for cause without allowing defendant an opportunity to rehabilitate. We disagree.

In *Wainwright v. Witt*, the Supreme Court held that a juror may properly be excused for his views on capital punishment if " '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, 420, 83 L. Ed. 2d 841, 849 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). Problems frequently arise because jurors are not privy to the semantics and nuances of this test; therefore, they often fail to state clearly their ability or inability to set aside their beliefs which would prevent or substantially impair the performance of their duties. This Court has stated that "a prospective juror's bias may not always be 'provable with unmistakable clarity [and,] [i]n such cases, reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially." *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 908 (1993) (quoting *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990)). The ruling of the trial court in such situations will not be disturbed absent an abuse of discretion. *Id.* (citing *State v. Wilson*, 313 N.C. 516, 526, 330 S.E.2d 450, 458 (1985)). Nothing in the transcript of the present case tends to indicate that further questioning would have shown that prospective juror Lovette could have set aside his strong religious beliefs in order to apply the law according to the trial court's instructions. Consequently, we must conclude that the trial court did not abuse its discretion in excusing prospective juror Lovette.

Defendant also asserts that the excusal of prospective juror Rebecca Dixon was error. Defendant argues that although Dixon initially indicated a general opposition to capital punishment, the trial court prematurely terminated defendant's attempt to rehabilitate her. He contends that this violated the rule established in *Brogden* that a trial court errs if it prohibits a defendant from any questioning intended to rehabilitate prospective jurors challenged for cause by the prosecution. We do not agree.

Here, prospective juror Dixon clearly and unequivocally stated that she could not temporarily set aside her religious beliefs against

the death penalty in deference to the rule of law. Moreover, defendant's attempts to rehabilitate her as a juror had already been fruitless and time-consuming.

In *Brogden*, we held that a trial court may not prohibit, in a blanket manner, all attempts at rehabilitation by defendant when a potential juror is challenged for cause. *Brogden*, 334 N.C. 39, 430 S.E.2d 905. However, it is within the discretion of the trial court to determine when such rehabilitation attempts have proven futile. *State v. Taylor*, 332 N.C. 372, 390, 420 S.E.2d 414, 425 (1992). In this case, defendant's additional questions did nothing to rehabilitate Dixon. Instead, she grew more steadfast in her view that she could not "go against [her] religious belief." Therefore, she was properly excused under *Witt*, and the trial court did not err in terminating defendant's questioning.

[2] In another assignment of error, defendant argues that the trial court erred by allowing the State to introduce evidence concerning the circumstances surrounding the murders of Shelia Denise Worley and the child, Psoma Baggett. Over objection, the trial court admitted this evidence as evidence tending to show the aggravating circumstance that the murder of James Worley was part of a course of conduct by defendant which included other crimes of violence against another person or persons. N.C.G.S. § 15A-2000(e)(11) (Supp. 1994). The jury rejected this aggravating circumstance.

In *State v. Cummings*, 332 N.C. 487, 422 S.E.2d 692 (1992), we held that a defendant's killing of two sisters, one of whom was his wife, over a period of twenty-six months was sufficiently linked to allow the trial court to submit evidence of those murders as tending to show a course of conduct by defendant. In order to submit the course of conduct aggravator, a trial court must consider the circumstances surrounding the acts of violence and discern evidence tending to show some connection, common scheme, or pattern that ties them together. *Id.* at 510, 422 S.E.2d at 705. In *Cummings*, we said, "It stands to reason that if multiple victims are from the same family, . . . it is much more likely that there exists some connection between their murders than if the victims were not so associated." *Id.* at 511, 422 S.E.2d at 705.

In the case *sub judice*, the facts surrounding the subsequent murders of James Worley's wife and her daughter were sufficiently connected to his murder to be submitted to the jury for their determination if they were, indeed, parts of the same course of conduct. Not only were the victims related, but Shelia Denise Worley solicited

defendant to commit the murder of James Worley. The contract murder of Mr. Worley, entered into by defendant and Ms. Worley, set into motion the chain of events that led to the murders of Ms. Worley and her daughter Psoma Baggett. Therefore, the evidence was sufficient to show that all of the murders were sufficiently connected to be parts of one course of conduct by defendant. The trial court did not err in admitting the evidence in question as evidence tending to establish the course of conduct aggravating circumstance, and the fact that the jury did not find this aggravating circumstance is irrelevant to the outcome of this issue.

[3] In another assignment of error, defendant argues that the trial court committed prejudicial error by allowing into evidence defendant's stipulation that he had been previously convicted of a felony involving the use of violence. On 12 June 1992, defendant filed a motion to limit testimony concerning his 1975 conviction for involuntary manslaughter. At the beginning of the new capital sentencing proceeding, defendant sought permission from the court to withdraw the 12 June 1992 motion and the stipulation contained therein. Without objection from the prosecution, the court allowed the withdrawal. However, during the sentencing hearing, the State sought to reintroduce the stipulation from the original trial. In defendant's original trial, defendant stipulated that he had been convicted of involuntary manslaughter, that the act involved the use of violence, and that he intentionally shot and killed the victim. Over objection by defendant, the trial court allowed the prosecutor to read the stipulation from the original trial into the record after the State had presented eyewitness testimony regarding the circumstances surrounding defendant's prior manslaughter conviction. The stipulation stated:

> The defendant hereby stipulates and agrees that on April 22, 1975, the defendant was convicted of involuntary manslaughter and that the act involved the use of violence in that Elton McLaughlin intentionally shot and killed Fred McNeil, Jr.

This evidence supported the State's submission of the aggravating circumstance 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).

Defendant argues that the prior stipulation from his original trial should not have been admitted into evidence. Defendant contends that parties cannot stipulate that various legal tests have been satisfied. *See State v. Fearing*, 315 N.C. 167, 337 S.E.2d 551 (1985) (stipulation concerning the competence of a witness); *State v. Prevette*, 39

N.C. App. 470, 250 S.E.2d 682 (stipulation concerning a party's standing to challenge a search), *disc. rev. denied & appeal dismissed*, 297 N.C. 179, 254 S.E.2d 38 (1979). Generally, stipulations as to matters of law are not binding upon courts. *See Prevette*, 39 N.C. App. at 472, 250 S.E.2d at 683 (citing 73 Am. Jur. 2d *Stipulations* § 5 (1974)). However, we do not find this to be a stipulation as to a matter of law. Although the stipulation used the language "involved the use of violence," this language addressed the factual circumstances supporting the prior conviction rather than a legal standard. This assignment of error is without merit.

[4] In the next assignment, defendant argues that the trial court erred in not allowing him to present evidence to establish a nonstatutory mitigating circumstance that Robinson had received only life imprisonment for the murder of Mr. Worley. Defendant concedes that under prior ruling of this Court, "evidence of the plea bargain and sentencing agreement between the State and a codefendant was irrelevant and properly excluded from the jury's consideration." *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 447 (1981). "Such evidence has no bearing upon defendant's character, record or the nature of his participation in the offense." *Id.*; *see also 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). However, defendant contends that a recent United States Supreme Court case, *Parker v. Dugger*, 498 U.S. 308, 112 L. Ed. 2d 812, *reh'g denied*, 449 U.S. 932, 113 L. Ed. 2d 271 (1991), compels a different result.

In *Parker*, the Supreme Court considered whether a trial court improperly failed to consider relevant nonstatutory mitigating circumstances in the course of deciding to reject a jury recommendation of a sentence of life imprisonment. In reconstructing the weight the trial court gave to the nonstatutory mitigating circumstances, the Supreme Court considered all the evidence presented during the sentencing hearing, among which was evidence of sentences given to codefendants. Defendant in the present case argued at trial, as well as here, that *Parker* establishes that in a capital sentencing proceeding, a trial court must consider a codefendant's life sentence as relevant nonstatutory mitigating evidence. The trial court rejected defendant's attempt to extend the holding of *Parker* to this case, and we concur.

We do not accept the view that *Parker* creates a federal mandate for considering a codefendant's sentence as evidence supporting a nonstatutory mitigating circumstance. Instead, the Supreme Court

was simply reconstructing the weighing process conducted in the Florida trial court in absence of clear findings of fact by the trial court. When referencing the sentences of Parker's accomplices, the Court was simply considering whether the state court properly conducted the weighing of all the evidence that had been introduced. The issue of admissibility of a codefendant's sentence was not an issue in *Parker*. Consequently, the Supreme Court's decision there has no bearing on this case. We have consistently held that such evidence is inadmissible under North Carolina law. This assignment is without merit.

[5] In another assignment of error, defendant contends that the trial court committed prejudicial error by failing to intervene *ex mero motu* to preclude the prosecutor from making improper arguments. We have stated that "[t]rial counsel are allowed wide latitude in jury arguments. Counsel are permitted to argue the facts based on evidence which has been presented as well as reasonable inferences which can be drawn therefrom. Control of closing arguments is in the discretion of the trial court." *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, 39-40, *cert. denied*, —— U.S. ——, 130 L. Ed 2d 547 (1994). Moreover, "[b]ecause defendant did not object to the portions of the argument to which he now assigns error, 'review is limited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu*.' " *State v. McNeil*, 324 N.C. 33, 48, 375 S.E.2d 909, 918 (1989) (quoting *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986)) (alternation in original), *sentence vacated*, 494 U.S. 1050, 108 L. Ed. 2d 756, *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991). Regarding appellate review of prosecutorial comments, we have said:

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

State v. Gibbs, 335 N.C. 1, 64, 436 S.E.2d 321, 357-58, (quoting *State v. Pinch*, 306 N.C. 1, 24, 292 S.E.2d 203, 221-22, *cert. denied*, 459

U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983)), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 321 (1993).

First, defendant argues that by emphasizing defendant's responsibility for his own predicament and minimizing the importance of the jury's role, the prosecutor's comments violated defendant's constitutional rights. During his closing argument, the prosecutor repeatedly emphasized that defendant started the chain of events that resulted in the jury being called to hear this case. Defendant contends that such an argument unconstitutionally diminished the jury's sense of responsibility for its sentencing decision.

We have previously held that such an argument does not violate defendant's constitutional rights. In *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604, *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991), we said:

> Viewed in context, it is plain these words were calculated not to relieve the jury of its responsibility, . . . but to indicate to the [jurors] the fact that it was defendant, not they, who chose to take the life of another, and that it was defendant, not they, who was master of his fate.

Id. at 328-29, 384 S.E.2d at 499 (citation omitted). Nothing in this case compels us to veer from this line of reasoning.

[6] Second, defendant argues that the trial court should have intervened *ex mero motu* because the prosecutor repeatedly misstated capital sentencing law. The prosecutor told the jurors that mitigating circumstances are "things which [defendant] says make his crime less deserving of the death penalty" and that "[y]ou don't have to find [a mitigating circumstance] if you don't want to." Defendant contends this statement implies that the jury can ignore credible mitigating evidence in violation of the state and federal Constitutions.

> A definition of mitigating circumstance approved by this court is a fact or group of facts which do not constitute any justification or excuse for killing or reduce 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, 446-47. The prosecutor's definition did not deviate from that we set out in *Irwin*.

[7] Defendant also contends in support of this assignment that the prosecutor misstated the manner in which the jury should evaluate the mitigating and aggravating evidence. We disagree. The transcript shows that the prosecutor, while placing a negative interpretation upon defendant's evidence, was properly addressing the process of weighing aggravating and mitigating circumstances. The prosecutor accurately related the proper standard used in the weighing process. The prosecutor argued:

> Now, after you consider first the aggravating circumstances, whether they exist, whether any of you find the mitigating circumstance, you do a weighing process. Do you find that the—beyond a reasonable doubt that the mitigating circumstance or circumstances found is or are insufficient to outweigh the aggravating circumstance or circumstances?

This argument follows our death penalty statute, which states that the jury must consider whether "the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found." N.C.G.S. § 15A-2000(c)(3). We find no error in the prosecutor's comments.

[8] Defendant further argues in support of this assignment of error that the prosecutor improperly advanced numerous arguments which would support the death penalty in every case of first-degree murder. The prosecutor made comparisons between defendant's life and the life that his victims would never have. The prosecutor referred to defendant's ability to watch television, exercise in a gymnasium, and work in the kitchen. Then the prosecutor listed all the things the four-year-old victim would never be able to do, such as go to school, get in fights with her sister, and worry her mother. In addition, the prosecutor argued that because of defendant's conduct, Alecia never knew her sister or mother. At the very end of his argument, the prosecutor turned his attention to the murder of Mr. Worley:

> James Worley I'm sure had dreams. He had aspirations. And he had things he wanted to do in his life. Elton McLaughlin took that away from James Worley. He took that away from James Worley for three thousand dollars.

Although defendant concedes that the United States Supreme Court overruled *Booth v. Maryland*, 482 U.S. 496, 96 L. Ed. 2d 440 (holding

that use of a victim impact statement during sentencing violated the Eighth Amendment), *reh'g denied*, 483 U.S. 1056, 97 L. Ed. 2d 820 (1987), defendant argues that N.C.G.S. § 15A-2000 still renders victim impact considerations irrelevant in capital sentencing proceedings. We disagree. We find nothing in the prosecutor's argument that would compel a trial court to intercede *ex mero motu*.

[9] Defendant next argues in support of this assignment of error that the prosecutor made arguments without adequate evidentiary support, requiring the trial court to intervene. The prosecutor argued: "Some folks get hired for yard work. Some folks get hired to paint houses. Elton McLaughlin gets hired to kill people." Defendant contends that there is no evidence to support the argument that defendant was a contract killer. Furthermore, defendant objects to the prosecutor's references to the legal rights of defendant. The prosecutor argued:

> But Denise Worley isn't getting the benefits of Elton McLaughlin. She didn't get a trial. He sentenced her to death before coming to a jury. He sentenced her to death before he ever thought of having her come into a courtroom. He sentenced her to death because his life was more important.

The prosecutor also referred to defendant as a "mass murderer." According to defendant, such prosecutorial statements are grossly improper and required the trial court to intervene *ex mero motu*. We again disagree. We find nothing so "grossly improper" in this case as to require the trial court to intervene *ex mero motu*.

[10] In his next assignment of error, defendant maintains that the trial court committed prejudicial error by failing to submit the requested nonstatutory mitigating circumstances that defendant "was of low intelligence with poor judgment and limited insight," that defendant "was under a pattern of substance abuse at the time of the commission of the crime," and that defendant's "limited mental capacity at the time of the trial significantly reduced his culpability for the offense."

The trial court ruled that these proposed nonstatutory mitigating circumstances were subsumed in the mitigating circumstances set out in N.C.G.S. § 15A-2000(f)(2) and (f)(6). *See* N.C.G.S. § 15A-2000(f)(2) ("The capital felony was committed while defendant was under the influence of mental or emotional disturbance."); N.C.G.S. § 15A-2000(f)(6) ("The capacity of defendant to appreciate

the criminality of his conduct or to conform his conduct to the requirements of law was impaired.").

Defendant introduced substantial and uncontroverted evidence from numerous experts and lay witnesses to support his contention that he had these difficulties. According to defendant's expert witness, Dr. Patricio F. Lara, a psychiatrist at Dorothea Dix Hospital, defendant's "intellectual functions appeared to be at a borderline intellectual deficit range." Moreover, Dr. Lara testified that defendant suffered poor judgment and limited insight. In support of his finding, Dr. Lara presented the results of an IQ test that showed defendant's IQ to be 72. Dr. Lara also testified that defendant was "maladapted" and suffered from a personality disorder. Dr. John F. Warren, a psychologist practicing in Winston-Salem, tested defendant and found him to have a full-scale IQ of 76. Dr. Warren testified that people with borderline intellectual function are more prone to misinterpret things and do not function normally. In addition to the expert testimony, relatives of defendant testified that defendant had a drinking problem. Defendant's evidence also tended to show that he had abused drugs and alcohol.

This Court and the United States Supreme Court have held that evidence such as that introduced by defendant has potential mitigating value. *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256 (1989); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979). However, the trial court refused to submit defendant's requested nonstatutory mitigating circumstances, finding that they were subsumed in the mitigating circumstances provided for by N.C.G.S. § 15A-2000(f)(2) and (f)(6). In explaining these two statutory mitigating circumstances, the judge instructed the jury:

> First, consider whether this murder was committed while defendant was under the influence of mental or emotional disturbance. A defendant is under such influence if he is in any way affected or influenced by a mental or emotional disturbance at the time he kills.
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> . . . .
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> You would find this mitigating circumstance if you find that defendant suffered from a mixed personality disorder and that, as a result, defendant was under the influence of mental or emotional disturbance when he killed the victim. . . .

> Second, consider whether the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.
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> . . . .
>
> You would find this mitigating circumstance if you find that defendant was impaired by borderline intellectual functioning with an I.Q. of 72 and a history of drug and alcohol abuse, and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

The trial court ruled that the two statutory mitigating circumstances coupled with these instructions properly subsumed defendant's three proposed nonstatutory mitigating circumstances. We conclude that the trial court was correct.

We have said that "where a defendant makes a timely written request for a listing in writing on the form of possible nonstatutory mitigating circumstances that are supported by the evidence and which the jury could reasonably deem to have mitigating value, the trial court must put such circumstances in writing on the form." *State v. Cummings*, 326 N.C. 298, 324, 389 S.E.2d 66, 80 (1990). In this case, defendant properly submitted his proposed nonstatutory mitigating circumstances, and those circumstances were supported by evidence. We have also held that it is not prejudicial error for the trial court to refuse to submit nonstatutory mitigating circumstances if it properly concludes that such nonstatutory mitigating circumstances are subsumed in the statutory mitigating circumstances given to the jury. *State v. Skipper*, 337 N.C. 1, 55, 446 S.E.2d 252, 282 (1994) (no error where trial court fails to submit a nonstatutory mitigating circumstance that was subsumed into a statutory mitigating circumstance), *cert. denied*, — U.S. —, 130 L. Ed. 2d 895 (1995); *State v. Green*, 336 N.C. 142, 182-83, 443 S.E.2d 14, 37-38 (error to fail to submit a nonstatutory mitigating circumstance supported by evidence, but such error harmless beyond a reasonable doubt where that nonstatutory mitigating circumstance was subsumed into another nonstatutory mitigating circumstance); *State v. Benson*, 323 N.C. 318, 326-27, 372 S.E.2d 517, 522 (1988) (no error when trial court fails to submit a nonstatutory mitigating circumstance that was subsumed into another mitigating circumstance). However, the question presented by this assignment of error turns on whether the proposed nonstatutory mitigating circumstances were subsumed in the mitigating circumstances given. We conclude that defendant's proposed nonstatutory

mitigating circumstances were subsumed in the (f)(2) and (f)(6) statutory mitigating circumstances submitted to the jury by the trial court. Therefore, the trial court did not commit reversible error by failing to submit those nonstatutory mitigating circumstances for the jury's consideration.

Furthermore, the jury could have given this evidence mitigating value under the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9) ("Any other circumstance or circumstances arising from the evidence which one or more of you deems to have mitigating value."). This assignment of error is without merit.

[11] In another assignment of error, defendant argues that the trial court committed prejudicial error by failing to peremptorily instruct the jury with respect to certain nonstatutory mitigating circumstances concerning defendant's employment record and adjustment to incarceration. During the jury instruction conference, defendant argued that the jury should be given peremptory instructions as to the following nonstatutory mitigating circumstances that were submitted, *inter alia*, to the jury:

> (4) That the Defendant cooperated with law enforcement officers at an early stage of their investigation in this case.
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> . . . .
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> (5) That the Defendant was regularly employed for over 12 years at Cape Craftsman and was a productive member of society.
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> . . . .
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> (7) That since the Defendant's incarceration he has made substantial efforts to improve himself by participation in both religious studies and voluntary training courses relative to his work in prison.
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> . . . .
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> (8) That since the Defendant's incarceration he has achieved a desirable and competitive position within the prison, working as a cook within the kitchen.
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> . . . .
>
> (9) That since the Defendant's incarceration he has made significant efforts to be of assistance to other inmates in the prison to help them to adjust to prison life.

. . . .

(10) That since the Defendant's incarceration in 1984, he has achieved a desirable prison record of only Two (2) infractions and has had no infraction since August 31, 1987.

The State countered that peremptory instructions as to submitted nonstatutory mitigating circumstances numbers (7), (8), (9), and (10) would not be appropriate because it would imply to the jury that those proposed mitigating circumstances had mitigating value. However, the State conceded that the trial court should give the jury a peremptory instruction as to number (4)—defendant's assistance in the investigation.

We have held that a trial court should, if requested, give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted and manifestly credible evidence. *State v. Green*, 336 N.C. 142, 172-74, 443 S.E.2d 14, 32-33; *State v. Gay*, 334 N.C. 467, 493, 434 S.E.2d 840, 855 (1993). Thus, this issue turns on whether the evidence in support of the nonstatutory mitigating circumstances at issue was "uncontroverted." If the evidence is controverted or the evidence supporting the circumstance is not manifestly credible, the trial court should not give peremptory instructions. *Green*, 336 N.C. at 172-74, 443 S.E.2d at 32-33.

As to defendant's employment at Cape Craftsman and his productivity as a member of society, defendant presented a number of witnesses who testified to his good work ethic and his reputation for honesty. However, while the State concedes that it presented no contrary evidence as to his employment at Cape Craftsman, the State maintains that ample evidence contradicted defendant's contention that he was a "productive member of society." The State points to evidence tending to show that defendant was responsible for four deaths in the community and was a confessed drug and alcohol abuser. We agree with the State that defendant's status as a productive member of society was anything but uncontroverted. Therefore, a peremptory instruction as to that nonstatutory mitigating circumstance would not have been proper under *Green*. *Id.* (explaining, *inter alia*, the distinctions in peremptory instructions for statutory and nonstatutory mitigators).

[12] Defendant also contends that the jury should have been peremptorily instructed as to his self-improvement while incarcerated.

Several witnesses testified as to defendant's rehabilitation during his incarceration. Defendant's witnesses testified that he had taken Bible and culinary courses and had worked in the prison kitchen. However, the State produced evidence that defendant also had committed two major infractions while incarcerated. First, he was punished for concealing a weapon; second, he was punished for attempting to take flammable material from the kitchen for the purpose of causing other inmates bodily harm. In addition, he had been involved in a fistfight with another inmate. Therefore, the evidence as to this nonstatutory mitigating circumstance was controverted, and defendant was not entitled to a peremptory instruction.

Defendant also sought a peremptory instruction as to his "desirable prison record." The evidence as to this nonstatutory mitigating circumstance was again anything but uncontroverted. Possession of a weapon (a single-edged razor) and an attempt to remove a flammable material from the prison kitchen with intent to use it to cause bodily harm are not slight prison infractions. In addition, defendant had been involved in one fistfight with another inmate. For these offenses, he had served forty-five days in disciplinary segregation. Even though defendant has presented evidence as to his favorable prison job and interests in chess, biographies, and the Bible, evidence of his infractions made his evidence of having a "desirable prison record" controverted. Thus, the trial court did not err in failing to give a peremptory instruction on this nonstatutory mitigating circumstance.

[13] Defendant also sought a peremptory instruction as to the submitted nonstatutory mitigating circumstance that he had "made significant efforts to be of assistance to other inmates in the prison to help them to adjust to prison life." Defendant presented evidence tending to show that he had been of assistance to only one inmate. Although this evidence was not directly controverted by evidence produced by the State, it was not manifestly credible. Therefore, defendant was not entitled to a peremptory instruction on this nonstatutory mitigating circumstance.

[14] Finally, defendant contends that the trial court erred in failing to give a peremptory instruction to the jury with regard to the submitted mitigating circumstance that he had achieved a position as a cook in the prison kitchen. Evidence as to this mitigating circumstance was both uncontroverted and manifestly credible. Therefore, the trial

court erred in failing to give a peremptory instruction as to this nonstatutory mitigating circumstance. *Id.*

For purposes of this opinion, we assume *arguendo* that the trial court's failure to give this peremptory instruction rose to the level of a federal constitutional violation. *Cf. State v. Benson*, 323 N.C. 318, 325-26, 372 S.E.2d 517, 521 (1988) (failure to *submit* nonstatutory mitigating circumstance "raises federal constitutional issues"). Therefore, we will deem this violation prejudicial unless we conclude it was harmless beyond a reasonable doubt. *Id.*

First, we note that the form returned by the jury clearly states that one or more members of the jury found this nonstatutory mitigating circumstance to exist and to have mitigating value. Nevertheless, we are unable to say that all jurors found this mitigator to exist and to have value or that more jurors would not have done so had a peremptory instruction been given. However, overwhelming evidence supported the jury's findings of the aggravating circumstances that defendant had been convicted of a prior violent felony and that the murder here was committed for pecuniary gain. When we consider the two aggravating circumstances found by the jury in light of the eight mitigating circumstances found by the jury, we are compelled to conclude that the trial court's failure to give a peremptory instruction, which may have caused one or more jurors to fail to find as a mitigating circumstance that defendant worked as a cook in the prison, was harmless error beyond a reasonable doubt. This assignment of error is without merit.

[15] Defendant contends in another assignment of error that the trial court committed plain error by failing to instruct the jury it could find the statutory mitigating circumstance set forth in N.C.G.S. § 15A-2000(f)(2) on the basis of evidence of defendant's poor judgment and limited insight. He also argues that the trial court erred by failing to instruct the jury it could find the statutory mitigating circumstance provided for in N.C.G.S. § 15A-2000(f)(6) on the basis of evidence of his poor judgment, limited insight, and consumption of intoxicating substances. Defendant contends that once the trial court undertook to instruct the jury about specific conditions that would permit a finding that the two statutory mitigating circumstances existed, it was required to state all possible conditions that tended to support a finding of either circumstance. Defendant argues that the trial court erred by failing to refer specifically to evidence of defendant's poor judgment, limited insight, and consumption of intoxicants

in connection with the two statutory mitigating circumstances. Defendant's counsel neither requested further instructions nor objected during trial. However, defendant now argues that the trial court's mistake amounted to plain error.

During the instructions to the jury, the trial court stated with regard to the N.C.G.S. § 15A-2000(f)(2) mitigator:

> You would find this mitigating circumstance if you find that defendant suffered from a mixed personality disorder and that, as a result, defendant was under the influence of a mental or emotional disturbance when he killed the victim.

Instructing the jury on the N.C.G.S. § 15A-2000(f)(6) mitigator, the trial court said:

> You would find this mitigating circumstance if you find that defendant was impaired by borderline intellectual functioning with an I.Q. of 72 and a history of drug and alcohol abuse, and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Defendant failed to make any objection to the instructions during trial. Our review is limited to plain error analysis. "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). In *Odom*, we also stated that plain error is " 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *Id.* at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Although a trial court must adequately instruct the jury concerning the appropriate scope of the (f)(2) and (f)(6) statutory mitigating circumstances, we find nothing in the instructions given to warrant reversal based on plain error. Defendant was not prohibited from presenting evidence regarding his mental capacity. Given that the jury was presented with the evidence and defendant outlined all of the circumstances he contended supported finding these mitigating circumstances during his closing argument, we find no plain error.

[16] Defendant next assigns error to the trial court's definition of "mitigating circumstance" in response to a jury question. He contends

that the definition given unduly restricted the jury's consideration of relevant evidence.

After deliberating for a short period of time, the jury presented the following question to the trial court:

> There is a question of how mitigating circumstances are to be deemed of value. (By law)
>
> Do we just use common sense, or do you have specific instructions.
>
> Does the mitigating evidence (personal character (only) change since crime committed) have bearing on decision of life or death sentence?

The trial court conferred with counsel and decided to instruct the jury:

> A mitigating circumstance is a fact or a group of facts which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders.
>
> A juror may find that any mitigating circumstance exists by a preponderance of the evidence, whether or not that circumstance is found to exist by all of the jurors.
>
> And then finally, members of the jury, we are going to instruct you that you are to consider all aspects of the defendant's character as presented by the evidence, including the evidence relating to the defendant's character since the murder of the victim.

Defendant argues that the trial court erred by failing to reinstruct the jury to consider "any other circumstances arising from the evidence which you deem to have mitigating value." Defendant asserts that the trial court must use this language in its instructions as mandated under *Skipper v. South Carolina*, 476 U.S. 1, 4, 90 L. Ed. 2d 1, 6-7 (1986), which provides that any evidence may be mitigating so long as "the jury could have drawn . . . inferences favorable to defendant" regardless of the relation of that evidence "to [defendant's] culpability for the crime he committed."

It is important to point out that this assignment of error concerns a reinstruction of the jury. The jurors posed their question presum-

ably to clarify any confusion they had concerning the meaning of mitigating circumstances. The jury already had been instructed to consider any other evidence having mitigating value before the jury began its deliberations. Further, the written form given the jury directed it to consider and weigh "any other circumstance or circumstances arising from the evidence which . . . [has] mitigating value." When reviewed in their entirety, the original instructions and the additional instructions did not restrict the jury from considering all evidence which may have mitigating value. This assignment of error is without merit.

[17] In his next assignment of error, defendant argues that the trial court erred by denying defendant's request to question prospective jurors concerning their possible misconceptions regarding parole eligibility. Defendant also contends under this assignment that the trial court's ruling sustaining the State's objection to his attempt to introduce evidence regarding his parole eligibility was error.

During deliberations, the jury asked the trial court whether "three consecutive life terms means that defendant will never be eligible for parole." The trial court instructed the jury: "The question of eligibility for parole is not a proper matter for you to consider in recommending a punishment. . . . In considering whether to recommend death or life imprisonment, you should determine the question as though life imprisonment means exactly what the [s]tatute says, imprisonment for life in the State's prison."

Defendant argues that the instruction given was contrary to the opinion of the Supreme Court of the United States in *Simmons v. South Carolina*, 512 U.S. —, 129 L. Ed. 2d 133 (1994). We have recently rejected this very argument. In *State v. Price*, 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), we stated that

> the United States Supreme Court's decision in *Simmons* is limited to those situations where the alternative to a sentence of death is life imprisonment *without possibility of parole.* The language and rationale of the main opinion and the concurring opinions are expressly confined to situations in which a defendant sentenced to life imprisonment will not be eligible for parole.

Id. at 763, 448 S.E.2d at 831 (emphasis added). Here, the alternative to death was not life imprisonment without parole. Therefore, the

trial court properly excluded all references to parole eligibility during *voir dire*, the trial, and jury instructions. *Id.*

[18] As the eleventh issue in his brief, defendant states:

> The trial court committed prejudicial error by instructing the jury concerning their failure to agree upon an appropriate answer to the fourth issue in such a manner as to improperly coerce unanimity.

Defendant contends in his brief that, "[t]aken in context, the trial court's actual instructions strongly implied that the sentencing jury *must* reach a unanimous result and would be compelled to continue deliberating until they did so. As a result, the trial court's instructions concerning the effect of non-unanimity contravened G.S. [§] 15A-2000 and improperly coerced a verdict. . . ."

Although the defendant has made no argument specifically addressing the issue of whether the instruction requiring jury unanimity for any answer to Issue Four is an improper statement of the law, we will address that issue here. As noted in our case of *State v. McCarver*, 341 N.C. 364, 389-94, 462 S.E.2d 25, 39-42 (1995), a trial court correctly states the law when it instructs the jury that it must be unanimous in order to answer Issues One, Three and Four on the "Issues and Recommendation as to Punishment" form, either "yes" or "no." A jury must be unanimous in deciding any sentence determinative issue, and Issue Four is a sentence determinative issue. *Id.* "If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment. . . ." N.C.G.S. § 15A-2000(b) (Supp. 1994). Therefore, the trial court in the present case properly instructed the jury that it must be unanimous before it could answer Issue Four "yes" or "no."

Given that the instruction requiring jury unanimity before giving either a "yes" or "no" answer to Issue Four was proper, we now turn to address the argument the defendant actually makes. In support of the eleventh issue set forth in his brief, defendant actually argues that the trial court committed prejudicial error by instructing the jury in a manner which improperly coerced unanimity by implying that they must render a decision on Issue Four and would be compelled to continue deliberating until they did so.

On two different occasions during the second day of jury deliberations, the trial court ascertained that the jury had not reached a recommendation as to sentence and instructed the jury to resume its

deliberations. The jury sent a note to the trial court indicating that it was divided eleven to one as to its recommendation. Thereafter, the trial court gave the following instructions:

> As to Issue Number Four, I instruct you that your answer to Issue Number Four—that your answer to Issue Number Four, whether you answer "yes" or "no" must be unanimous.
>
> Members of the jury, I am going to ask that you resume your deliberations in an attempt to return a recommendation. I have already instructed you that your recommendation must be unanimous. That is, each of you must agree on the recommendation. I shall give you these additional instructions.
>
> First, it is your duty to consult with one another and deliberate with a view towards reaching a recommendation, if it can be done without violence to individual judgment.
>
> And second, each of you must decide the case for yourself, and your recommendation for yourself, but only after an impartial consideration of the evidence with your fellow jurors.
>
> Third, in the course of your deliberations you should not hesitate to reexamine your own views, and to change your opinion, if you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your views and opinions if you remain convinced that they are correct.
>
> Fourth, no juror should surrender his or her honest conviction as to the weight or the effect of the evidence solely because of the opinion of their fellow jurors, or for the mere purpose of reaching a recommendation.
>
> Fifth, your inability to reach a unanimous recommendation as to punishment should not be your concern, but should simply be reported to the Court.
>
> Please be mindful that I am in no way trying to coerce you to reach a recommendation. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions I have just given you, I merely want to emphasize the fact that it is your duty to do whatever you can . . . to reason the matter together as reasonable people, to reconcile your differences, if you can without the surrender of honest convictions to reach a recommendation.

Although the trial court did instruct the jurors that their "inability to reach a unanimous recommendation as to punishment should not be [their] concern, but should simply be reported to the Court," defendant argues that this instruction was coupled with language which is objectionable under *State v. Smith*, 320 N.C. 404, 422, 358 S.E.2d 329, 339 (1987). Defendant contends that taken in the context, the trial court's actual instructions strongly imply that the sentencing jurors must reach a unanimous result and would be compelled to continue deliberating until they did so. We disagree.

In determining whether an instruction coerced the jury to render a judgment, "an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury." *State v. Alston*, 294 N.C. 577, 593, 243 S.E.2d 354, 364-65 (1978). In considering the instruction at issue here, we conclude that the trial court properly instructed the jury. First, the jurors merely stated that they were not unanimous; they did not specifically inquire as to the consequence of inability to reach unanimity as in *Smith*. Second, the trial court explicitly instructed the jurors that their "inability to reach a unanimous recommendation as to punishment should not be [their] concern, but should simply be reported to the Court." This language fully complies with our holding in *Smith*. "The lesson in *Smith* is that, in telling a jury that its recommendation as to punishment must be unanimous, the trial court must be vigilant to inform the jurors that whatever recommendation they *do* make must be unanimous and not to imply that a recommendation *must* be reached." *State v. Price*, 326 N.C. 56, 92, 388 S.E.2d 84, 105 (1990). That is exactly what the trial court did in this situation. Third, we find nothing coercive in the instructions when they are reviewed in context and in their entirety. Therefore, we find no error, and this assignment of error is without merit.

[19] On 11 October 1994, this Court allowed defendant to bring forth an additional issue[1] concerning a codefendant's assertion of his Fifth Amendment privilege and the resulting admission of his prior testimony. Defendant argues that the trial court committed prejudicial error by allowing the admission of a transcript of a codefendant's testimony from defendant's first trial into evidence after finding that the codefendant was "unavailable" on grounds of privilege. Specifically,

1. In his motion to amend his brief, defendant also asserted five additional preservation issues. We have grouped these additional preservation issues with the ones asserted in the original brief. The preservation issues are discussed below.

defendant contends that the trial court did not adequately determine that the codefendant was, in fact, entitled to assert the privilege against self-incrimination in this proceeding.

During the new capital sentencing proceeding, the State called codefendant Robinson to testify. After stating his name, Robinson, through his attorney, asserted his privilege against self-incrimination. Over defendant's objection, the trial court ruled that Robinson was "unavailable" as that term is defined in N.C.G.S. § 8C-1, Rule 804(b)(1) and allowed Robinson's recorded testimony from defendant's prior trial to be read into evidence. Defendant contends that the admission of this recorded prior testimony was improperly admitted and so unfairly prejudiced him as to require a new capital sentencing proceeding. We do not agree.

Our capital sentencing laws provide:

> In the [capital sentencing] proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impanelled, but *all such evidence is competent for the jury's consideration in passing on punishment.*

N.C.G.S. § 15A-2000(a)(3) (emphasis added). Defendant in this case was not awarded a new trial but was awarded a new capital sentencing proceeding based on *McKoy* error; therefore, a new jury was impanelled solely to recommend punishment. Under N.C.G.S. § 15A-2000(a)(3), the State was required to resubmit the evidence presented in the original trial in order to have it considered, but such evidence was competent as a matter of law. Whether the evidence at issue here was admissible under N.C.G.S. § 8C-1, Rule 804 is not controlling in the case at hand. Instead, N.C.G.S. § 15A-2000(a)(3) expressly provides that evidence presented during the guilt determination phase of a capital case is competent and admissible as a matter of law during a capital sentencing proceeding in the same case. Therefore, the evidence was properly admitted.

[20] Although the evidence at issue here was admissible as a matter of law under the statute, we must also address whether the admission of that recorded prior testimony violated defendant's confrontation rights under the federal and state constitutions. The Supreme Court of the United States has held that the Confrontation Clause is not violated by the admission of a witness' recorded prior testimony where the witness

> was under oath[;] [defendant] was represented by counsel—the same counsel in fact who later represented him at trial[;] [defendant] had every opportunity to cross-examine [the witness] as to his statement[;] and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.

California v. Green, 399 U.S. 149, 165, 26 L. Ed. 2d 489, 501 (1970); *see also State v. Prince*, 270 N.C. 769, 154 S.E.2d 897 (1967) (constitutional right of confrontation not denied by introduction of prior testimony where witness has since died, become insane, left the state, become incapacitated, or absented himself by procurement of or connivance with the accused). In *Green*, the Supreme Court went on to say that even when the witness whose prior testimony had been recorded took the stand and testified, claimed a loss of memory, claimed his privilege against compulsory self-incrimination, *or simply refused to answer*, nothing in the Confrontation Clause prohibited the State from relying on his recorded prior testimony to prove its case. *Green*, 399 U.S. at 167-68, 26 L. Ed. 2d at 502.

In the case at hand, defendant was represented by counsel at his original trial and had ample opportunity to cross-examine Robinson on the stand at that time. Defendant did in fact extensively cross-examine Robinson during the original trial. His motivation to cross-examine Robinson then was the same as his motivation at the new capital sentencing proceeding leading to this appeal. Furthermore, without addressing the propriety or impropriety of Robinson's claim of privilege against self-incrimination, as in *Green*, Robinson simply refused to answer any questions. In light of the holding of *Green* and our holding in *Prince*, we conclude that defendant's confrontation rights were not violated under either the state or federal constitutions. This assignment of error is overruled.

Defendant has also brought forward numerous assignments of error presenting "preservation issues." As to each of these issues, defendant acknowledges with commendable candor that prior decisions of this Court require a ruling contrary to his contentions. He raises these issues for the purpose of permitting this Court to reexamine its prior holdings and also "for the purpose of preserving these issues for any necessary federal habeas corpus review." Having carefully examined each of those assignments of error, we conclude that they are without merit.

[21] 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 and concluded that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

In conducting proportionality review, we must determine "whether the sentence of death in the present case is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 354, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983).

> In essence, our task on proportionality review is to compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and defendant's character, background, and physical and mental condition.

State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). The pool of available cases from which those roughly similar with regard to the crime and defendant may be drawn for comparison purposes has been defined as

> *all cases* 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. "The pool, however, includes only those cases which this Court has found to be free of error in both phases of the trial." *State v. Stokes*, 319 N.C. 1, 19-20, 352 S.E.2d 653, 663 (1987). 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 at 542, 564 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995). Simply, the pool includes only cases found to be free of error in both the guilt-innocence and penalty phases.

In the present case, defendant had previously been convicted of three counts of first-degree murder for which he received one death sentence for the murder of James Worley and two life sentences for the murders of Shelia Denise Worley and Psoma Wine Baggett. During the new capital sentencing proceeding, which is the subject of this appeal, the jury considered the sentencing of defendant solely for the murder of James Worley. As to this murder, the jury found: (1) 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 (2) that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). The jury also found as mitigating circumstances that: (1) defendant aided in the apprehension of another capital felon; (2) defendant cooperated with law enforcement officers at an early stage of their investigation in this case; (3) defendant was of good character and reputation in the community in which he lived and worked; (4) since defendant's incarceration, he has made substantial efforts to improve himself by participation in both religious studies and voluntary training courses relative to his work within the prison; (5) since defendant's incarceration, he has achieved a desirable and competitive position within the prison, working as a cook within the kitchen; (6) since

defendant's incarceration, he has made significant efforts to be of assistance to other inmates in the prison to help them to adjust to prison life; (7) since defendant's incarceration in 1984, he has achieved a desirable prison record of only two infractions and has had no infraction since 31 August 1987; and (8) defendant has consistently supported his child financially.

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, (1993). We find this case is not substantially similar to any case in which this Court has found the death penalty disproportionate and entered a sentence of life imprisonment. Each of those cases is distinguishable from the present case.

In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517, the evidence tended to show that defendant hid in the bushes at a bank and waited for the victim to make a night deposit. When the victim arrived, defendant demanded the money bag. When the victim hesitated, defendant fired a shotgun, striking the victim 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 defendant had previously been convicted of a felony involving the use or threatened use of violence to the person. Further, defendant in the present case committed three murders rather than a single murder such as that committed by defendant in *Benson*.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653, defendant and several others planned to rob the victim's place of business. During the robbery, one of the assailants beat the victim, killing him. *Stokes* is also easily distinguishable from the present case because the jury in *Stokes* found only one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel. In the present case, the jury found two aggravating circumstances. More importantly, defendant in the present case, unlike the defendant in *Stokes*, killed three 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 defendant was convicted was part of a course of conduct which included the commission of other crimes of violence against another person or persons. In the present case, the jury found two aggravating circumstances. Also, defendant in the present case murdered three victims, while defendant in *Rogers* killed only one.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), defendant and two companions went to the victim's home intending to rob and murder him. After gaining entry into the victim's home, the men killed him and stole his money. The jury found as aggravating circumstances that the murder was committed during the commission of a robbery or burglary and that it was committed for pecuniary gain. In concluding that the death penalty was disproportionate in *Young*, this Court focused on the failure of the jury in *Young* to find either the aggravating circumstance that the murder was especially heinous, atrocious, or cruel or the aggravating circumstance that the murder was committed as part of a course of conduct which included the commission of violence against another person or persons. The present case is easily distinguishable from *Young* because, among other things, the jury found as an aggravating circumstance that defendant had previously been convicted of a felony involving the use or threatened use of violence to the person. Additionally, it bears repeating that defendant in this case murdered three victims, unlike 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 contracted to kill Mr. Worley for money and later killed Ms. Worley and her young child when Ms. Worley failed to pay him.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), 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 defendant had previously been convicted of a

felony involving the use or threatened use of violence to the person. Moreover, defendant here murdered three victims, rather than one.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the evidence tended to show that defendant and a group of friends were riding in a car when defendant taunted the victim by telling him that he would shoot him and by questioning whether the victim believed that defendant would shoot him. 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 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. To the contrary, he placed the body of Mr. Worley in a car and set it afire. The bodies of Ms. Worley and her child were left floating in a creek, either dead or dying.

In sum, we have never found that the death penalty is disproportionate for a convicted murderer of multiple victims. We have said that "[a] heavy factor . . . is that he is a multiple killer." *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). Moreover, none of the above-cited cases involved a contract killing. For the foregoing reasons, we conclude that each of the cases in which we have found the death penalty to be disproportionate is distinguishable from the present case. In fact, the present case bears little or no similarity to any of those cases.

In performing our statutory duty of proportionality review, it is also appropriate for us to compare the case before us to other cases in the pool used for proportionality review. *Lawson*, 310 N.C. at 648, 314 S.E.2d at 503.

> If, after making such comparison, we find that juries have consistently returned death sentences in factually similar cases, we will have a strong basis for concluding that the death sentence under review is not excessive or disproportionate. If juries have consistently returned life sentences in factually similar cases, however, we will have a strong basis for concluding that the death sentence in the case under review is disproportionate.

McCollum, 334 N.C. at 242, 433 S.E.2d at 163. However, the factors to be considered and their relevance during proportionality review in a given capital case "will be as numerous and as varied as the cases

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

Defendant here has cited a number of cases involving multiple killings where defendant or defendants received life sentences. None of these cases involved a defendant who committed a "contract killing." It suffices to say that we have examined all of the numerous cases cited by defendant and conclude that each of them is distinguishable from the present case.

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although we review all of the cases in the pool when engaging in our statutorily mandated duty of proportionality review, we reemphasize here "that we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* "The Bar may safely assume that we are aware of our own opinions filed in capital cases arising since the effective date of our capital punishment statute, 1 June 1977." *Williams*, 308 N.C. at 81-82, 301 S.E.2d at 356. Here, it suffices to say that we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have consistently returned recommendations of life imprisonment.

We have consistently stated that "this Court has never found disproportionality in a case in which defendant was found guilty for the death of more than one victim." *State v. Price*, 326 N.C. 56, 388 S.E.2d 84, *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 (1995), *reh'g denied*, — U.S. —, 131 L. Ed. 2d 879 (1995).

After comparing this case carefully with all others in the pool used for proportionality review, we conclude that it falls within the class of first-degree murders in which we have previously upheld the death penalty. For the foregoing reasons, we conclude that the sentence of death entered in the present case is not disproportionate.

Having considered and rejected all of defendant's assignments of errors, we hold that defendant's capital sentencing proceeding was free of prejudicial error and that the resulting sentence of death was not disproportionate. Therefore, the sentence of death entered against defendant must be and is left undisturbed.

NO ERROR.

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

Justice FRYE dissenting.

I disagree with the majority's holding in this case and in *State v. McCarver*, 341 N.C. 364, 396, 462 S.E.2d 25, 43 (1995), that a trial court correctly states the law in a capital sentencing proceeding when it instructs the jury that it must be unanimous in order to answer "no" to Issues One, Three and Four on the "Issues and Recommendation as to Punishment" form. I especially disagree with the majority's apparent holding that the instruction is somehow mandated by the North Carolina Constitution. Accordingly, for the reasons stated in my dissent in *McCarver*, and for the additional reasons stated here, I dissent.

Defendant's eleventh assignment of error in this capital sentencing case is as follows:

DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR BY INSTRUCTING THE JURY CONCERNING THEIR FAILURE TO AGREE UPON AN APPROPRIATE ANSWER TO THE FOURTH ISSUE IN SUCH A MANNER AS TO IMPROPERLY COERCE UNANIMITY?

The trial court instructed the jury immediately after the lunch recess on 16 March 1993 as follows:

> [I]t is not enough for the State to prove from the evidence beyond a reasonable doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer Issue Number Four, "Yes," you must agree unanimously that they are.
>
> If you answer Issue Number Four, "No," you must recommend that the defendant be sentenced to life imprisonment. If you answer Issue Number Four, "Yes," it would be your duty to recommend that the defendant be sentenced to death.

The jury deliberated concerning defendant's sentence until 4:55 p.m. on the afternoon of 16 March 1993. The jury then recessed until the next day.

On two different occasions during the morning of 17 March 1993, the trial court ascertained that the jury had not reached a unanimous verdict and requested that the jury resume its deliberations. After many hours of deliberation, the jurors were obviously confused as to what they should do. Shortly before noon, they indicated in written communication to the court that their vote was eleven to one and that their answer to Issue Four was "No." More specifically, the note stated, in pertinent part: "Issue 4 contradicts recommendation as to punishment (eg.) Issue 4 is No yet Recommendation states we the jury 'unanimously' Recommend [—] we are not unanimous (11 to 1)."

The trial court and defendant's counsel engaged in a lengthy discussion concerning the appropriate response to the jury's statement. At the suggestion of the State, the trial court gave the jury a supplemental instruction as follows:

> First question is, "Issue Number Four contradicts recommendation as to punishment. Example: Issue Number Four is no, and recommendation states, we, the jury, unanimously recommend." And you go on to say, "We, are not unanimous," and that "We are eleven to one."

. . . .

And, members of the jury, I'm going to give you these additional instructions, and will ask you to pay careful attention.

As to Issue Number Four, I instruct you that your answer to Issue Number Four—that your answer to Issue Number Four, whether you answer "yes" or "no" must be unanimous.

. . . .

And, members of the jury, I want to make it clear that as you answer Issue Number Four "yes" or "no" unanimously, then that will of consequence determine your answer to the recommendation. So please understand if you answer Issue Number Four "yes," your recommendation will be the death penalty. And if you answer Issue Number Four "no," your recommendation will be life imprisonment.

I conclude that the trial court committed reversible error in responding to the question from the sentencing jury, because the court's supplemental instruction incorrectly informed the jury that it could not answer "no" to Issue Four on the written Issues and Recommendation As To Punishment form unless all twelve jurors concurred in the negative answer. I further conclude that this error entitles defendant to a new sentencing proceeding.

In this case, the jury was given a form entitled: Issues and Recommendation as to Punishment. The first part of the form is labeled: Issues. There are four issues on the form. Issue Two relates to the finding of mitigating circumstances, and contains no reference to unanimity. Issues One, Three and Four, on the other hand, begin as follows: "Do you unanimously find." It seems clear to me that if the jurors vote eleven to one on issue One, Three or Four, their answer to that issue has to be "no." The second part of the form is labeled: Recommendation As To Punishment. There is one recommendation on the form. It is: "We, the jury unanimously recommend that the Defendant ELTON OZELL McLAUGHLIN, be sentenced to _____."

In the instant case, the jury's note indicated that it had answered issue Four "no" because its vote was eleven to one. Issue Four on the Issues and Recommendation form read as follows:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are,

sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?

ANSWER: _____

The judge should have instructed the jurors that they should continue to try to reach unanimity as to Issue Four, but if they could not unanimously answer "yes" to Issue Four, the foreman should write "no" in the space provided for the answer to that issue. Instead, the trial judge, as the majority does here, failed to distinguish between the *issues* the jury must answer in reaching a recommendation as to life or death and the *recommendation* itself. The jury can recommend death *only if it unanimously* answers *yes to Issues One, Three and Four.* If the jury does not *unanimously* answer yes to Issues One, Three and Four, it cannot recommend death as punishment for defendant's crime. See N.C.G.S. § 15A-2000(b), (c) (Supp. 1994). If the jury cannot unanimously agree to its sentencing recommendation, the judge will impose a sentence of life imprisonment. N.C.G.S. § 15A-2000(b) (Supp. 1994).

In this case, the jury was given two alternative instructions upon which to determine its sentencing recommendations: (1) the law as stated in the court's initial instructions and on the Issues and Recommendation As To Punishment form, and (2) the law as stated in the supplemental instruction. Where a jury is given two alternate theories upon which to base its decision, one of which is improper, the matter must be remanded for a new proceeding. *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987). This result is required because the appellate court is unable to determine upon which instructions the jury relied in reaching its decision and, therefore, must assume that the jury relied on the erroneous, improper instructions. *Id.* This Court is "not at liberty" to assume upon which instructions defendant's sentencing jury relied. *State v. Belton*, 318 N.C. 141, 162, 347 S.E.2d 755, 768 (1986). We "cannot assume the jury adopted a theory favorable to the state; instead, [we must] construe[] the ambiguity in favor of defendant." *Id.*

Furthermore, I conclude that the supplementary instruction had a probable impact on the jury's recommendation of defendant's death sentence. As noted earlier, the jury informed the judge that its vote at the time on Issue Four was eleven to one. Had the jury been properly instructed, it may have answered "no" to Issue Four, thus resulting in a sentence of life imprisonment. Accordingly, defendant's death sen-

tence should be vacated and the case remanded for a new capital sentencing proceeding in accord with N.C.G.S. § 15A-2000.

Justice WHICHARD joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. RONALD WAYNE FRYE

No. 511A93

(Filed 8 September 1995)

1. **Criminal Law §§ 396, 738 (NCI4th)— preliminary instructions—jury as collaborators in judgment—no expression of opinion**

The trial court did not express an opinion by stating to all prospective jurors, "You will become in effect officers of the Court and collaborators in judgment with me," where the statement occurred during the court's preliminary instructions regarding the role of jurors in the criminal justice system, and the court's comments as a whole accurately described the criminal justice process, including the interrelated roles of judge and jury.

Am Jur 2d, Trial § 277.

2. **Criminal Law § 395 (NCI4th); Jury § 134 (NCI4th)— court's question to jurors—proof beyond reasonable doubt—no expression of opinion**

The trial court's question to each prospective juror in a capital trial, "If chosen to sit as a juror will you require the state to satisfy you of the defendant's guilt beyond a reasonable doubt before you find him guilty?" did not constitute an expression of opinion that each juror would vote to convict but was a proper attempt to ascertain whether the prospective jurors could follow the court's preliminary instructions regarding the burden of proof.

Am Jur 2d, Jury § 206.

3. **Jury § 153 (NCI4th)— capital trial—jury selection—question by court—effect of death penalty views**

The trial court's question to prospective jurors in a capital trial, "If you serve as a juror in this case, and the state has satisfied you of the existence of those things [which constitute first-

degree murder] beyond a reasonable doubt, will you vote to find defendant guilty of first degree murder or would your personal convictions about the death penalty prevent or substantially impair the performance of your duty in accordance with your instructions and your oath?" did not require each juror to draw a legal conclusion about his or her competence to serve or attempt to stake out jurors by eliciting an agreement to vote in favor of a guilty verdict; rather, the question properly sought to assort those prospective jurors who were unable to find defendant guilty, regardless of the evidence presented by the State, because of their views about capital punishment.

Am Jur 2d, Jury §§ 199, 206, 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.

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

4. Criminal Law §§ 396, 1323 (NCI4th)— capital trial—instruction about sentencing hearing—aggravating circumstances—no expression of opinion

The trial court's instruction that, if defendant is found guilty of first-degree murder, the court will conduct a sentencing hearing at which "the same jury will hear the evidence from the state of aggravating factors . . . [a]nd then the defense may present evidence of mitigating factors" did not improperly imply that the existence of aggravating circumstances was predetermined but that there might be no mitigating circumstances since no capital sentencing proceeding occurs unless the State has evidence to support at least one aggravating circumstance; after such evidence is presented, a defendant is permitted to present evidence of mitigating circumstances but may opt not to present evidence at the sentencing phase; and the instruction was thus accurate and proper.

Am Jur 2d, Trial § 1444.

5. Jury § 187 (NCI4th)— granting of challenge for cause—standard of appellate review

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. The standard of review does not become *de novo* because fundamental constitutional rights are implicated.

Am Jur 2d, Jury §§ 231, 232.

6. Jury § 227 (NCI4th)— capital trial—jury selection—death penalty views—excusal for cause despite rehabilitation

The trial court did not abuse its discretion by excusing for cause in a capital trial a prospective juror who twice stated in response to questions by the prosecutor that having to vote on the death penalty would substantially impair her ability to function as a juror, and who also stated in response to questioning by the court that her personal convictions would prevent her from recommending the death penalty, even though the juror stated in response to questioning by defense counsel that she could follow the law if selected, since the trial court could have formed a definite impression that the juror would be unable to faithfully and impartially apply the law.

Am Jur 2d, Jury § 279.

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

7. Criminal Law § 452 (NCI4th)— prosecutor's statements—purpose of aggravating and mitigating circumstances—substantiality of aggravating circumstances—no gross impropriety

The prosecutor's statements to the effect that aggravating circumstances made a crime deserving of the death penalty and that mitigating circumstances "move[d] it down from death to life," and his statements informing certain panels of prospective jurors that they had to decide in the fourth issue whether the aggravating circumstances were sufficiently substantial to call for a death sentence were essentially correct, did not distort the jury's understanding of mitigating circumstances, and did not require the trial court to intervene *ex mero motu*.

Am Jur 2d, Trial §§ 554, 555, 566.

8. Criminal Law § 452 (NCI4th)— capital sentencing—prosecutor's closing argument—Issue Three—improper burden on defendant—instructions by court—no gross impropriety

Assuming *arguendo* that the prosecutor's closing argument regarding Issue Three in a capital sentencing proceeding, whether the mitigating circumstances found are insufficient to outweigh the aggravating circumstances found, placed a burden of proof upon defendant which the law does not require, the trial court did not err by failing to intervene immediately to correct the prosecutor where the court notified the jury prior to closing arguments that it would give instructions on the applicable law, instructed the jury that the closing arguments are not evidence, and properly instructed on Issue Three after the closing arguments.

Am Jur 2d, Trial § 544.

9. Indigent Persons § 26 (NCI4th); Constitutional Law § 266 (NCI4th)— capital trial—jury selection—objections by only one attorney—right to additional counsel not violated

The trial court's ruling that only one attorney from each side could make objections during *voir dire* of prospective jurors did not violate the indigent defendant's statutory right to the assistance of two attorneys in a capital trial since the second attorney remained present and could prompt the first when he thought objections should be made. Nor did this ruling violate defendant's constitutional right to the assistance of counsel because an indigent defendant's right to the appointment of additional counsel in a capital case is statutory, not constitutional. N.C.G.S. § 7A-450(b1); U.S. Const. amend. VI; N.C. Const. art. I, § 23.

Am Jur 2d, Criminal Law § 976.

Comment Note.—Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution. 93 ALR2d 747.

10. Jury § 202 (NCI4th)— jury selection—preconceived opinion—excusal for cause—discussions with other jurors—questioning by defendant not allowed

The trial court did not err by excusing for cause a prospective juror who stated during *voir dire* that he had discussed this murder case with a close friend who knew the victim's brother and had formed an opinion about the case that he would be unable to

set aside without giving defendant a chance to question the juror to determine whether he had discussed his knowledge of and opinions about the case with other prospective jurors where no prospective juror indicated that the excused juror had shared his opinion about the case with other members of the venire; even after the excused juror's departure, defense counsel did not ask any prospective jurors whether the excused juror had divulged to them his opinion or other information about the case; and whether the excused juror talked to other prospective jurors about his opinion is thus a matter of speculation.

Am Jur 2d, Jury §§ 253, 291, 303.

11. Jury § 102 (NCI4th)— newspaper article in jury assembly room—excusal of selected jurors—failure to question remaining prospective jurors

The trial court did not abuse its discretion by failing to question the remaining prospective jurors *ex mero motu* regarding their exposure to media coverage after it learned that a newspaper article about the case had been circulated around the jury assembly room where the court properly questioned the selected jurors about their exposure to news coverage of this case and the impact such exposure might have on their ability to be fair and impartial; the trial court excused for cause two previously selected jurors who stated they had read the article about the case and were not sure they could set aside that information; defendant objected when the prosecutor challenged these two selected jurors for cause; although defendant was on notice that at least one newspaper had circulated in the jury assembly room, he failed to ask the remaining prospective jurors about their exposure to this article after the two jurors were excused; and defendant accepted a prospective juror who stated that she had read an article about the case at her grandmother's house without asking her whether that article had affected her ability to be fair and impartial.

Am Jur 2d, Jury § 289.

12. Appeal and Error § 155 (NCI4th)— objection to evidence—additional grounds not presented for appeal—waiver

Where defendant objected to evidence on only one ground, he failed to preserve for review the additional grounds presented on appeal, N.C. R. App. P. 10(b)(1); he also waived appellate review

of those additional arguments by failing specifically and distinctly to argue plain error. N.C. R. App. P. 10(c)(4).

Am Jur 2d, Appellate Review § 388.

13. Evidence and Witnesses § 1457 (NCI4th)— blood sample—chain of custody—who took sample

The first link in the chain of custody of a blood sample, that is, who drew the blood, was sufficiently proven to permit admission of the sample and expert testimony based thereon where the autopsy physician testified that an autopsy assistant was also present during the autopsy; an investigator testified that he received two vials of the victim's blood directly from the autopsy physician and the autopsy assistant; and this evidence permits an inference that either the physician or the assistant drew the blood during the autopsy.

Am Jur 2d, Evidence §§ 946, 947.

14. Criminal Law § 463 (NCI4th)— prosecutors' closing arguments—scenarios supported by evidence

The prosecutors' closing arguments in this murder trial suggesting that defendant stabbed the victim several times to force him to reveal the location of his money but not to kill him, that the victim revealed his money was under the mattress, and that defendant wiped the victim's blood from his hands with a pair of pants, obtained the money, washed his hands, and then stabbed the victim to death was supported by evidence that the fatal wound was the one in the center of the victim's chest from which a pair of scissors was removed; the remaining wounds to the chest and neck were painful but not fatal and were inflicted prior to the victim's death; the mattress in the victim's bedroom was found askew and contained blood consistent with defendant's; blood consistent with that of the victim was found on a pair of pants in the bedroom; and police officers found blood around the kitchen sink and on the faucet handles.

Am Jur 2d, Trial §§ 554, 566, 632.

15. Criminal Law § 460 (NCI4th)— capital sentencing—closing argument—thoughts of victim during murder—permissible inferences from evidence

The prosecutor's argument in a capital sentencing proceeding that the murder was especially heinous, atrocious, or cruel by

surmising that the victim may have been thinking that he had treated defendant like a son and was wondering why defendant was doing this to him was not so grossly improper as to require the trial court to intervene *ex mero motu* where there was evidence that defendant considered the victim a friend and appeared to view him as a father figure, that the victim forgave defendant's debts in exchange for work around the house and yard, and that the relationship between the two was one of trust and kindness.

Am Jur 2d, Trial § 632.

16. Criminal Law § 450 (NCI4th)— closing argument—references to victim's wounds—no gross impropriety

The prosecutor's references to the victim's wounds as "slashes" and "stabs" when some were only minor lacerations were neither inflammatory nor grossly improper.

Am Jur 2d, Trial §§ 664, 665.

17. Homicide § 253 (NCI4th)— first-degree murder—sufficient evidence of premeditation and deliberation

Even if the evidence shows that defendant entered the victim's home with the intent to rob and not to kill, the trial court properly submitted to the jury the charge of first-degree murder based on premeditation and deliberation where the evidence showed that the victim was felled in his living room near the front door; there was no evidence that the victim provoked defendant into stabbing him; the evidence permits the inferences that defendant struck the deadly blow after felling the victim and rendering him defenseless and that he used a second deadly weapon, scissors, after the first one, a knife, broke from the force of his attack; and the evidence tends to show that defendant killed the victim to avoid apprehension.

Am Jur 2d, Homicide § 439.

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.

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

18. Homicide § 552 (NCI4th)— first-degree murder trial—instruction on second-degree murder not required

The evidence in a first-degree murder prosecution did not require the trial court to submit second-degree murder to the jury where uncontroverted evidence supported an inference of premeditation and deliberation. Defendant's assertion that he had the intent only to rob when he arrived at the victim's house does not negate or contradict the State's proof of premeditation and deliberation, and an investigator's testimony that he had the impression that a struggle had occurred at the victim's house, without more, was insufficient to require a second-degree murder instruction.

Am Jur 2d, Homicide §§ 501, 511.

19. Criminal Law § 1344 (NCI4th)— capital trial—especially heinous, atrocious, or cruel aggravating circumstance—psychological torture

The evidence in a capital trial permitted the inference that the murder involved psychological torture sufficient to support submission of the especially heinous, atrocious, or cruel aggravating circumstance where it tended to show that the victim, defendant's landlord, had forgiven defendant's rent payments in exchange for yard work; defendant viewed the victim as a benign father figure, indicating that the men trusted and were kind to each other; five wounds were inflicted to the victim's neck and chest before the sixth and fatal stab wound; the fatal stab wound, which tore a hole in the victim's aorta, caused him to bleed to death; the victim would not have lost consciousness immediately but would have remained conscious for about two minutes; defendant first used a sharp knife but resorted to scissors when the knife blade broke off of the handle; the victim was still alive while defendant searched his bedroom for money; blood evidence raised an inference that defendant cut the victim and left him to bleed and feel pain but not to die before he ransacked the bedroom; and defendant inflicted the fatal blow before leaving the house because he knew the victim could identify him. N.C.G.S. § 15A-2000(e)(9).

Am Jur 2d, Criminal Law §§ 598, 599.

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

The evidence was sufficient to support submission of the mitigating circumstance that defendant had no significant history of prior criminal activity where evidence of defendant's criminal past consisted of testimony about his extensive use of illicit drugs and testimony by a county jailer that he had "dealt with [defendant] a number of times over the years" when defendant was "in jail for reasons," defendant requested that the court submit this circumstance, and the trial court could have viewed evidence presented by defendant about his drug use and prior periods of incarceration as offered to support this circumstance. Further, the trial court properly allowed the State to present evidence of defendant's criminal record in rebuttal. N.C.G.S. § 15A-2000(f)(1).

Am Jur 2d, Criminal Law §§ 598, 599.

21. Criminal Law § 1363 (NCI4th)— alcohol intoxication—nonstatutory mitigating circumstance—refusal to submit—subsumption in impaired capacity circumstance

The trial court did not err by refusing to submit the nonstatutory mitigating circumstance that defendant's alcohol intoxication impaired his abilities to conform his behavior to the requirements of the law since it was subsumed within the submitted and found statutory mitigating circumstance 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, N.C.G.S. § 15A-2000(f)(6). Further, the court instructed on three nonstatutory circumstances regarding defendant's alcohol problem, the circumstance that defendant had a diminished capacity to conform his social behavior to social norms, and the "catchall" circumstance, and the jury was thus not precluded from considering mitigating evidence regarding defendant's alcohol abuse and its effect on his mental capacity.

Am Jur 2d, Criminal Law §§ 598, 599.

22. Criminal Law § 454 (NCI4th)— capital sentencing—prosecutors' closing arguments—reminder to follow the law—no gross impropriety

Closing arguments by the prosecutors in a capital sentencing proceeding to the effect that the jury should be guided by the law,

not by emotions, and that all persons are treated alike by the law did not misstate the law and were not grossly improper. Further, prosecutors could properly argue to the sentencing jury that its decision should be based not on sympathy, mercy, or whether it wants to kill the defendant, but on the law.

Am Jur 2d, Trial §§ 554, 555, 566.

23. Criminal Law § 454 (NCI4th)— capital sentencing—prosecutors' closing arguments—telling jury to follow the law—no diminishment of jury's responsibility

The closing arguments of the prosecutors in a capital sentencing proceeding did not diminish the jury's sense of responsibility by telling the jury to follow the law since juries are to exercise guided discretion when making the findings required by the capital sentencing statute, and the law, as instructed by the court, constitutes the jury's guide in exercising its discretion.

Am Jur 2d, Trial §§ 497, 566-568, 572.

24. Criminal Law § 452 (NCI4th)— capital sentencing—closing argument—comment about mitigating circumstances

The prosecutor did not improperly criticize the capital sentencing statute or disparage defendant's right to present evidence in mitigation by arguing that the State is restricted in the presentation of aggravating circumstances while the defense can "play a numbers game" and "come up with as many [mitigating circumstances] as [it] want[s]" where the comment, read in context, was intended to attack the weight of mitigating circumstances and to convince the jury that the fifty-nine mitigating circumstances could not outweigh the two aggravating circumstances.

Am Jur 2d, Trial § 572.

25. Criminal Law § 433 (NCI4th)— capital sentencing—closing argument—dangerousness of defendant—supporting evidence

The prosecutor's argument that defendant was a Type H inmate, "the most dangerous there are" was a reasonable extrapolation from a psychologist's testimony that Type H inmates, such as defendant, "are some of the most disturbed inmates," are more likely to be psychotic, and "typically have been hard drug users before they went to jail."

Am Jur 2d, Trial § 614.

26. Criminal Law § 1357 (NCI4th)— capital sentencing—mental or emotional disturbance mitigating circumstance—instruction using conjunctive—no plain error

The trial court's instruction that the jury should find the mental or emotional disturbance mitigating circumstance, N.C.G.S. § 15A-2000(f)(2), if it determined that defendant was under the influence of a mental and/or emotional disturbance at the time of the murder as a result of "paranoid disorder, mixed substance abuse disorder, mixed personality disorder, and child abuse syndrome" did not constitute plain error because of the court's use of the conjunctive where the court also stated that "it is enough that the defendant's mind or emotions were disturbed from any cause," since this permitted the jury to consider any or all of defendant's psychological problems in the context of that circumstance.

Am Jur 2d, Criminal Law §§ 598, 599.

27. Criminal Law § 1360 (NCI4th)— capital sentencing—impaired capacity mitigating circumstance—instruction using conjunctive—no plain error

The trial court's instruction that the jury should find the impaired capacity mitigating circumstance, N.C.G.S. § 15A-2000(f)(6), if it found "that the defendant suffered from paranoid disorder, mixed substance abuse disorder, mixed personality disorder and substance abuse syndrome, and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" did not constitute plain error because of the court's use of the conjunctive where defendant's psychologist never testified that any one of defendant's disorders alone resulted in impaired capacity; the psychologist did testify that defendant's history of drug abuse exacerbated his paranoia and that "intoxicants *and* psychosis [were] driving his behavior" at the time of the crime; and the instruction thus basically comported with defendant's evidence.

Am Jur 2d, Criminal Law §§ 598, 599.

28. Criminal Law § 1361 (NCI4th)— capital sentencing—impaired capacity mitigating circumstance—instructions—omission of intoxication

The trial court did not err by omitting intoxication as a factor from its instruction on impaired capacity where the evidence

showed only that defendant smoked crack cocaine on the Friday night preceding the Sunday morning murder and that he walked unsteadily on the Saturday night before the murder, but there was no evidence that defendant was intoxicated at the time of the murder.

Am Jur 2d, Criminal Law §§ 598, 599.

29. Criminal Law § 1360 (NCI4th)— capital sentencing—impaired capacity mitigating circumstance—instructions—omission of child abuse syndrome—harmless error

Assuming *arguendo* that the trial court erred by failing to include child abuse syndrome in its instruction on the impaired capacity mitigating circumstance, this error did not improperly restrict the jury's consideration of mitigating evidence and was harmless beyond a reasonable doubt where the jury heard testimony from defendant's psychologist about the physical abuse defendant endured in a foster home and his opinion that defendant suffered from child abuse syndrome, and the trial court submitted the "catchall" mitigating circumstance, which no juror found.

Am Jur 2d, Criminal Law §§ 598, 599.

30. Criminal Law § 1323 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—failure to instruct on each circumstance submitted—harmless error

Any error in the trial court's failure to give an individual instruction for each of the fifty-four nonstatutory mitigating circumstances submitted on the mechanics by which the jury might answer "yes" to such a circumstance was harmless where the jury heard and was instructed to consider all the evidence defendant proffered in mitigation; all fifty-four nonstatutory mitigating circumstances were listed individually on the Issues and Recommendation as to Punishment form; the jury found thirty-two of them and also found two statutory mitigating circumstances; the trial court submitted, but the jury did not find, the "catchall" circumstance; and despite the substantial amount of mitigating evidence, the jury recommended a sentence of death.

Am Jur 2d, Trial § 1125.

31. 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 defendant stabbed the victim to death in his own home during a nighttime robbery; the jury convicted defendant under both the felony murder rule and the theory of malice, premeditation and deliberation; defendant chose to kill a person who had treated him with kindness and compassion and who was viewed by defendant as a friend and father figure; the victim suffered physical and psychological torture in that he was not only in pain but was also aware of his impending death as he lay bleeding on his living room floor; and the victim, age seventy, would have been unequal in physical strength to defendant, a healthy thirty-four-year-old man. Defendant's sentence was not disproportionate because the jury found numerous mitigating circumstances and only two aggravating circumstances.

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 Hyatt, J., at the 1 November 1993 Criminal Session of Superior Court, Catawba County, on a jury verdict finding defendant guilty of first-degree murder and robbery with a dangerous weapon. Heard in the Supreme Court 10 May 1995.

Michael F. Easley, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State.

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

WHICHARD, Justice.

Defendant was tried capitally for the first-degree murder and robbery with a dangerous weapon of Ralph Childress, his landlord. The jury found defendant guilty of all charges and recommended a sentence of death for the first-degree murder. The trial court sentenced accordingly on the murder charge. It arrested judgment on the robbery conviction because it was the basis for an aggravating circumstance found by the jury in the capital case. We hold that defendant

had a fair trial, free of prejudicial error, and that the sentence of death is not disproportionate.

The State's guilt-phase evidence tended to show the following:

Leroy Childress, the victim's brother, testified that the victim owned a trailer, across the street from his home, which he had leased to defendant for about a year prior to his death. Defendant could not always pay the rent, so the victim occasionally allowed him to perform yard work in exchange for the rent owed. The victim had been trying to evict defendant for two or three months before the murder, but defendant had not left. Leroy and the victim spent the afternoon together on Saturday, 23 January 1993. At 6:00 p.m. they arrived at the victim's home where the victim wrote and signed two notes, which Leroy also signed, ordering defendant to vacate the trailer. Leroy affixed one note to the front door of the trailer and the other to the back door. The brothers then drove to Leroy's house to retrieve the victim's truck. The victim drove off to run an errand; Leroy never again saw him alive. Leroy further testified that the victim was known to carry five thousand dollars in his pocket in a roll consisting primarily of hundred-dollar bills.

The victim telephoned Leroy at about 2:00 a.m. on Sunday, 24 January. He stated that defendant, who had been at his house trying to sell him a couch, would vacate the trailer in the morning. According to Leroy, the victim called because he was upset about defendant's visit. At the close of the conversation, Leroy told the victim he would see him at breakfast later that morning.

Leroy telephoned the victim about one-half hour before he planned to pick him up for breakfast. The victim did not answer; Leroy immediately rushed to his house, arriving between 7:30 and 8:00 a.m. He found the storm door open and the victim lying on the floor near the door with a pair of scissors embedded in his chest. The telephone had been disconnected, so Leroy called the police from a neighbor's house.

Hickory police officers arrived at about 8:01 a.m. They found the victim with the scissors in his chest and blood around his neck area. A bloody wallet, devoid of money, lay open between his legs. The investigation of the premises revealed no sign of forced entry.

The living room furniture had been knocked over. Police found a .38 Special revolver under a cushion behind a footstool and a bloody knife blade under the cushion of an easy chair. A small file box next

to the chair appeared to have been opened; police removed a latent fingerprint from the box. The television was still on.

The light in the victim's bedroom was on, the bed covers were pulled back revealing a blood smear on the mattress, and the cord to the telephone on the nightstand had been pulled out of the wall. Desk drawers were open, and clothes were scattered about the room. A knife handle was discovered on the floor near the bedroom door. Just inside the door, police found a pair of bloodstained khaki pants. In the kitchen bloodstains were found around the sink area, including the faucet handles. A silver Derringer .22-caliber pistol lay on the kitchen table with blood on its handle.

Leroy testified that the .38 Special belonged to the victim and was normally kept under the cushion of the footstool in front of the easy chair. He never kept the gun loaded; he stored the cartridges in the nightstand beside the chair. The victim also owned the Derringer and ordinarily kept it in his top dresser drawer.

Leroy and his daughter, Linda Cline, returned to the victim's house to clean it on 30 January 1993. Cline found a piece of white paper with duct tape on it in the bedroom. It said, "Get out now," in Leroy's handwriting and bore his signature. Leroy identified the paper as one of the two notes he had attached to defendant's trailer and turned it over to police on 2 February 1993.

Dr. Joseph Vogel testified about the autopsy results. The victim's body contained six discrete wounds to the neck and chest region. Dr. Vogel determined that blood loss from the stab wound to the chest from which the scissors were removed caused the victim's death. That wound penetrated through the skin and sternum into the aorta. The victim bled one and one-half liters of blood into his left chest cavity and one liter into the right. The other chest wounds were inflicted prior to death by a relatively dull instrument, such as scissors. They would have caused pain but not unconsciousness. Bruising occurred around the chest wounds, and three ribs were broken.

The victim also sustained two neck wounds which could have been inflicted by a knife blade or sharp scissors. One was almost one and one-half inches deep and cut into smaller blood vessels and some neck muscles. The other, one-half inch wide, penetrated to the bone under the chin. These wounds could have been inflicted sometime before the fatal chest wound and occurred prior to the victim's death.

Nothing indicated that the victim would have lost consciousness prior to his death.

Michael Ramseur testified that defendant bought seventy-five dollars' worth of crack from him late on a Friday night in January 1993. After he had smoked it, he traded jewelry, old coins, and a microwave for more crack. He returned to Ramseur on Saturday morning, out of money. He told Ramseur he knew he could get some money from "that landlord." Defendant suggested that Ramseur rob the man, who would recognize defendant if he did it, but Ramseur refused. Defendant then told Ramseur to meet him at 11:30 on Sunday morning; he would have money with which to buy more crack. On Sunday, Ramseur saw defendant and sold him more drugs. At that time defendant had a roll of money which included five or six hundred-dollar bills.

Kenneth Berry, defendant's cousin, testified that he lived next door to the victim. He further testified that defendant came to his house between 11:30 p.m. on 23 January and 1:00 a.m. on 24 January. Defendant was drunk and tried to sell the green army jacket he was wearing and two tires to Berry. Berry told defendant not to sell his jacket and sent him away; defendant did not have a cut on his hand at that time.

Doug Propst testified that defendant visited him between 8:30 and 9:00 on 24 January and paid him the one hundred dollars he owed. The two men smoked some crack; defendant then laid a large number of hundred-dollar bills on the counter, stating it totaled three thousand dollars. Propst asked defendant where he had obtained the money, and defendant replied, "Ask me no questions, I'll tell you no lies." Defendant stayed with Propst until Tuesday, when he was arrested. Police officers conducted a consent search of Propst's house. They seized the army jacket defendant was wearing when he arrived on 24 January, among other items.

Franki Bryson testified that she saw defendant on a Sunday morning in 1993 and that they were both smoking crack. Defendant, who then had a lot of hundred-dollar bills, asked her to buy some crack for him. She did so and continued to buy drugs for him with his money, two or three hundred dollars at a time, from Sunday until the time of his arrest. When Bryson first saw defendant on Sunday, his hand was cut. Defendant kept all his money in a roll.

Kevin Templeton testified that he had used drugs with defendant in the past. He knew the victim and had spoken with defendant several times after the murder. Templeton told defendant that he had heard that defendant had a lot of money, and he asked why he had no more left. Defendant replied that he had spent some on drugs and given some to a girl. He also told Templeton he "only meant it to be a robbery" and "got carried away." Defendant said he had obtained almost five thousand dollars.

SBI Special Agent Jennifer Elwell of the Serology Section testified about the blood she found on various pieces of evidence. She determined that: blood on the knife handle, Derringer, mattress, three areas of defendant's army jacket, and defendant's blue jeans was consistent with that of defendant; blood on the khaki pants, knife blade, and the left sleeve of defendant's army jacket was consistent with that of the victim.

SBI Special Agent Mark Boodee analyzed the DNA content of substances on several items of evidence received from Elwell. He determined that bloodstains from the knife blade and the army jacket matched the blood sample taken from the victim. He further determined that the bloodstain from the mattress matched the sample taken from defendant.

Defendant presented no evidence during the guilt phase. The State introduced no additional evidence at the sentencing phase.

Defendant's sentencing phase evidence showed the following:

Paul Burgess, the chief jailer at the Catawba County Jail, testified that defendant had caused no problems while incarcerated for nine months awaiting trial. Further, defendant had been in jail previously and had demonstrated an ability to conform to prison life.

Dr. Jerry Noble, a clinical psychologist, testified about his interviews with defendant and the results of psychological tests he administered. Defendant did not talk about the victim's death and never directly expressed feelings of remorse for the murder. He did speak well of the victim, whom he considered a friend. Defendant requested that Dr. Noble not talk with his family; the doctor spoke only with defendant and defense counsel. Defendant had lived in several foster homes and an orphanage. He suffered extreme physical abuse at the hands of his first foster father. He dropped out of high school and began abusing drugs and alcohol as a teenager. Dr. Noble opined that the victim represented a benign father figure to defendant.

Test results revealed that defendant was immature, suspicious, isolated, oriented toward immediate gratification, and had difficulty sustaining interpersonal relationships. He also had concerns about being conspired against and persecuted. Dr. Noble diagnosed defendant with three psychiatric disorders: paranoia; mixed substance abuse; and mixed personality. He also believed defendant suffered from child abuse syndrome. Dr. Noble opined that defendant had diminished capacity to know right from wrong and to conform his behavior to social requirements.

On rebuttal the State presented evidence of defendant's criminal record, which included convictions for damage to property, damage to city property, assault on an officer, destruction of property, felonious breaking and entering, and possession with intent to sell or deliver drugs.

JURY SELECTION

Defendant first assigns as error four statements made by the trial court to all prospective jurors. He argues that the comments indicated the court's opinion about the proper verdict or otherwise gave weight to the State's position.

[1] First, defendant contends the court encouraged the jurors to identify with it by stating, "You will become in effect officers of the Court and collaborators in judgment with me." He asserts this comment ensured that any suggestion of an opinion by the court would carry significant weight with the jury and would affect the verdict. We disagree. The statement occurred during the court's preliminary instructions, before the prospective jurors were sworn, regarding their role in the criminal justice system. The court stated, *inter alia*:

> When you are selected and qualify as jurors in a trial, and [take] the juror[']s oath, you become the sole judges of the weight to be given any evidence and the credibility of each and every witness. Any decision agreed to by all 12 jurors which is free of partiality, unbiased and unprejudiced, reached in sound and conscientious judgment based on credible evidence, and in accord with the Court's instruction, becomes a final and determinative result in a case. You will become in effect officers of the Court and collaborators in judgment with me.
>
> It is my duty to see that the trial is conducted in accord with the rules of law that prescribe the pattern of trial procedure, to rule on points of evidence, to maintain order, to preserve deco-

> rum, and instruct you on that law that you are to apply to the facts as you find the facts to be.
>
> . . . .
>
> Your entry upon this service will delegate to you certain powers of decision on human affairs which are not given to every citizen. It will impose upon you important duties and grave responsibilities which enlist your best talent of appraisal and judgment to discharge.

These comments accurately described the criminal justice process, including the interrelated roles of judge and jury. We cannot conclude that the statement defendant complains of was erroneous.

[2] Second, the trial court asked each prospective juror: "If chosen to sit as a juror will you require the state to satisfy you of the defendant's guilt beyond a reasonable doubt before you find him guilty?" Defendant contends this question improperly conveyed an assumption that each juror would vote to convict. Defendant further contends the court exacerbated this error by failing to ask whether the prospective juror would vote to acquit if not satisfied of defendant's guilt beyond a reasonable doubt.

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). The context of the court's comment reveals that it was not an expression of opinion but an attempt to ascertain whether the prospective jurors could follow the court's preliminary instructions regarding the burden of proof. We conclude that no reasonable juror would have interpreted the question as indicating an opinion of the court.

[3] Third, the trial court asked the following question after explaining the two sentences possible for first-degree murder:

> If you serve as a juror in this case, and the state has satisfied you of the existence of those things [which constitute first-degree murder] beyond a reasonable doubt, will you vote to find the defendant guilty of first degree murder or would your personal convictions about the death penalty prevent or substantially impair the performance of your duty in accordance with your instructions and your oath?

Defendant asserts that this inquiry was erroneous because, among other reasons, it required each juror to draw a legal conclusion about his or her competence to serve and had the effect of staking out jurors by eliciting an agreement to vote in favor of a guilty verdict. We cannot conclude that this question was improper. It sought to assort those prospective jurors who were unable to find defendant guilty, regardless of the evidence presented by the State, because of their views about capital punishment. Such jurors may be excused for cause. *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985).

[4] Fourth, defendant contends the trial court accorded undue weight to the State's position during its remarks regarding aggravating and mitigating circumstances, in which it stated:

> Members of the jury, if the defendant is found guilty of first degree murder, then the court will conduct a sentencing trial. At that trial the same jury will hear the evidence from the state of aggravating factors, those factors which suggest that the death penalty should be imposed. And then the defense may present evidence of mitigating factors, that is, those factors which suggest that life imprisonment should be imposed.

Defendant asserts that this instruction improperly implied that the existence of aggravating circumstances was predetermined but that there might be no mitigating circumstances. We disagree. No capital sentencing proceeding occurs unless the State has evidence to support at least one aggravating circumstance. *State v. Johnson*, 298 N.C. 47, 79-80, 257 S.E.2d 597, 620 (1979). After such evidence is presented, a defendant is permitted to present evidence of mitigating circumstances. *State v. Taylor*, 304 N.C. 249, 276-77, 283 S.E.2d 761, 779 (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). A defendant may opt not to present any evidence at the sentencing phase. Thus, the instruction was accurate, proper, and not an expression of the court's opinion. These assignments of error are overruled.

Defendant next contends the trial court committed reversible error by striking prospective juror Mallonee for cause. He asserts the court should not have excused her for her views on the death penalty unless they would have prevented or substantially impaired her performance of her duty as a juror. Defendant contends that Mallonee should not have been excused because she affirmatively agreed to follow the law, said she believed in the death penalty, and made state-

ments indicating that although she would not like to impose the death penalty, she could do so.

[5] Defendant asserts that the standard of review is *de novo* because fundamental constitutional rights are implicated. The United States Supreme Court, however, has stated that "deference must be paid to the trial judge who sees and hears the juror." *Wainwright*, 469 U.S. at 426, 83 L. Ed. 2d at 853. Accordingly, "[t]he 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).

[6] In response to questioning by the prosecutor during *voir dire*, Mallonee twice stated that having to vote on the death penalty would substantially impair her ability to function as a juror. She also stated, in response to questioning by the court, that her personal convictions would prevent her from recommending the death penalty. These responses appear to contradict her statement to defense counsel that she could follow the law if selected. Defendant contends that because Mallonee's responses to the questions of the court and the prosecutor are consistent with a desire to follow the law, the court should not have excused her for cause.

The bias of a prospective juror may not be provable with unmistakable clarity. *Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 852. "Despite [a] lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* The trial court here properly could have formed such an impression about Mallonee. Thus, we conclude that it did not abuse its discretion by excusing this prospective juror for cause. This assignment of error is overruled.

[7] Next, defendant asserts that certain of the prosecutor's comments, during both *voir dire* and closing arguments at sentencing, distorted the jury's understanding of the function of mitigating circumstances. The prosecutor stated, in different forms, that aggravating circumstances made a crime more deserving of the death penalty and that mitigating circumstances, for example, "move[d] it down from death to life." Defendant contends the prosecutor also misstated the fourth issue of the capital sentencing procedure by informing certain panels of prospective jurors that they had to decide whether the aggravating circumstances were sufficiently substantial to call for a

death sentence. This, defendant argues, misrepresented the importance of mitigating evidence by omitting it from the calculus.

At sentencing the prosecutor again stated that a mitigating circumstance reduced the prospect of the death penalty. He also stated, with regard to Issue Three:

> Do you unanimously find beyond a reasonable doubt that mitigating circumstance or circumstances are insufficient to outweigh the aggravating? So let me not confuse you. The first issue, is there any aggravating? I said you find yes. . . . Are any mitigating? You've got 59. So find as many as you want. Three[,] . . . you have to balance them. Number three's your balance question. . . . If some of you found yes on all 59 at this weighing session . . . [e]very one of those will not stack to reach his burden. And outweigh the aggravating circumstances of the State. . . . And I say number three is a yes, those mitigating circumstances don't outweigh what happened [in] this case. So find every one of them yes, if that's what you think, and I argue to you, you can find every one of them yes, that's still going to be a burden they can't overcome.

Defendant argues that this was an insidious misstatement of the law because defendants bear no burden of proof regarding the third issue.

Defendant did not object to any of these statements at trial. Thus, we will find error only if the comments were so grossly improper that the trial court should have intervened *ex mero motu*. "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial [court] abused [its] discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

The comments during jury selection were shorthand summaries of the definitions of aggravating and mitigating circumstances. They were substantially correct, even if slightly slanted toward the State's perspective. The statement concerning Issue Four of the balancing process at sentencing was also essentially correct. Further, the prosecutor reminded the prospective jurors that the court would instruct them on the applicable law at the appropriate time, and the court properly did so. The statements were not grossly improper and did not require the trial court to intervene *ex mero motu*.

[8] Assuming *arguendo* that the closing argument regarding Issue Three placed a burden of proof upon defendant which the law does not require, we nevertheless conclude the trial court did not err by failing to intervene immediately to correct the prosecutor. Before closing arguments began, the court told the jury: "At the conclusion of these arguments I will instruct you on the law in this case . . . . The final arguments of the lawyers are not evidence but are given to assist you in evaluating the evidence. . . . I will go over [the Issues & Recommendations as to Punishment form] with you during my instructions." Further, the court properly instructed on Issue Three at the close of the arguments. Specifically, the court stated, "If you unanimously find beyond a reasonable doubt that the mitigating circumstances found are insufficient to outweigh the aggravating circumstances found, you would answer issue three yes." This correctly stated the applicable burden of proof. In this context, the prosecutor's statement could not have denied defendant due process of law and was not grossly improper. *See State v. Jones*, 336 N.C. 490, 493-96, 445 S.E.2d 23, 24-26 (1994) (assuming *arguendo* prosecutor erroneously defined "reasonable doubt," defendant not entitled to new trial where court notified jury prior to arguments that it would give instructions on the applicable law and then properly instructed on reasonable doubt after closing arguments). These assignments of error are overruled.

[9] Next, defendant asserts that the trial court improperly allowed only one of his attorneys to conduct *voir dire*. During the questioning of a prospective juror by the State, both defense attorneys objected at different times. After an objection by the second attorney, the trial court ruled that it would "hear from one of you and not both and, of course, this applies to [the prosecutors]." Defendant argues that this ruling impermissibly infringed on his statutory right to the assistance of two attorneys in a capital trial and his constitutional right to the assistance of counsel. We disagree.

The governing statute provides in relevant part:

> An indigent person indicted for murder may not be tried where the State is seeking the death penalty without an assistant counsel being appointed in a timely manner. If the indigent person is represented by the public defender's office, the requirement of an assistant counsel may be satisfied by the assignment to the case of an additional attorney from the public defender's staff.

N.C.G.S. § 7A-450(b1) (1989). Violation of this statute constitutes prejudicial error *per se*. *State v. Hucks*, 323 N.C. 574, 579-81, 374 S.E.2d 240, 244-45 (1988).

We do not interpret the trial court's ruling to have violated defendant's statutory entitlement to two attorneys, however. The court ruled that only one attorney from each side could make objections during *voir dire*. The second attorney remained present and could prompt the first when he thought objections should be made. The court thus did not deny defendant the assistance of a second attorney or so drastically circumscribe the second attorney's role as to render the appointment of two attorneys meaningless. Therefore, the statute was not violated.

The Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution secure a defendant's right to the assistance of counsel. *State v. Colbert*, 311 N.C. 283, 286, 316 S.E.2d 79, 80-81 (1984). Defendant contends the trial court's ruling prejudiced these rights. Defendant did not raise this constitutional issue at trial and therefore failed to preserve it for our review. *See State v. Gibbs*, 335 N.C. 1, 42, 436 S.E.2d 321, 344 (1993), *cert. denied*, —- U.S. —-, 129 L. Ed. 2d 881 (1994). Defendant would not prevail even if he had preserved the issue, however, because "[a]n indigent defendant's right to the appointment of *additional* counsel in capital cases is statutory, not constitutional." *State v. Locklear*, 322 N.C. 349, 357, 368 S.E.2d 377, 382 (1988). These assignments of error are overruled.

[10] Defendant also contends the trial court erred by excusing prospective juror Kenneth Pless, upon the State's challenge for cause, without according defendant a chance to question him. Pless stated during *voir dire* that he had a close friend who knew the victim's brother, that he had discussed the case with his friend, that he had formed an opinion about the case, and that he would be unable to set aside that opinion. After Pless left the courtroom following the court's excusal for cause, defense counsel informed the court that the purpose of his request for further questioning was to determine whether Pless had discussed his knowledge of and opinions about the case with other prospective jurors. Defendant contends the court should have allowed such an inquiry and that its failure to do so constitutes reversible error.

Whether to excuse a prospective juror for cause is a decision within the trial court's sound discretion. *State v. McDowell*, 329 N.C.

363, 379-80, 407 S.E.2d 200, 209 (1991). A defendant must show both an abuse of discretion and prejudice to establish reversible error relating to *voir dire*. *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). Defendant has not met this burden. No prospective juror, including Pless, indicated that Pless had shared his opinion about the case with other members of the *venire*. Further, defense counsel did not—even after Pless's departure—ask any prospective jurors whether Pless had divulged to them his opinion or other information regarding the case. Thus, we are left with speculation as to whether Pless talked to other prospective jurors about his opinion. Mere speculation is an insufficient basis upon which to grant relief. *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.

[11] Defendant also contends the trial court erred by failing to question prospective jurors *ex mero motu* regarding their exposure to media coverage after it learned that a newspaper article about the case had been circulated around the jury assembly room. Prospective juror Anita Allison testified on *voir dire* that she had read a newspaper article about the jury selection brought into the jury assembly room by another member of the jury pool. At this time, eleven jurors had been selected. Defendant challenged Allison for cause the next morning. The court then questioned the entire panel of twelve, including Allison, about exposure to media coverage. Allison and two others admitted to seeing the article. Maria Sharpe stated that she had read the entire article the morning she was chosen and that something bothered her about the case as a result. Sharpe and Allison were both excused for cause. The third person who admitted seeing the article said that he had read only defendant's name and the charges and that this would not impair his ability to be fair and impartial. He remained on the jury panel. Defendant concedes that the court properly questioned the selected jurors "regarding their exposure to the news coverage of this case and what impact, if any, such exposure might have on their ability to be fair and impartial." He contends, however, that the trial court should have questioned subsequent prospective jurors in a similar manner even though defendant himself neither requested nor conducted such an inquiry.

Defendant has again failed to show that the trial court abused its discretion and that he suffered prejudice as a result. Defendant was on notice that at least one newspaper had circulated in the jury assembly room; he chose, however, not to ask prospective jurors

about their exposure to media coverage after Sharpe and Allison were excused. In fact, defendant objected when the prosecutor challenged for cause two jurors who stated that they had read information about the case and were not sure they could set aside that information. The trial court excused both jurors. Defendant elicited information from one prospective juror that she had read an article about the case at her grandmother's house. Defendant accepted this person without asking her whether that article had affected her ability to be fair and impartial. He did not ask any of the final six prospective jurors about media exposure. Based on this record, we cannot conclude that the trial court abused its discretion. *See, e.g., State v. Barts*, 316 N.C. 666, 678-80, 343 S.E.2d 828, 837-38 (1986) (no abuse of discretion where the defendant failed to show "that the jury selection process resulted in the 'contamination' of other jurors by information from jurors previously exposed to . . . pretrial publicity"). This assignment of error is overruled.

GUILT PHASE

Defendant next contends the trial court erred by admitting State's Exhibit 22, a sample of blood purportedly taken from the victim during the autopsy, as well as expert testimony based thereon. Defendant argues that the State did not adequately establish the exhibit's chain of custody because it failed to present evidence of: who drew the blood sample from the victim; who gave the sample to Investigator Mueller; how the sample was transferred from Mueller to Investigator Shook, who delivered it to the SBI lab; and how SBI Agent Elwell made a bloodstain from the sample which she submitted to SBI Agent Mark Boodee for DNA analysis.

Defendant objected to the portion of Elwell's testimony that relied on Exhibit 22 and to the exhibit's admission into evidence on the sole ground that "there was no testimony from anyone as to who drew that blood or when it was drawn or, in fact, that it was drawn from Mr. Ralph Childress." He now presents three additional grounds on which he contends the exhibit should have been excluded.

[12] Rule 10(b)(1) of the Rules of Appellate Procedure provides in pertinent part:

> (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 if the specific grounds were not apparent from the context.*

(Emphasis added.) Defendant objected to the evidence on only one ground; thus, he failed to preserve the additional grounds presented on appeal. He also waived appellate review of those arguments by failing specifically and distinctly to argue plain error. N.C. R. App. P. 10(c)(4).

[13] As to the ground for objection properly preserved, this Court has stated that the person who draws a blood sample need not always testify to establish a proper foundation for the admission of the sample. *State v. Grier*, 307 N.C. 628, 632-33, 300 S.E.2d 351, 353-54 (1983). In *Grier*, the first link of the chain of custody was sufficiently proven because a doctor who had examined a rape victim "testified that although she did not actually see the blood drawn from [the victim], she signed a blood sample that was supposedly taken from the victim by a laboratory technician either immediately before or after the examination. The technician who drew the blood did not testify." *Id.* at 632, 300 S.E.2d at 353. We concluded that "[a]ny weakness in the chain of custody relate[d] only to the weight of the evidence and not to its admissibility." *Id.* at 633, 300 S.E.2d at 354.

There was sufficient evidence here to permit the inference that either Dr. Vogel or Bob Osborn, an autopsy assistant, drew the blood during the autopsy, even though Dr. Vogel was never questioned about the samples of blood and Osborn never testified. Dr. Vogel testified that Osborn was present during the autopsy. Investigator Mueller stated without objection that he received two vials of the victim's blood "directly from Dr. Vogel and Bob Osborn." Defendant calls Mueller's testimony into question by noting that Dr. Vogel did not recall seeing Mueller at the time of the autopsy. This does not, however, preclude the inference that Osborn gave Mueller the blood which either Osborn or Dr. Vogel withdrew from the victim. Any weakness in this chain of custody affected the weight, not the admissibility, of the exhibit. Thus, the trial court properly admitted the exhibit and the testimony based thereon. This assignment of error is overruled.

[14] Next, defendant complains about the prosecutors' closing arguments at the guilt and sentencing phases. He did not object to any of them but now asserts that the trial court should have intervened *ex mero motu* because they were grossly improper. Defendant contends the arguments in which the prosecutors suggested that defendant stabbed the victim several times to force him to reveal the location of

his money, but not to kill him, were unsupported by the record and represented "gross speculation bordering on fantasy." The first prosecutor to argue in closing at the guilt phase stated, *inter alia*:

> [Defendant] comes over to his house. And we don't know if he broke down the door or had problems with the door or whatever. . . . And he wants some money. . . . I am being thrown out, I've got to leave tomorrow. Okay I'll leave, but I want some money.
>
> Wallet's open. . . . But it was empty between his legs. No money. Where's your money? . . . Broke the knife on him. Jabbed him through the fat, through the skin, and through the bone, and broke the knife.
>
> [The victim] sat through five wounds to tell [where] his money [was]. He finally said okay, my money is under the mattress. That's how the defendant got the blood under the mattress. He went to get his money under the mattress. . . . Why was [the bedroom] torn up? Why that place look so messy? . . . Why was the Derringer in the kitchen? That man's alive. I'm not going to kill him until I find his money. . . . Remember the bloody Derringer was found in the sink area in the kitchen. He was just moving it around so he couldn't get it and shoot him with it. . . . The defendant is keeping him alive. Until he finds his money.
>
> How about the pants? The pants had [the victim's] blood. Now [the victim] was in [the] living room stabbed to death. The pants are back in the bedroom. [Defendant] cut himself. Slicing up [the victim]. . . . So [defendant] picks up [that] pair of pants, wherever they were. He wipes [his] hand off. Why? Because he's walking to the bedroom. Why? Because that's where the mattress is. Why? That's where the money is. And right when he gets to the door, he throws those pants down.
>
> . . . .
>
> Now I think you've heard [about] proximate cause from the doctor. He talked a lot about the wounds. He said the first five were not fatal. Said that makes sense, those first five were just to get him to talk. Wasn't going to kill him until he got his money. Washed everything off, went to the sink, had the handles, washed everything. And as he was leaving he gave him the deathblow after he had his money.

He also made a comparable argument at sentencing. The second prosecutor argued in a similar vein, stating, *inter alia*: "And while [defendant is] . . . searching, ransacking it, [the victim] is laying here on the floor bleeding. He's suffering. He's not lost consciousness because the doctor said 'Hey, those wounds to his neck wouldn't cause him to lose consciousness.' That old man was suffering. He's suffering."; and

> While [the victim is] alive, laying here bleeding, he's running through the house trying to find the money. Finds the money, then tries to go wash his hands. On his way out [the victim] moved. . . . [O]ld man, . . . you can't stay here, you know who I am, you can identify me.

Counsel have wide latitude to argue the law, the facts, and reasonable inferences supported thereby. *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). Prosecutors may, in closing arguments, create a scenario of the crime committed as long as the record contains sufficient evidence from which the scenario is reasonably inferable. *State v. Ingle*, 336 N.C. 617, 645, 445 S.E.2d 880, 895 (1994), *cert. denied*, —- U.S. —-, 131 L. Ed. 2d 222 (1995).

Our review of the record reveals sufficient evidence to support the scenarios created by both prosecutors during their guilt phase closing arguments. Dr. Vogel testified that the fatal wound was the one in the center of the victim's chest from which a pair of scissors was removed. The remaining wounds to the chest and neck were painful but not fatal and were inflicted prior to the victim's death. The mattress in the victim's bedroom was found askew and contained blood consistent with defendant's. Blood consistent with that of the victim was found on a pair of pants in the bedroom. Police officers also found blood around the kitchen sink and on the faucet handles. This evidence supports the scenario created by the prosecutors. The arguments were not grossly improper; thus, the trial court did not err by failing to intervene *ex mero motu*.

[15] At sentencing the second prosecutor argued that the murder was especially heinous, atrocious, or cruel by surmising what the victim might have thought as defendant committed the crime:

> Do you think he might have asked why Ronny, why you doing this to me, I loved you, I treated you like a son and you're doing this

to me? . . . Do you think that might have been a psychological torture the old man had to go through? The pain of that knife going through his chin. The slash on his throat. Laying there, blood dripping out of his neck. And the only thing he could think of was why Ronny, why?

We cannot conclude that this argument was grossly improper. In *Ingle* the victims were discovered by their grandson. The prosecutor argued in closing, over the defendant's strenuous objections, about how that young boy might remember "the day when he 'flew' into the home of his grandparents and encountered their dead bodies, finding that he could not kiss his grandma and grandpa because defendant had bludgeoned them to death." *Id.* at 644, 445 S.E.2d at 894. The defendant argued that he should receive a new trial because no evidence supported this argument. Noting that prosecutorial arguments may be permissible even though they address facts not testified to, we concluded that "[d]espite the absence of evidence of [the grandson's] . . . feelings toward his grandparents, the prosecutor's emphasis on the inherent tragedy of the episode and [the grandson's] reaction were a reasonable extrapolation of what may have been the thoughts and actions of such a boy upon encountering such a grisly scene." *Id.* at 645-46, 445 S.E.2d at 895.

Here we have the benefit of testimony regarding the relationship between the victim and defendant. Dr. Noble testified that defendant considered the victim a friend and appeared to view him as a father figure. Leroy Childress testified about the victim's willingness to forgive defendant's debts in exchange for work around the house and yard. The evidence portrayed the relationship between the two as one of trust and kindness. This created a basis, stronger than that present in *Ingle*, from which the prosecutor could reasonably extrapolate the victim's thoughts as defendant ruthlessly attacked him. Therefore, the argument was not grossly improper.

[16] Defendant also asserts that both prosecutors referred to the victim's wounds as "slashes" and "stabs" when some were only minor lacerations. This, defendant asserts, falsely portrayed the gravity of the wounds. We conclude that the language used, while perhaps hyperbolic, was neither inflammatory nor grossly improper. It did not fall outside the latitude granted counsel in closing arguments. We hold that none of the arguments complained of in these assignments of error required the trial court to intervene *ex mero motu*.

[17] Defendant argues that the evidence was insufficient to support a conviction based on malice, premeditation, and deliberation. Therefore, only the theory of felony murder, with robbery with a dangerous weapon as the underlying felony, should have been submitted to the jury. Had the trial court submitted this theory alone, the State would not have been allowed to submit as an aggravating circumstance that the murder was committed while defendant was engaged in the commission of a robbery with a dangerous weapon; therefore, defendant contends, he must have a new sentencing hearing at which this aggravating circumstance is not submitted. We disagree.

Before a trial court submits the charge of first-degree murder, it must determine whether the evidence, taken in a light most favorable to the State, shows that defendant "thought about the act [of murder] for some length of time, however short, before the actual killing; no particular amount of time is necessary to illustrate that there was premeditation." *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994). Evidence of premeditation and deliberation is usually circumstantial. *Id.*

Defendant contends the uncontroverted evidence shows that he entered the victim's home with the intent to rob, not to kill. Even if true, that does not foreclose the existence of premeditation and deliberation, which could have arisen at any time before, during, or after the robbery. For example, in *State v. Thomas*, 332 N.C. 544, 423 S.E.2d 75 (1992), the defendant argued that he had not formed the intent to kill when his fatal assault of the victim began and therefore that the charge of first-degree murder on the theory of premeditation and deliberation should not have been submitted. We found no error, stating, "[i]t is clear that defendant's intent to kill the victim could have developed at any time prior to the beating, during the beating, or after the beating." *Id.* at 561, 423 S.E.2d at 85.

Our review of the evidence reveals numerous circumstances from which premeditation and deliberation are inferable. First, a lack of provocation on the victim's part supports such an inference. *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992). The evidence shows that the victim was felled in his living room near the front door. There is no evidence that the victim provoked defendant into stabbing him. Second, the evidence permits the inferences that defendant struck the deadly blow after felling the victim and rendering him defenseless and that he used a second deadly weapon, scissors, after the first one, a knife, broke from the force of his attack. These also

support a finding of premeditation and deliberation. *See State v. Vause*, 328 N.C. 231, 239, 400 S.E.2d 57, 62 (1991). Third, premeditation and deliberation may be inferred where, as here, the evidence tends to show that the defendant killed his victim to avoid apprehension. *See State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 822 (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). From the foregoing we conclude that the trial court properly submitted the charge of first-degree murder based on premeditation and deliberation. This assignment of error is overruled.

[18] Next, defendant argues that the trial court erred by failing to instruct on the charge of second-degree murder. Defendant neither requested such an instruction nor objected to its absence, but he now contends the court committed plain error.

It is well established that

> [i]f the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial [court] should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Strickland, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). Defendant argues that because the evidence of premeditation and deliberation conflicted, the court had to instruct on second-degree murder. As noted above, however, uncontroverted evidence supported an inference of premeditation and deliberation. Defendant's assertion that he had the intent only to rob when he arrived at the victim's house does not negate or contradict the State's proof of premeditation and deliberation. Investigator Greg Shook's testimony that he had the impression that a struggle had occurred in the victim's house, without more, is insufficient to require a second-degree murder instruction. Evidence of a struggle during the commission of a felony does not necessarily entitle a defendant to an instruction on a lesser charge. *See Thomas*, 332 N.C. at 560-62, 423 S.E.2d at 84-85 (evidence of struggle during a sexual assault which resulted in the victim's death did not require trial court to instruct on second-degree murder where State proved every element of first-degree murder). We conclude that the evidence did not support sub-

mission of the charge of second-degree murder. This assignment of error is overruled.

SENTENCING PHASE

[19] Defendant argues that the trial court erred by submitting the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *See* N.C.G.S. § 15A-2000(e)(9) (Supp. 1994). He contends that the evidence was insufficient to support submission of the circumstance and that the trial court's action violated the Eighth and Fourteenth Amendments to the United States Constitution. We disagree.

In determining whether the evidence is sufficient to submit this aggravating circumstance, it must be considered in the light most favorable to the State. *State v. Quick*, 329 N.C. 1, 31, 405 S.E.2d 179, 197 (1991). "[T]he State is entitled to every reasonable . . . inference to be drawn [from the evidence]; contradictions and discrepancies are for the jury to resolve . . . and all of the evidence . . . admitted . . . which is favorable to the State is to be considered." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

We have held that "killings which are less violent, but involve infliction of psychological torture by leaving the victim in his last moments aware of but helpless to prevent impending death" warrant submission of the circumstance. *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984). The evidence here permits the inference that defendant's crime involved psychological torture. The victim, defendant's landlord, had forgiven defendant's rent payments in exchange for yard work. Defendant viewed the victim as a benign father figure, indicating that the men trusted and were kind to each other. The victim would have admitted defendant into his home in the middle of the night without suspecting that defendant would attack him. This relationship, while not quite as close as a familial one, rendered the offense more egregious than normal. *See State v. Greene*, 324 N.C. 1, 25-26, 376 S.E.2d 430, 445 (1989) (murder of father by son distinguished from other robbery-murders because of relationship between killer and victim), *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).

Medical evidence raises the inference that five wounds were inflicted to the victim's neck and chest before the sixth and fatal stab wound. The preliminary wounds would have caused pain but not

unconsciousness; one cut was deep enough to hit bone. The fatal stab wound, which tore a hole in the victim's aorta, caused him to bleed to death. He would not have lost consciousness immediately but would probably have remained conscious for about two minutes.

The physical evidence showed that defendant used two different weapons. He first used a sharp knife, resorting to scissors when the knife blade broke off of the handle. The telephone had been torn from the wall in the bedroom, which was completely ransacked. It is reasonable to infer from this that the victim was still alive while defendant searched the room for money. The blood found in the bedroom, some of which matched the victim's, raises the further inference that defendant cut the victim, leaving him to bleed and feel pain, but not to die, before he went on his rampage in the bedroom. Defendant inflicted the fatal blow before leaving the house because he knew the victim could identify him.

A reasonable juror could have found from the foregoing evidence that the murder was especially heinous, atrocious, or cruel. Thus, the trial court did not err by submitting the (e)(9) circumstance.

[20] Defendant argues that the evidence was insufficient to support submission of the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. *See* N.C.G.S. § 15A-2000(f)(1). He also argues that the court should not have allowed the State to present evidence of his criminal record in rebuttal at sentencing. Although no juror found the circumstance to exist, defendant contends its submission affected the jury's weighing process and therefore is harmful error.

Before a trial court submits the (f)(1) circumstance, it 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). A significant history for purposes of this circumstance 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). In reviewing this issue, "it is this Court's duty only to review the evidence brought forth at trial." *Ingle*, 336 N.C. at 643, 445 S.E.2d at 893.

A review of the record indicates that evidence of defendant's criminal past consisted of testimony regarding his extensive use of illicit drugs and the testimony of Paul Burgess, who stated that he had dealt with defendant often in his capacity as chief jailer at the

Catawba County jail. Burgess testified that he had "dealt with [defendant] a number of times over the years" when defendant was "in jail for reasons."

As defendant notes, we stated in *State v. Rouse*, 339 N.C. 59, 100, 451 S.E.2d 543, 566 (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), that the (f)(1) circumstance should not be submitted where "the references to criminal activity are made not with regard to this mitigating circumstance but in other contexts for other reasons." *Id.* Defendant requested that the court submit the circumstance. He presented no evidence expressly directed at this or any other circumstance, but he presented witnesses who testified about his drug use and his numerous prior periods of incarceration. The trial court properly could have viewed this evidence as offered to support this mitigating circumstance. Thus, *Rouse* does not entitle defendant to a new sentencing proceeding.

We held in *Ingle* that the record contained sufficient evidence to warrant submission of the (f)(1) circumstance where it showed that the defendant had used illegal drugs and that his aunt had taken out warrants on him for communicating threats and trespassing. *Ingle*, 336 N.C. at 643, 445 S.E.2d at 893. Following *Ingle*, we hold that the evidence here was sufficient to support submission of the circumstance. We further hold that the trial court properly allowed the State to present evidence of defendant's criminal record in rebuttal. *See Brown*, 315 N.C. at 64, 337 S.E.2d at 826 (1985) (State "is entitled to offer evidence designed to rebut mitigating circumstances . . . after the defendant offers evidence in support of [them]."). These assignments of error are overruled.

[21] Defendant next assigns as error the trial court's refusal to submit the nonstatutory mitigating circumstance that defendant's alcohol intoxication impaired his abilities to conform his behavior to the requirements of law. Defendant timely requested this circumstance in writing. The trial court concluded, however, that it was subsumed within the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6).

Trial courts may combine redundant mitigating circumstances. *See Greene*, 324 N.C. at 19-21, 376 S.E.2d at 441-43. We agree that the requested nonstatutory circumstance was covered by the (f)(6) cir-

cumstance, which was submitted and found. Further, the trial court instructed on three nonstatutory circumstances regarding defendant's alcohol problems as well as on the circumstance that defendant had diminished capacity to conform his social behavior to social norms at the time of the offense. Finally, the court instructed on the "catchall" mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). Therefore, the jury was not precluded from hearing or considering mitigating evidence regarding defendant's alcohol abuse and its effect on his mental capacity. This assignment of error is overruled.

Next, defendant argues that the trial court erred by failing to intervene *ex mero motu* during the prosecutors' closing arguments at sentencing. He points to three specific types of arguments: (1) those which misstated the law and diminished the jury's sense of responsibility for the verdict, (2) those which criticized the capital sentencing statute, and (3) those which strayed beyond the facts in evidence. Defendant objected to none of the arguments; thus, we will find error only if the statements were so grossly improper as to warrant the trial court's *ex mero motu* intervention. *Rouse*, 339 N.C. at 91, 451 S.E.2d at 560.

[22, 23] First, defendant contends both prosecutors misstated the law and diminished the jury's sense of responsibility for its recommendation. The first prosecutor stated that

> everybody [who is] tried for murder and then goes to phase two should be treated equally. Everybody treated alike. If this jury feels sympathy and lets him go, he's not treated the same. . . . So this isn't an issue of sir, what do you feel?, ma'am, what do you feel? This is follow the law. Follow the law. You don't have to struggle with your own emotions oh, did I want to kill him.

The second prosecutor likewise stated, "It's not about mercy. It's about following the law."

Defendant contends these comments misstated the law in that the United States Supreme Court has held that the Eighth Amendment to the United States Constitution requires an individualized assessment regarding whether a death sentence is appropriate. *See Penry v. Lynaugh*, 492 U.S. 302, 317, 106 L. Ed. 2d 256, 277 (1989). Further, they falsely informed jurors that sympathy, mercy, and personal beliefs should play no part in the sentence recommendation. Defendant finally contends the comments improperly diminished the jury's sense of responsibility for its recommendation. By repeatedly

telling the jury to follow the law, the prosecutors implied that the law, not the jury, was responsible for a recommendation of death.

We consider these remarks within their context, including the factual circumstances to which they referred. The record indicates that the above statements were in response to the following argument made by defense counsel:

> As I said you have to answer in your own minds two questions. The first question is do I really, do I want to kill [defendant]? Each of you has to make that personal decision. And second, do I have to kill [defendant]? Is it necessary for society or for protection to kill [him]? I submit to you, and I argue to you, that the answer to both of these questions is no.

Given this context, the prosecutors' statements were reminders to the jury that it should be guided by the law, not by emotions, and that all persons are treated alike under the law. This is not grossly improper. Further, prosecutors may properly argue to the sentencing jury that its decision should be based not on sympathy, mercy, or whether it wants to kill the defendant, but on the law. *Rouse*, 339 N.C. at 93, 451 S.E.2d at 561-62. It follows that the comments here did not misstate the law. Finally, the arguments did not diminish the jury's sense of responsibility by telling it to follow the law. Juries are to exercise guided discretion when making the findings required by the capital sentencing statute. *State v. Pinch*, 306 N.C. 1, 33-34, 292 S.E.2d 203, 227, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *and by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, —- U.S. —-, 130 L. Ed. 2d 650 (1995). The law, as instructed by the court, constitutes the jury's guide in exercising its discretion. *Id.* Thus, the prosecutors correctly told the jurors to follow the law.

[24] Second, defendant contends one of the prosecutors improperly criticized the capital sentencing statute by arguing that the State is restricted in the presentation of aggravating circumstances while the defense can "play a numbers game" and "come up with as many [mitigating circumstances] as [it] want[s] to." Defendant asserts such comments disparaged his right to present evidence in mitigation and misled the jury into believing that defendants may submit anything as a mitigating circumstance, regardless of whether the evidence supports its submission. We disagree.

Read in context, the comment was intended to attack the weight of the mitigating circumstances and to convince the jury that the fifty-nine mitigating circumstances could not outweigh the two aggravating circumstances. Further, the argument was more innocuous than some we have upheld in other cases. For example, we found no gross impropriety when a prosecutor argued that the law required submission of any mitigating circumstance imaginable and that some of the defendant's proposed mitigating circumstances "border[ed] on the ridiculous." *State v. Basden*, 339 N.C. 288, 304-05, 451 S.E.2d 238, 247 (1994), *cert. denied*, — U.S. —, 132 L. Ed. 2d 845 (1995). The statements here, as in *Basden*, were not grossly improper.

[25] Third, defendant posits that the prosecutor argued outside the evidence when he stated that defendant was a Type H inmate, "the most dangerous there are." We conclude that the statement was a reasonable extrapolation from the testimony of Dr. Noble. He testified that Type H inmates, such as defendant, "are some of the most disturbed prison inmates" and "are more likely than other prisoners . . . to be psychotic and diagnosed by their medical staff as psychotic." Such inmates "typically have been hard drug users before they went into the jail." Mindful of the wide latitude accorded prosecutors in their closing arguments, we conclude that this argument was not grossly improper.

We hold that none of the arguments complained of in these assignments of error were grossly improper. Thus, the trial court did not err by failing to intervene *ex mero motu*.

Defendant also argues that the trial court gave erroneous instructions on two statutory mitigating circumstances: mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); and impaired capacity, N.C.G.S. § 15A-2000(f)(6). Defendant contends the court improperly instructed in the conjunctive for both circumstances, thereby constricting the scope of each. The jury found both circumstances. We review this issue for plain error because defendant did not object to the instructions at trial. *See State v. Payne*, 337 N.C. 505, 526-29, 448 S.E.2d 93, 106-07 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995).

[26, 27] The trial court instructed that the jury would find the (f)(2) circumstance if it determined that defendant was under the influence of a mental and/or emotional disturbance at the time of the murder as a result of "paranoid disorder, mixed substance abuse disorder, mixed personality disorder, and child abuse syndrome." Similarly, the

court instructed the jury to find the (f)(6) circumstance if it found "that the defendant suffered from paranoid disorder, mixed substance abuse disorder, mixed personality disorder and substance abuse syndrome, and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Defendant maintains that the use of "and" in these instructions impeded the jury's consideration of "significant mitigating evidence." We disagree.

The court's instructions here did not preclude the jury from considering mitigating evidence. The court stated, with respect to the (f)(2) circumstance, that "it is enough that the defendant's mind or emotions were disturbed from any cause." This permitted the jury to consider any or all of defendant's psychological problems in the context of that circumstance. As to the (f)(6) circumstance, Dr. Noble never testified that any one of defendant's disorders alone resulted in impaired capacity. He did testify that defendant's history of drug abuse exacerbated his paranoia and that "intoxicants *and* psychosis [were] driving his behavior" at the time of the crime. (Emphasis added.) Thus, both instructions basically comported with defendant's evidence and were not plain error.

Defendant also disputes the trial court's instruction on the (f)(6) circumstance on the ground that it did not include child abuse syndrome or intoxication as factors to be considered in determining whether the circumstance existed. He contends these omissions improperly precluded the jury from considering mitigating evidence. Again, we disagree.

[28] The record contains no evidence that defendant was intoxicated at the time of the murder. It indicates that defendant smoked crack cocaine on the Friday night preceding the Sunday morning murder; it further shows that defendant walked unsteadily on the Saturday night before the murder. None of this evidence establishes that defendant was intoxicated when he killed the victim sometime after 2:00 a.m. Sunday morning. Thus, the trial court properly omitted intoxication as a factor from its instruction on impaired capacity.

[29] Assuming *arguendo* that the trial court should have included child abuse syndrome in the instruction on the (f)(6) circumstance, we find the error harmless beyond a reasonable doubt. The jury heard Dr. Noble testify at length about the physical abuse defendant endured in a foster home. It also heard Dr. Noble opine that defendant suffered from child abuse syndrome. The trial court submitted the

"catchall" mitigating circumstance, which no juror found. Thus, the instruction at issue did not improperly restrict the jury's consideration of mitigating evidence, and any error is harmless beyond a reasonable doubt. These assignments of error are overruled.

[30] Defendant contends the trial court erred by failing to individually instruct on each of the fifty-four nonstatutory mitigating circumstances submitted. The court instructed:

> You should also consider circumstances five through 58 arising from the evidence which you find to have mitigating value. If one or more of you find by a preponderance of the evidence that any one of the following circumstances, that being numbers five through 58, exist and also are deemed by you to have mitigating value, you would so indicate by having your foreman write yes in the space provided.

The court did not name the particular circumstances in question. Defendant asserts that this instruction diminished the importance of the nonstatutory mitigating circumstances, thereby discouraging the jury's full consideration of them in violation of *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and its progeny.

Assuming error *arguendo*, we conclude that it was harmless beyond a reasonable doubt. The jury heard and was instructed to consider all the evidence defendant proffered in mitigation. Trial courts are not required to state, summarize, or recapitulate evidence which might support submitted mitigating circumstances. N.C.G.S. § 15A-1232 (1988). All fifty-four nonstatutory mitigating circumstances were listed individually on the Issues and Recommendation as to Punishment form. The jury found thirty-two of them; it also found two statutory mitigating circumstances. The trial court submitted, but the jury did not find, the "catchall" circumstance. Despite the substantial amount of mitigating evidence, the jury recommended a sentence of death. Based on the foregoing, we cannot hold that defendant was prejudiced by the court's failure to repeat fifty-four times the mechanics by which the jury might answer "yes" to any of the nonstatutory mitigating circumstances. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant presents numerous preservation issues that, as he acknowledges, we have decided contrary to his position: (1) the trial court erred by denying defendant's motion for individual *voir dire*

and sequestration of prospective jurors; (2) the trial court erred by excusing for cause prospective jurors who expressed an unwillingness to impose the death penalty, thereby creating a death-qualified jury "biased in favor of the prosecution and prone to find . . . defendant guilty"; (3) the trial court erred in its instructions regarding nonstatutory mitigating circumstances because it allowed a juror to reject those he or she deemed to have no mitigating value; (4) the trial court erred by using the words "satisfaction" and "satisfy" in its definition of the burden of proof applicable to mitigating circumstances; (5) the trial court erred by defining a mitigating circumstance as a fact or group of facts that may extenuate or reduce the moral culpability of the killing because that precluded consideration of evidence of defendant's character; (6) the trial court erred by using the word "may" in its instructions regarding Issues Three and Four because this allowed jurors to ignore proven mitigating circumstances; (7) the trial court erroneously instructed that each juror should consider at Issues Three and Four only those mitigating circumstances found by that juror at Issue Two; and (8) the trial court erred by instructing the jury that it had a "duty" to recommend a sentence of death if it determined that the mitigating circumstances found were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to warrant the imposition of the death penalty. Defendant presents no compelling reason to overrule our precedents on these issues.

Defendant also presents two issues which he should have treated as preservation issues: (1) the trial court erred by denying his pretrial motion to permit questioning of prospective jurors regarding their beliefs about parole eligibility; and (2) the trial court erred by giving an instruction on the "especially heinous, atrocious, or cruel" aggravating circumstance that did not adequately limit the application of this inherently vague circumstance. We have decided both of these issues contrary to defendant's position and perceive no reason to depart from our holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[31] Having found no error in either the guilt or sentencing phase, we must determine whether: (1) the evidence supports the aggravating circumstances the jury found; (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 robbery with a dangerous weapon. The trial court submitted two aggravating circumstances, both of which the jury found: that the murder was committed while defendant was engaged in a robbery with a dangerous weapon, 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 the 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 consider proportionality.

One purpose of proportionality review "is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Another is to guard "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 others in the pool, which we defined in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983), and *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), that "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). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, — U.S. —, 130 L. Ed. 2d 547 (1994).

This case has several distinguishing features. The jury convicted defendant under 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). Further, the victim was killed in his own living room in the middle of the night. 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 chose to kill a person who had treated him with kindness and compassion, one whom he viewed as a friend and father figure. A quasi-familial relationship between a defendant and his victim renders a murder more dehumanizing than normal. *See Greene*, 324 N.C. at 25-26, 376 S.E.2d at 445. Additionally, there is evidence that the victim suffered physical and psychological torture before he died. Dr. Vogel testified that the victim would not have lost consciousness prior to his death; thus, he was not only in pain but also aware of his impending death as he lay bleeding on his living room floor. Finally, the victim, age seventy, would have been unequal in physical strength to defendant, a healthy thirty-four-year-old man. These features distinguish this case from those in which we have held the death penalty disproportionate.

Defendant argues that his sentence is disproportionate for several reasons, including: (1) the jury found thirty-four of the fifty-nine mitigating circumstances submitted, and (2) the killing was "a simple robbery-murder." The sheer volume of mitigating circumstances does not suffice to render a death sentence disproportionate. Even a "single aggravating circumstance may outweigh a number of mitigating circumstances and . . . be sufficient to support a death sentence." *Bacon*, 337 N.C. at 110, 446 S.E.2d at 566. Here only five of the mitigating circumstances submitted were statutory, including the "catchall," and the jury found only two of them—impaired capacity and mental or emotional disturbance. Significantly, all but four of the nonstatutory mitigating circumstances found were directly related to those two statutory circumstances. Seventeen related to defendant's dysfunctional childhood, which Dr. Noble linked to defendant's mental disorders. Six were directed at defendant's drug and alcohol abuse, which exacerbated the mental problems created by his childhood experiences. Five listed the specific disorders diagnosed by Dr. Noble.

We have held a death sentence proportionate where only one aggravating circumstance was found and thirty-eight of forty-one mitigating circumstances were found. *State v. Lynch*, 340 N.C. 435, 483-84, 459 S.E.2d 679, 704-05 (1995). Here the jury found two aggravating cir-

cumstances, including that the murder was especially heinous, atrocious, or cruel. Under *Lynch*, defendant's sentence is not disproportionate simply because the jury found numerous mitigating circumstances.

Defendant points to several cases in which juries have returned life sentences and argues that they require us to hold his sentence disproportionate. While we cannot distinguish all of them from this case, "the fact that one, two, or several juries have returned recommendations of life imprisonment in cases similar to the one under review does not automatically establish that juries have 'consistently' returned life sentences in factually similar cases." *Green*, 336 N.C. at 198, 443 S.E.2d at 47.

Based on the nature of this crime, particularly the features noted above, we cannot conclude as a matter of law that the sentence of death was disproportionate. We hold that defendant received a fair trial and sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. GEORGE EARL GOODE, JR.

No. 10A94

(Filed 8 September 1995)

1. Evidence and Witnesses § 2176 (NCI4th)— expert testimony—specialized knowledge—valid methodology

When a trial court is faced with a proffer of expert testimony, it must determine whether the expert is proposing to testify to scientific, technical, or other specialized knowledge that will assist the trier of fact to determine a fact in issue. This requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether that reasoning or methodology can be properly applied to the facts in issue.

Am Jur 2d, Evidence § 1001.

Reliability of scientific technique and its acceptance within scientific community as affecting admissibility, at federal trial, of expert testimony as to result of test or

study based on such technique—modern cases. 105 ALR Fed. 299.

2. **Evidence and Witnesses §§ 2148, 2154 (NCI4th)— expert testimony—qualification of expert—relevancy**

When the trial court has determined that the method of proof is sufficiently reliable as an area for expert testimony, the court must then determine whether the witness is qualified as an expert to apply this method to the specific facts of the case and, once qualified, whether the expert's testimony is relevant.

Am Jur 2d, Expert and Opinion Evidence §§ 32-36, 55-67.

3. **Evidence and Witnesses § 2176 (NCI4th)— scientific method of proof—reliability—expert testimony and judicial notice**

In determining whether a scientific method of proof is reliable, a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two.

Am Jur 2d, Evidence § 1001.

Reliability of scientific technique and its acceptance within scientific community as affecting admissibility, at federal trial, of expert testimony as to result of test or study based on such technique—modern cases. 105 ALR Fed. 299.

4. **Evidence and Witnesses § 2210 (NCI4th)— bloodstain pattern interpretation—appropriate area for expert testimony**

A forensic serologist's testimony was sufficient to show that bloodstain pattern interpretation is an appropriate area for expert testimony where the serologist testified that this method is a specialized crime scene technique wherein a specially trained individual studies the blood and types of stains at the crime scene and then, based upon his knowledge of similar bloodstain characteristics and reproductions of the crime scene, he forms an opinion about what actually occurred at the crime scene; in using this method of proof, experts rely upon specific categories of bloodstains which are defined by the way in which they are made; these categories can be established through observation and

reconstruction, as similar stains are produced under similar circumstances; and an expert in the field of bloodstain pattern interpretation would reproduce the bloodstains in order to determine whether his observations and interpretations were correct. Further, bloodstain pattern interpretation was implicitly accepted as a scientific method of proof in *State v. Daughtry*, 340 N.C. 488 (1995).

Am Jur 2d, Expert and Opinion Evidence § 300.

Admissibility, in criminal prosecution, of expert opinion evidence as to "blood splatter" interpretation. 9 ALR5th 369.

5. Evidence and Witnesses § 2210 (NCI4th)— bloodstain pattern interpretation—qualification of expert

The trial court did not err by finding that an S.B.I. agent who was a forensic serologist was qualified to testify as an expert in bloodstain pattern interpretation based upon his education, training, and extensive experience in bloodstain pattern interpretation.

Am Jur 2d, Expert and Opinion Evidence § 300.

Admissibility, in criminal prosecution, of expert opinion evidence as to "blood splatter" interpretation. 9 ALR5th 369.

6. Evidence and Witnesses § 2210 (NCI4th)— expert testimony—lack of bloodstains on defendant—no exclusion of participation in stabbings

The trial court did not err by permitting an expert in bloodstain pattern interpretation to state his opinion that the lack of bloodstains on defendant would not exclude defendant as a participant in the stabbing deaths of the victims based upon the expert's study of autopsy photographs in this case as well as in other cases, his examination of the clothing of the victims and the codefendants in this case as well as in other cases, and his participation in the examination of crime scenes where bloodstains did not occur.

Am Jur 2d, Expert and Opinion Evidence § 300.

Admissibility, in criminal prosecution, of expert opinion evidence as to "blood splatter" interpretation. 9 ALR5th 369.

7. Criminal Law §§ 105, 113 (NCI4th)— discovery—bloodstain pattern tests—notice four days before trial—recesses to research and locate expert

The State did not violate the discovery statute, N.C.G.S. § 15A-903(e), when it informed defense counsel four days prior to trial of its intention to have certain evidence examined by a bloodstain pattern interpretation expert and provided the expert's report to defense counsel during the trial on the same day the State received it. Even if it is assumed that the State failed to comply with the discovery statute, the trial court was not required to exclude the expert's testimony and properly acted within its discretion by ordering a recess to permit defense counsel to research the admissibility of bloodstain pattern interpretation evidence and by offering another recess for the defense to locate an expert witness.

Am Jur 2d, Depositions and Discovery §§ 426-428, 449.

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

8. Evidence and Witnesses § 2210 (NCI4th)— microscopic quantity of blood on boot—relevancy—probative value

An expert's testimony about a microscopic quantity of blood discovered on the boot worn by defendant on the night of two murders was relevant to the issue of whether defendant actually participated in the stabbing of the victims and was properly admitted in defendant's murder trial, even though the State could not show the source or type of the blood, where defendant admitted that he was present when the murders occurred but denied that he participated in them. Furthermore, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice since testimony about the bloodstain was not presented in a manner designed to inflame the passions of the jury or otherwise to have an undue tendency to suggest a decision on an improper basis.

Am Jur 2d, Expert and Opinion Evidence § 300.

9. Evidence and Witnesses § 1688 (NCI4th)— photograph of murder victims while alive

A family photograph of the two murder victims, taken while they were alive, was properly admitted in defendant's murder trial where the photographs were used for illustrative purposes

during testimony by the victim's nephew describing the victims while alive.

Am Jur 2d, Evidence § 974.

Admissibility of visual recording of event or matter other than that giving rise to litigation or prosecution. 41 ALR4th 877.

10. Evidence and Witnesses § 309 (NCI4th)— first-degree murder—prior robbery—admissibility to show identity

Evidence of defendant's participation in a robbery an hour before the robbery and two murders for which defendant was on trial was admissible under Rule 404(b) to show defendant's identity as a perpetrator of the murders where, in both the prior robbery and the crimes against the murder victims, there were at least two individuals involved who incapacitated the victims by pulling their clothing down around their elbows and hands, and at least one person was robbed during both events; the evidence tended to show that defendant punched the prior robbery victim in the face and that the male murder victim had "areas of abrasion and bruising on his face"; and the similar acts and close proximity in time thus tend to indicate that the same person was involved in both the prior robbery and the murders. Furthermore, the probative value of defendant's involvement in the prior robbery outweighs any potential for unfair prejudice. N.C.G.S. § 8C-1, Rules 404(b), 403.

Am Jur 2d, Evidence § 423.

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

11. Evidence and Witnesses § 179 (NCI4th)— murder—statements in letter—admissibility to show motive

In light of testimony that immediately prior to stabbing a murder victim, defendant speculated that the victim had been "messing around" with his wife, defendant's statements in a letter to his wife regarding his anger and desire to kill someone as a result of his wife cheating on him, written four days prior to the murder, were relevant to show a motive for defendant's killing of the victim, and the State was properly permitted to cross-examine defendant about this letter.

Am Jur 2d, Evidence § 558.

12. Evidence and Witnesses § 3027 (NCI4th)— cross-examination of defendant—prior false statements

The trial court properly permitted the State to cross-examine defendant pursuant to Rule 608(b) about false statements defendant made to hospital personnel and his commanding officer less than a year before the murders for which he was on trial since those statements are highly probative of defendant's character for truthfulness. N.C.G.S. § 8C-1, Rule 608(b).

Am Jur 2d, Witnesses §§ 901-904, 968.

13. Criminal Law § 450 (NCI4th)— closing argument—he who runs with pack—acting in concert illustration—no impropriety

The trial court did not err by failing to intervene *ex mero motu* when the prosecutor stated during his closing argument in a first-degree murder prosecution that "he who runs with the pack is responsible for the kill" where this statement was used to illustrate acting in concert, and there was ample evidence to support this theory as one basis for defendant's guilt.

Am Jur 2d, Trial §§ 648, 681.

Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88 ALR4th 8.

14. Criminal Law § 1363 (NCI4th)— capital sentencing—accomplice's criminal record—not mitigating circumstance

The trial court did not err by excluding evidence of a codefendant's criminal record as a nonstatutory mitigating circumstance in this capital sentencing proceeding since an accomplice's criminal record has no bearing on defendant's character or propensity to commit the murder and does not qualify as a mitigating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599.

15. Criminal Law § 1363 (NCI4th)— capital sentencing—lingering doubt of guilt—improper mitigating circumstance

Lingering doubt as to defendant's guilt is not a proper nonstatutory mitigating circumstance for submission to the jury in a capital sentencing proceeding.

Am Jur 2d, Criminal Law §§ 598, 599.

16. Criminal Law § 450 (NCI4th)— capital sentencing—closing argument—murders as "feeding frenzy"—supporting evidence

The trial court did not err by failing to intervene *ex mero motu* when the prosecutor referred to two murders as a "feeding frenzy" where the prosecutor was emphasizing the brutality and senselessness of the murders of an elderly and defenseless couple, and this analogy was supported by evidence that the victims were unsuspecting of the attack, unarmed, and stabbed repeatedly and that the victims' clothing was ripped and in disarray, with the only apparent gain of the defendant and his accomplices being a wallet and its contents.

Am Jur 2d, Trial §§ 648, 681.

17. Criminal Law § 1373 (NCI4th)— death penalty 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 crimes and the defendant, where the jury convicted defendant on both the theory of malice, premeditation, and deliberation in both of the murders, and also on the theory of felony murder in one of the murders; the jury found the aggravating circumstances that both murders were especially heinous, atrocious, or cruel, that the murders were part of a course of conduct including other violent crimes, and that the murder involving the felony was committed while defendant was engaged in an armed robbery; and the elderly victims, who were unsuspecting of the attack, unarmed, and stabbed repeatedly, would have been no match for the physical strength of defendant, a twenty-two-year-old man, and his accomplices.

Am Jur 2d, Criminal Law § 628.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death entered by Ellis, J., at the 1 November 1993 Criminal Session of Superior Court, Harnett 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 an additional judgment imposed for robbery with a dangerous weapon was allowed 19 September 1994. Heard in the Supreme Court 11 May 1995.

Michael F. Easley, Attorney General, by Tiare B. Smiley, Special Deputy Attorney General, for the State.

J. Clark Fischer for defendant-appellant.

ORR, Justice.

This case arises out of the stabbing deaths of Leon and Margaret Batten. At the time of the murders, Mr. Batten was the landlord of the trailer park in which defendant resided with his wife. On 30 March 1992, defendant was indicted for two counts of first-degree murder and one count of robbery with a dangerous weapon. Defendant was tried before a jury, and on 19 November 1993, the jury found defendant guilty of all charges. Following a capital sentencing proceeding, the jury recommended sentences of death for the murder convictions. In accordance with the jury's recommendation, the trial court entered one sentence of death for the first-degree murder conviction based on the theory of premeditation and deliberation and the felony murder theory, one sentence of death for the first-degree murder conviction based solely on the theory of premeditation and deliberation, and a sentence of forty years' imprisonment for the robbery with a dangerous weapon conviction.

After consideration of the assignments of error brought forward on appeal by the defendant and 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. For the reasons set forth below, we affirm his convictions and sentences.

At trial, the State's evidence tended to show the following: Glen Troublefield testified that on 29 February 1992, defendant arrived at his apartment between 4:00 and 5:00 p.m. accompanied by defendant's brother, Chris Goode, and Eugene DeCastro. After talking for a short while, the four men left for a club in a Nissan Maxima driven by defendant. Leonard Wiggins, a resident of Selma, North Carolina, testified that this same night at approximately 6:20 p.m., he observed defendant in the Maxima on Kay Drive. Wiggins testified that defendant stopped the car, got out, approached him, and asked, "Don't I know you?" Wiggins further testified that he replied, "No, I do not

know you." Defendant then punched him in the eye and along with DeCastro robbed him of his jacket and necklace. Troublefield testified that at this time, he heard Wiggins yell, "Help, I'm being robbed," and that defendant and DeCastro returned to the car carrying a jacket and necklace belonging to Wiggins.

Troublefield also testified that after defendant returned to the car, he began driving in an erratic manner and lost control of the car, which ended up in a ditch. After it was removed from the ditch, defendant drove to a store where the men purchased a bottle of wine. Troublefield testified that defendant resumed driving and shared the bottle of wine with Chris Goode and DeCastro. Thereafter, defendant again drove the car into a ditch. Troublefield testified that at this time, defendant, Chris Goode, and DeCastro were near a trailer. Troublefield exited the car and began running in the opposite direction.

James Adams testified that on 29 February 1992, he was a resident of the Dallas Mobile Home Park. Adams testified that between 7:15 and 7:30 p.m., he observed a black man in a trailer he knew to be unoccupied. He then notified the landlord, Mr. Batten, about his observation, and Mr. Batten followed him back to the trailer. As Mr. Batten approached the trailer, Adams observed someone go into the trailer and get something off the "eating table." Thereafter, Adams returned to his trailer and sat in his vehicle for approximately ten minutes before returning to the trailer where Mr. Batten was. As he approached the trailer, Adams observed four black men beating Mr. Batten, and he heard Mr. Batten crying out, "Help me. Help me. Please help me." Adams then left to go get help.

Levi Snead testified that when he arrived at the Dallas Mobile Home Park between 7:15 and 7:30 p.m. on 29 February 1992, he observed "three or four guys outside [a] trailer with the door wide open." They appeared to be "scuffling," and the person on the ground looked like he was trying to get up. Snead went to the Batten house to notify Mr. Batten of the trouble at his trailer park. Mr. Batten's wife, Margaret Batten, answered the door and informed him that she thought her husband was already at the trailer park. Snead then left to report the disturbance to a deputy sheriff. Snead testified that on his way to notify the sheriff, he passed Margaret Batten heading toward the trailer park.

Detective Michael Bass of the Johnston County Sheriff's Department testified that on 29 February 1992 at 7:33 p.m., he

responded to a call concerning a disturbance at the Dallas Mobile Home Park. Detective Bass testified that when he arrived on the scene, he observed three black males, one of whom he identified as defendant, between a Toyota truck and a Buick parked in the yard of a trailer. As Detective Bass exited his patrol car, the three males fled the scene. At this time, Detective Bass found the bodies of Leon and Margaret Batten in the bed of the truck. Detective Bass observed Mr. Batten lying on his right side, with his head elevated slightly because of the fender wheel in the back of the truck. Mrs. Batten's shirt had been removed, her bra was up above her breast area, and she was bleeding heavily from her chest area. There was no pulse on either victim.

Lieutenant Ron Reynolds testified that on 29 February 1992 at 7:33 p.m., he was on patrol when he heard Detective Bass' dispatch regarding the trailer park and received a description of the three black men who had fled the crime scene. While on his way to assist in the call, he noticed a black man walking at a fast pace away from the trailer park, looking back over his shoulder. When the man refused to talk to Lieutenant Reynolds, he placed the man in his patrol car and transported him back to the trailer park. The man was later identified as defendant. The other two suspects were also eventually apprehended. Reynolds further testified that police officers recovered a wallet containing Mr. Batten's identification cards and money during their search of defendant.

Patrick Byrd, an acquaintance and former jailmate of defendant, testified that on approximately 22 December 1992, defendant approached him while he was in his cell in the Johnston County jail. Byrd testified that defendant informed him that he was charged with murder. Byrd further testified that defendant told him that on the night of the murders, DeCastro and defendant's brother were in his trailer with him "drinking [and] smoking weed."

On direct examination by the prosecutor, Byrd further testified:

> A. [Defendant] told me then the rent man came. He come [sic] to collect the rent cause they was [sic] a couple months behind. Then he speculated—-told me he speculated that the rent man was messing around with his wife and they started fussing, you know.
>
> Q. Who started fussing?
>
> A. Mr. Goode, George.

Q. And who was he fussing with?

A. Mr. Batten.

Q. Go ahead.

A. Then he took him—DeCastro, took and hit him, he told me.

Q. Hit who?

A. Mr. Batten. Then he say [sic] he pull out the knife and started stabbing him.

Q. Who pulled out the knife?

A. George.

Q. Stabbed who?

A. Mr. Batten.

Q. Did he tell you anything else?

A. Yes, sir.

Q. Tell us about it.

A. Then he took him and put him in the back of the truck. While they were doing that his wife pulled up.

Q. Whose wife pulled up?

A. Mr. Batten's wife.

Q. Did he tell you what happened after that?

A. She got out and saw what happened, started hollering, you know, so they grabbed her.

Q. Did he tell you any more about that?

A. No. He told me they started messing with her.

Dr. Deborah Radisch, Associate Chief Medical Examiner of the State of North Carolina, was tendered and qualified as an expert in the field of forensic pathology. Dr. Radisch testified that she performed autopsies on the bodies of the victims on 1 March 1992. Dr. Radisch further testified that during the autopsy of Margaret Batten, she observed multiple injuries, including stab wounds in the chest, abdomen, head, and neck; six or seven broken ribs; and cuts through the esophagus, stomach, large intestine, spleen, right kidney,

and liver. A total of twenty-three distinct stab wounds was found on Margaret Batten. Dr. Radisch also found several "defensive" wounds located on the backs of Mrs. Batten's hands. Dr. Radisch testified that in her opinion, the cause of death was multiple stab wounds to Mrs. Batten's chest and abdomen.

Dr. Radisch testified that during her autopsy of Leon Batten, she again observed multiple injuries, including four stab wounds to his chest and back, puncture wounds, bruising, areas of abrasion, bruising about his head and face, and several broken ribs. The cause of death was determined to be a stab wound to the left chest.

State Bureau of Investigation Special Agent Duane Deaver, who was proffered as an expert in the field of forensic serology and bloodstain pattern interpretation, testified that although he found no visible bloodstain located on defendant's boots, a chemical test indicated the presence of blood, the type of which could not be determined. Agent Deaver did not detect any visible bloodstains on defendant's coveralls, hat, or boxer shorts. It was Agent Deaver's opinion that the absence of blood on any of defendant's clothing had no exculpatory effect.

Ralph Richardson, a former Marine and friend of defendant, testified that in March 1991, he gave defendant a Gerber brand knife with an interchangeable blade. He testified that the knife found at the crime scene and the knife he gave defendant were very similar and that he could not detect any differences. Testimony showed that the knife was capable of causing the stab wounds on the bodies of both victims.

Defendant also presented evidence during the trial. Defendant testified that on 29 February 1992, he and his brother were on their way to Johnston County when they saw DeCastro on the side of the road and picked him up. They arrived in Smithfield at approximately 5:30 p.m. and went to visit Glen Troublefield. Defendant testified that they had a few beers earlier in the afternoon and that he had a glass of gin at Troublefield's house.

The four men then left Troublefield's apartment. Defendant testified that as they approached a stop sign on Kay Drive, defendant thought he saw someone he knew, so he stopped and got out. Defendant testified that he approached the man, asked him a question, and when the man did not reply, defendant punched him and grabbed his coat. Defendant resumed driving, lost control of the car,

and ran the car into a ditch. After having his car pulled out of the ditch by a friend, defendant drove to a nearby store, where he picked up the other three individuals who had walked there to wait for him. Defendant testified that they arrived at a club called "Red Avery's" shortly thereafter "but there wasn't [sic] too many people there" so they decided to go to defendant's trailer.

On the way to the trailer, defendant again drove his car into a ditch. Defendant testified that they could not remove the car from the ditch and that all four of them, including Troublefield, walked the rest of the way to defendant's trailer. Defendant testified that at the trailer, the four of them began drinking and that he consumed about a glass of wine. Thereafter, the men moved outside. After defendant spoke briefly with Deborah Atkinson, a friend of defendant's wife, Leon Batten pulled up in a car. Defendant testified that he informed Mr. Batten he was going to move out of the trailer and that he then went inside the trailer to get his tape player.

Defendant testified that while he was inside his trailer, he heard Mr. Batten "holler." Defendant went back outside, where he found his brother, DeCastro, and Troublefield beating Mr. Batten while he lay on the ground. Defendant testified that he became scared and confused and turned to walk away. Defendant further testified that he refused to help move the body of Mr. Batten and that at that time, he also discovered Troublefield was missing. Defendant then observed Mrs. Batten drive up to the trailer. Defendant testified that DeCastro began to stab Mrs. Batten with "some sort" of butcher knife when she exited the car and ran over to her husband. Defendant then saw Detective Bass arrive on the scene, and the three men fled. After he and his brother separated, an officer stopped defendant, patted him down, handcuffed him, and took him back to the trailer park.

After arguments of counsel and instructions by the trial court, the jury returned verdicts finding the defendant guilty of two counts of first-degree murder and one count of robbery with a dangerous weapon. Thereafter, the trial court conducted a separate capital sentencing proceeding for the murder conviction pursuant to N.C.G.S. § 15A-2000.

During the sentencing proceeding, the State presented additional evidence. Dr. Deborah Radisch, the Associate Chief Medical Examiner of North Carolina, was recalled to the stand and testified that the three stab wounds to Mr. Batten's back by themselves were not fatal and that the stab wound to his chest was not immediately

fatal because it was on the right side of his heart, which is not the strong pumping chamber of the heart. Dr. Radisch testified that it would have taken Mr. Batten about three minutes to have been rendered unconscious and about five to ten minutes to die as a result of the chest wound.

Dr. Radisch also testified concerning the multiple stab wounds to the body of Mrs. Batten. She testified that based on the amount of blood within Mrs. Batten's body cavity, she was still alive when most of the wounds, "if not all" of them, were inflicted. Dr. Radisch further testified that Mrs. Batten would have experienced pain not only from the stab wounds, but her breathing would have been painful and difficult due to her broken ribs. Dr. Radisch estimated that Mrs. Batten lived for about five to ten minutes after receiving the wounds.

Defendant also presented evidence during the sentencing proceeding. Defendant testified that he quit school in the eleventh grade. He testified that he worked at Wendy's, Trade Mart, and Wood Pest Control prior to enlisting in the Marines. He received his high school diploma from Johnston Technical College. Defendant further testified that he had a close and loving relationship with his family and had never been convicted of any other criminal offense.

Peggy Leonard, a former employer of defendant's, testified that in the summer of 1988, she hired the defendant to work in the convenience store she managed. She also testified that defendant was always friendly and respectful towards her and the customers.

Mary Louise Pully, defendant's grandmother, testified that defendant was a quiet and respectful child. Deborah Goode, defendant's aunt, testified that defendant had been raised in the church and was a talented musician. Oralee Privett, another aunt, gave similar testimony.

GUILT-INNOCENCE PROCEEDING

I.

Defendant's first assignment of error concerns expert testimony by SBI Special Agent Duane Deaver on bloodstain pattern interpretation. Generally, "[a]ll relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible." N.C.G.S. § 8C-1, Rule 402 (1992). Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the

determination of the action more or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992).

Specifically, the admissibility of expert testimony is also governed by Rule 702 of the North Carolina Rules of Evidence, which states:

> 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). Preliminary questions concerning the qualifications of a witness to testify and the admissibility of evidence shall be determined by the trial court. N.C.G.S. § 8C-1, Rule 104(a) (1992).

[1] Thus, under our Rules of Evidence, when a trial court is faced with a proffer of expert testimony, it must determine whether the expert is proposing to testify to scientific, technical, or other specialized knowledge that will assist the trier of fact to determine a fact in issue. As recognized by the United States Supreme Court in its most recent opinion addressing the admissibility of expert scientific testimony, this requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether that reasoning or methodology can be properly applied to the facts in issue. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 125 L. Ed. 2d 469 (1993).

In *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984), this Court, addressing the reliability of footprint identification, gave a comprehensive review of the law concerning the determination of whether a proffered method is sufficiently reliable. Speaking for the Court, Justice Frye restated the following rule, which is applicable in assessing the reliability issue:

> "In general, when no specific precedent exists, scientifically accepted reliability justifies admission of the testimony of qualified witnesses, and such reliability may be found either by judicial notice or from the testimony of scientists who are expert in the subject matter, or by a combination of the two."

Id. at 148, 322 S.E.2d at 381 (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 86, at 323 (2d ed. 1982)). Further, in

Bullard, this Court recognized the application of this rule in *State v. Rogers*, 233 N.C. 390, 64 S.E.2d 572 (1951), where we "took judicial notice of the fact that fingerprinting was sufficiently established." *Bullard*, 312 N.C. at 145, 322 S.E.2d at 379.

In *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990), Justice Whichard also examined the reliability of a scientific method of proof setting out the following principles:

> Reliability of a scientific procedure is usually established by expert testimony, and the acceptance of experts within the field is one index, though not the exclusive index, of reliability. *See State v. Bullard*, 312 N.C. at 147, 322 S.E.2d at 380; *State v. Peoples*, 311 N.C. 515, 532, 319 S.E.2d 177, 187 (1984). Thus, we do not adhere exclusively to the formula, enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and followed in many jurisdictions, that the method of proof "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014. Believing that the inquiry underlying the *Frye* formula is one of the reliability of the scientific method rather than its popularity within a scientific community, we have focused on the following indices of reliability: the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked "to sacrifice its independence by accepting [the] scientific hypotheses on faith," and independent research conducted by the expert. *State v. Bullard*, 312 N.C. at 150-51, 322 S.E.2d at 382.

Pennington, 327 N.C. at 98, 393 S.E.2d at 852-53.

Pennington involved the reliability of the DNA profiling process. Expert testimony on this issue was given by a professor of genetics and microbiology, a forensic serologist, a staff scientist at Cellmark, and an assistant professor of microbiology. These experts testified as to their background and experience in the field of DNA profiling and the established techniques used in this field. In addition, the Court noted that these experts used visual aids in their testimony. This Court held that the expert testimony "established the reliability of the DNA profiling process" and "that the evidence of the DNA profile testing results was[, therefore,] properly admitted." *Id.* at 100, 393 S.E.2d at 854. For examples of cases in which this Court has held that the method of proof was not sufficiently reliable, *see State v. Peoples*, 311 N.C. 515, 319 S.E.2d 177 (holding hypnosis is an unreliable scientific

process), and *State v. Foye*, 254 N.C. 704, 120 S.E.2d 169 (1961) (holding polygraph testing not acceptable as an instrument of evidence in criminal cases).

[2] Once the trial court has determined that the method of proof is sufficiently reliable as an area for expert testimony, the next level of inquiry is whether the witness testifying at trial is qualified as an expert to apply this method to the specific facts of the case. N.C.G.S. § 8C-1, Rule 702. "It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession." *State v. Evangelista*, 319 N.C. 152, 164, 353 S.E.2d 375, 384 (1987) (citing *Bullard*, 312 N.C. at 140, 322 S.E.2d at 376; *State v. Phifer*, 290 N.C. 203, 225 S.E.2d 786 (1976), *cert. denied*, 429 U.S. 1050, 50 L. Ed. 2d 766, *and cert. denied*, 429 U.S. 1123, 51 L. Ed. 2d 573 (1977)). "It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.' " *Id.* at 164, 353 S.E.2d at 384 (quoting *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1978)). Further, "the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *Bullard*, 312 N.C. at 140, 322 S.E.2d at 376.

Finally, once qualified, the expert's testimony is still governed by the principles of relevancy. As previously stated, relevant evidence is defined 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. Further, in judging relevancy, it should be noted that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified than the jury to draw such inferences. *Bullard*, 312 N.C. at 139, 322 S.E.2d at 376. Having set out the specific guidelines trial courts are to follow in determining the admissibility of expert testimony, we now must apply these guidelines to the issue presented.

In the present case, defendant's specific assignments of error regarding the expert testimony are (1) that the trial court erred in qualifying Agent Deaver as a purported bloodstain pattern interpretation expert, and (2) that the admission of this testimony constituted an alleged due process violation. However, defendant also contends in his brief that "blood spatter interpretation" is not an appropriate area for expert testimony, as it has not been established as scientifi-

cally reliable. Although defendant did not specifically object to this at trial, we will in our discretion address this issue because of the gravity of this case. We note, however, that the actual scientific method of proof involved in this case is "bloodstain pattern interpretation."

A.

First, we will address defendant's contention that bloodstain pattern interpretation is not an appropriate area for expert testimony. Defendant argues that because this area has not been established as a scientifically reliable field, it does not qualify as an area for expert testimony. We disagree.

[3] "A new scientific method of proof is admissible at trial if the method is sufficiently reliable." *Pennington*, 327 N.C. at 98, 393 S.E.2d at 852 (citing *Bullard*, 312 N.C. at 148, 322 S.E.2d at 381). As stated above, in determining reliability, a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two. *Bullard*, 312 N.C. at 148, 322 S.E.2d at 381 (quoting 1 *Brandis on North Carolina Evidence* § 86, at 323). In the present case, Agent Deaver, a forensic serologist, testified extensively on *voir dire* concerning the reliability of bloodstain pattern interpretation.

[4] Agent Deaver testified that bloodstain pattern interpretation is a "specialized crime scene technique" wherein a specially trained individual studies the blood and the types of stains at the scene of the crime, and then, based upon his knowledge of similar bloodstain characteristics and reproductions of the crime scene, he forms an opinion about "what actually occurred [at] the crime scene." In order to determine what occurred at the crime scene using this method of proof, experts rely upon specific categories of bloodstains which are defined by the way in which they are made. These categories can be established through observation and reconstruction, as similar stains are produced under similar circumstances. Further, Agent Deaver testified that the expert in the field of bloodstain pattern interpretation would reproduce the bloodstains in order to determine whether their observations and interpretations were correct. Our review of Agent Deaver's testimony leads us to conclude that it is sufficient to show that bloodstain pattern interpretation is an appropriate area for expert testimony.

Further, this Court implicitly accepted bloodstain pattern interpretation as a scientific method of proof in *State v. Daughtry*, 340

N.C. 488, — S.E.2d —, 1995 WL 444437 (1995), as did the Court of Appeals in *State v. Willis*, 109 N.C. App. 184, 426 S.E.2d 471, *disc. rev. denied*, 333 N.C. 795, 431 S.E.2d 29 (1993). We also note that appellate courts in other jurisdictions have reached the same conclusion and result in finding bloodstain pattern interpretation as an appropriate area for expert testimony. *State v. Rodgers*, 119 Idaho 1047, 812 P.2d 1208 (1991); *Fox v. State*, 506 N.E.2d 1090 (Ind. 1987); *State v. Hall*, 297 N.W.2d 80 (Iowa 1980), *cert. denied*, 450 U.S. 927, 67 L. Ed. 2d 359 (1981); *Farris v. State*, 670 P.2d 995 (Okla. Crim. App. 1983); *State v. Melson*, 638 S.W.2d 342 (Tenn. 1982), *cert. denied*, 459 U.S. 1137, 74 L. Ed. 2d 983 (1983); *Compton v. Commonwealth*, 219 Va. 716, 250 S.E.2d 749 (1979).

[5] Next, we address defendant's specific assignment of error relating to the qualification of Agent Deaver as a purported expert in bloodstain pattern interpretation. First, our review of Agent Deaver's qualifications shows that he was properly qualified as an expert to testify in this area. The record indicates that Agent Deaver has extensive experience in the field of bloodstain pattern interpretation. The following testimony during the *voir dire* of Agent Deaver illustrates his background:

> Q. Have you been employed during your entire [career] with the Bureau in the position of a forensic serologist?
>
> A. Yes, I do have other assignments within the Bureau, but my specific title is a forensic serologist.
>
> Q. What is your educational background?
>
> A. I have a bachelor of science degree from North Carolina State University. At such time that I was employed with the SBI I was sent to the 17th SBI Academy where I was trained as a special agent. Upon completion of that course of study, I was then entered into the crime laboratory in an in-house training program for forensic serology. In the middle of that course of study, I was asked to take on an additional expertise which was blood spatter interpretation[,] which I accepted[,] and I was sent to schools also in that area to complete a course of study in that area. I have been sent to various areas throughout the United States for training. To the University of New Haven in Connecticut in serology. I was sent for training in blood spatter pattern interpretation or blood stain analysis to the Mid-Western Association of Forensic Science. That course was put on by the Minnesota Bureau of

> Criminal Apprehension. That was a basic course. After completion of that course I was sent to an advanced course offered by Valencia College in Florida. I then, during that period of time[,] completed my serology training and began course work in the area of serology and also blood stain pattern interpretation.
>
> Since that time I have been involved in the SBI with the specialized crime scene team that goes out and investigates homicides. I'm also an instructor for the State of North Carolina certified in the area of law enforcement instruction. I do teach about serology and blood stain pattern interpretation for the State of North Carolina to SBI agents, responsible for criminal training of North Carolina State Highway Patrol, and also for local agencies, I provide training for Sheriff's Departments and Police Departments throughout the State of North Carolina.

Further, the trial court reasonably could have believed that Agent Deaver's experience and research placed him in a better position than the jury to testify regarding bloodstain pattern interpretation. Thus, the trial court did not err in qualifying Agent Deaver as an expert in this area.

[6] Defendant also specifically challenges Agent Deaver's testimony concerning his opinion as to the lack of blood on defendant. The pertinent portion of the objectionable testimony proceeded as follows:

> Q. Agent Deaver, do you have an opinion satisfactory to yourself based on your experience and examination of the items that you've seen in this case whether or not you would necessarily exclude a certain individual as a participant in a stabbing type of assault simply because such person did not have any visible blood stains on his clothing?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> A. Yes, I do have an opinion to that.
>
> Q. What is the basis for your opinion?
>
> A. The basis for my opinion first, in general terms would be my experience. My experience comes from having looked at a great number of scenes and also from having done testing involving beatings, shootings, and those type of things. And so my experience generally would be [sic] I would be able to answer that ques-

tion in general terms. What I need [sic] to do in this specific case was to look at the specific circumstances surrounding this case to see what one might expect to find. What types of stain, who might have the stains on them or what might they be on in order to form an opinion as to this specific case.

Q. To your satisfaction, have you been able to examine all those areas?

A. Yes, I have.

Q. Agent Deaver, I then ask your opinion about whether you could necessarily exclude someone simply because they did not have blood on them?

A. Generally, I would not. I have seen enough cases where I have been able to reconstruct the circumstances that were given to me and was able to determine that bloodstain did not occur as one might expect from an individual involving those circumstances. Specifically, in this case, after having looked at these items of evidence, the crime scene and the autopsy, again my opinion would be that one could not be excluded from having inflicted at least some of the injuries on these individuals simply because they do not have blood staining on their clothes.

There is no doubt this testimony is critical to defendant, as it relates directly to the issue of whether the defendant actually participated in the murders. Although defendant admitted his presence at the time the murders were committed, he denied participation in the stabbing deaths. Defendant contends that the testimony of Agent Deaver was "totally unnecessary and thus inadmissible under Rule 702," as the jury could have reached its own conclusions on the matter. However, the testimony of Agent Deaver prior to the above statements clearly shows that he was in a better position than the jury to draw conclusions from the presence or absence of blood on defendant.

Q. . . . Agent Deaver, if you would, can you describe for the members of the jury in the court the factors that determined whether or not blood stain occurs.

A. Well, there has to first—it may seem fairly simple but there has to be a source of blood present. . . . In other words, there can be a tremendous fight or injuries [of] some kind that blood stain does not occur, blood spatter interpretation is not worthwhile. . . .

> . . . Very rarely does an initial injury create blood stains either on anything that's present in the crime scene or anything around it—around the injuries themselves. That's true of gun shots, it's true of beatings, it's true of stabbings, it's true of most injuries. Because one must remember that a body is not, for instance, I use this example, a water balloon is filled with blood. It doesn't instantly explode when punctured creating blood stains.
>
> What happens is that an injury creates internal injuries that create blood. We have a vascular system, made up of arteries, veins, heart, those type of things. When they are injured, then the blood stain begins to occur. And that blood stain occurs internally first. If one, for instance, was to beat someone. You can beat a person in the head fairly severely for a while but until those internally [sic] injuries, injuries to the head or the brain cause blood to be on the outside of the head, you don't create blood stain. . . . You have to have a very traumatic injury.
>
> Q. If I understand you correctly, it would have to be some blood or successive blows to come in contact with?
>
> A. That's correct. I also, if I might, clothing is also important to this also. Not only are injuries internal but even when it comes to surface, if there's clothing present, it also prevents a lot of stains many times and, of course the amount of clothing, the type of clothing would indicate how much staining you could expect. . . .
>
> Q. Any other factors that you're familiar [with] to the fact whether the blood stain will or will not occur?
>
> A. Well, particular injuries, that's always very important. That's why I ask for autopsy reports so that I can see what type of injuries are present.

Thus, due to Agent Deaver's study of autopsy photographs in this case as well as in other cases, examination of the clothing of the victims and codefendants in this case as well as in other cases, and participation in the examination of crime scenes where bloodstains did occur and other cases where bloodstains did not occur, we conclude his testimony was properly admitted to aid the jury in making its determination.

In addition, the question of whether an absence of blood on defendant should exculpate him is clearly relevant to the case, as defendant's theory of the case is that he was at the scene of the crime

as the murders were being committed but took no actual part in the killings. "Once properly admitted, the weight to be given the evidence was a decision for the jury." *State v. Whiteside*, 325 N.C. 389, 398, 383 S.E.2d 911, 916 (1989). Further, during defendant's cross-examination of Agent Deaver, he was able to elicit testimony that it is "certainly a possibility if you haven't been involved in violence of some kind you would expect that there would be no blood on you," which, in fact, supported defendant's version of the events occurring the night of the murder. Thus, not only did defendant have the opportunity to thoroughly cross-examine Agent Deaver regarding the absence of blood on defendant, but he was also able to elicit favorable testimony from him. Accordingly, defendant's assignment of error is without merit.

B.

[7] Defendant's final specific assignment of error regarding blood-stain pattern interpretation is that his due process rights were violated because he was not given adequate notice of the expert's report and was, therefore, unable to conduct a meaningful cross-examination.

N.C.G.S. § 15A-903(e) provides:

> (e) Reports of Examinations and Tests.—Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor. In addition, upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case.

N.C.G.S. § 15A-903(e) (1988).

The record reflects the fact that on 27 October 1993, four days prior to trial, the prosecution informed counsel for the defense of its intention to have certain pieces of evidence examined in order to develop expert opinion. The expert's written report was given to the State on 8 November 1993 and turned over to the defense late that

afternoon. Four days later a *voir dire* of Agent Deaver was conducted. The court then recessed for a day, and the judge delayed ruling on the admission of the bloodstain pattern interpretation testimony in order to give defense counsel time to research the issue. The court concluded that the State had turned over the report by Agent Deaver as required by N.C.G.S. § 15A-903(e). Agent Deaver's testimony was delayed while the State called two other witnesses. At this point, the court offered another recess in order for defendant to locate an expert witness. Defense counsel stated, "To tell you the truth, I don't know that we really need any recess. We've called everybody I could get up with, and nobody knows anybody, private detectives or the Death Penalty Resource Center or even other lawyers." A ten-minute recess was given after which defense counsel elected to hold a *voir dire* on Agent Deaver's qualifications. Trial then continued, and the complained-of evidence was offered.

In a similar case, *State v. McCoy*, 303 N.C. 1, 277 S.E.2d 515 (1981), this Court found no error where the State did not provide ballistics test results to the defendant until the third day of trial. In *McCoy*, as in this case, the State was not aware of the evidence until several days prior to trial and immediately notified defendant's counsel. Also in that case the defense counsel noted, "I've looked for ballistics experts before and there are just not any," and doubted that he could locate such an expert within a reasonable time. *Id.* at 21, 277 S.E.2d at 530.

"We find no error in this procedure. Even if we assume, for purposes of argument, that the [S]tate failed to comply with the discovery statute, exclusion of evidence is but one of several sanctions authorized by N.C.G.S. § 15A-910. Another is to 'grant a continuance or recess.' " *Id.* "The sanction to be imposed rests in the trial judge's sound discretion and, absent abuse, is not reviewable on appeal." *Id.* (citing *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978); *State v. Thomas*, 291 N.C. 687, 231 S.E.2d 585 (1977)). Given that the prosecutor notified defendant of the evidence four days before trial and knew of it himself no sooner, the trial court's ordering a recess to permit defendant to locate material on the subject or another expert witness was well within the due exercise of the discretion permitted the court under the circumstances. This assignment of error is overruled.

II.

[8] Defendant next assigns as error the trial court's admission of SBI Special Agent Deaver's testimony concerning a microscopic quantity

of blood on the top leather portion of defendant's left boot. Other than revealing the presence of this "invisible" blood, Agent Deaver could draw no further conclusions as to the type or source of the minute quantity of blood he found. The invisible bloodstain could not be tested further to establish if it was human blood.

Defendant objected to the testimony and contends the results of the blood test were too attenuated and therefore not relevant. Alternatively, defendant contends that even if marginally relevant, the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. We do not agree.

Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401. Generally, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402; *State v. Collins*, 335 N.C. 729, 734, 440 S.E.2d 559, 562 (1994). This Court has "interpreted Rule 401 broadly and [has] explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *Collins*, 335 N.C. at 735, 440 S.E.2d at 562 (citing *State v. Stager*, 329 N.C. 278, 302, 406 S.E.2d 876, 890 (1991)). "An individual piece of evidence need not conclusively establish a fact to be of some probative value. It need only support a logical inference of the fact's existence." *State v. Payne*, 328 N.C. 377, 401, 402 S.E.2d 582, 596 (1991).

Prior to the testimony of Agent Deaver, the State offered evidence tending to show defendant was one of the men at the trailer park where Mr. and Mrs. Batten were murdered. Defendant was the only one of the perpetrators acquainted with the Battens, and he was found with Mr. Batten's wallet in his possession shortly after the murders. Defendant also possessed a knife identical to the one found at the crime scene and later determined to be capable of causing the stab wounds on both victims. Defendant had boasted of the events which occurred on 29 February 1992 to a jailmate and former acquaintance, admitting participation in the murders of the Battens, and admitted on the witness stand that he was present when the murders occurred.

When considered with other circumstances shown by the evidence, evidence of an "invisible" bloodstain on the boot worn by defendant the night of the murders is probative of a material fact in this case and, therefore, relevant to the issue of whether defendant

actually participated in the crimes. "Once properly admitted, the weight to be given the evidence was a decision for the jury." *Whiteside*, 325 N.C. at 398, 383 S.E.2d at 916. The fact that the State could not show the source or type of the blood went to the weight of the evidence and not to its admissibility.

Defendant also contends that the evidence should have been excluded under the balancing test of Rule 403, as the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (1992). "The decision whether to admit evidence subsequent to a Rule 403 analysis rests within the sound discretion of the trial court, and its ruling will not be overturned unless it is shown that the ruling was 'manifestly unsupported by reason and could not have been the result of a reasoned decision.' " *State v. Mason*, 337 N.C. 165, 171, 446 S.E.2d 58, 61 (1994) (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)). The testimony concerning the "invisible" bloodstain "was not presented in a manner designed to inflame the passions of the jury or otherwise to have 'an undue tendency to suggest decision on an improper basis.' " *Id.* (quoting *State v. Mercer*, 317 N.C. 87, 94, 343 S.E.2d 885, 889 (1986)). Defendant has shown no abuse of discretion on the part of the trial court; accordingly, this assignment of error is overruled.

III.

[9] Defendant also assigns as error the trial court's admission of a family photograph of the victims, Leon and Margaret Batten, taken prior to the murders. The photograph was introduced during the testimony of the Battens' nephew, Douglas Batten, wherein he recounted his actions in response to the events occurring at the Dallas Mobile Home Park on 29 February 1992. His testimony was concluded as follows:

> Q. . . . [A]t this time, I'm going to hand you a photograph which has been marked for purpose of identification as State's Exhibit Number 9, and I'll ask if you can identify that for us.
>
> A. Yes, sir.
>
> Q. And what is depicted in that photograph?
>
> A. It's a photograph of my Uncle [Leon] and Aunt Margaret.
>
> Q. And does that photograph, Exhibit Number 9, fairly and accurately depict the appearance of your aunt and uncle the last time you saw them alive prior to February 29, 1992?

A. Yes, sir.

Defendant contends that the photograph is irrelevant and should have been excluded under N.C.G.S. § 8C-1, Rule 403, as it "had the obvious and unavoidable effect of stirring the natural rage of the jurors at the senseless deaths of two elderly and apparently defenseless members of the community." We disagree.

" 'Photographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words.' " *State v. Holden*, 321 N.C. 125, 140, 362 S.E.2d 513, 524 (1987) (quoting *State v. Watson*, 310 N.C. 384, 397, 312 S.E.2d 448, 457 (1984)), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). The trial court must use a totality of the circumstances approach when determining admissibility of a photograph. The trial court should consider "[w]hat a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, [and] the scope and clarity of the testimony it accompanies." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

In the present case, the photograph was in fact used for illustrative purposes during Douglas Batten's testimony to describe his aunt and uncle while alive. We are not persuaded by defendant's argument that one photograph of the victims while they were alive so prejudiced defendant that he is entitled to a new trial. In fact, this Court rarely has found photographic evidence depicting the victim, even after death, to be so highly prejudicial as to require a reversal. *State v. Butler*, 331 N.C. 227, 235, 415 S.E.2d 719, 723 (1992) (quoting *State v. Robinson*, 327 N.C. 346, 357, 395 S.E.2d 402, 409 (1990)); *accord State v. Conaway*, 339 N.C. 487, 453 S.E.2d 824 (admission of photographs depicting the partially decomposed bodies of the victims not prejudicial), *reconsideration denied*, 339 N.C. 740, 457 S.E.2d 304 (1995); *State v. Corbett*, 339 N.C. 313, 451 S.E.2d 252 (1994) (no error in admission of twenty gruesome photographs of the crime scene and the victim); *State v. Ruof*, 296 N.C. 623, 252 S.E.2d 720 (1979) (photographs depicting the victim's head properly admitted to illustrate the entry and exit of the bullet). In light of our prior holdings with regard to the admissibility and lack of prejudicial effect of photographic evidence of the victims of brutal crimes, the admission of one photograph depicting Mr. and Mrs. Batten when they were alive does not rise to the level of prejudice required for a reversal. In fact, we are not persuaded that this photograph had any prejudicial effect at all.

See State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994) (admission of photograph of victim dressed in police uniform taken prior to the murder not prejudicial), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 861 (1995); *State v. McNeill*, 326 N.C. 712, 392 S.E.2d 78 (1990) (photograph of victim and his brother taken prior to victim's murder properly admitted and not unduly inflammatory); *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673 (admission of photograph of victim and defendant taken prior to the murder not prejudicial error), *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986); *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (no error in admission of photograph of victim holding a fishing pole taken prior to murders).

In the present case, due to the abundant evidence of brutality presented, it is natural the jurors would feel a sense of rage throughout the trial. However, this cannot be attributed to the admission of one photograph of the victims while they were living; rather, it is due to the cumulative effect of the evidence of the murders presented at trial. Based on our review of this evidence, we conclude that the trial court did not commit error by admitting this photograph into evidence. Defendant's assignment of error is overruled.

IV.

[10] Next, defendant contends that the trial court erred by allowing testimony concerning defendant's participation in the robbery of Leonard Wiggins, which occurred prior to the murders. We disagree.

At trial, Glen Troublefield and Leonard Wiggins testified that on 29 February 1992, approximately one hour before the robbery and murders of Leon and Margaret Batten, defendant robbed Leonard Wiggins. Wiggins testified that as he was walking down Kay Drive, defendant and DeCastro got out of their car and approached him. Specifically, Wiggins testified that he was punched in the eye by defendant; his chain "snatched" off his neck; and his jacket pulled down around his elbows, rendering him helpless.

On appeal, defendant contends that this "other crime" evidence was inadmissible under N.C.G.S. § 8C-1, Rule 404(b). We disagree.

> Rule 404(b) provides that evidence of other crimes, wrongs, or acts may 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). Such evidence is relevant and admissible under Rule 404(b) against a defendant "if the incidents are

sufficiently similar and not too remote in time so as to be more probative than prejudicial under the Rule 403 balancing test." *State v. Scott*, 318 N.C. 237, 248, 347 S.E.2d 414, 420 (1986).

The other crime may be offered on the issue of defendant's identity as the perpetrator when the *modus operandi* of that crime and the crime for which defendant is being tried are similar enough to make it likely that the same person committed both crimes. *State v. Moore*, 309 N.C. 102, 305 S.E.2d 542 (1983). This theory of admissibility requires "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes." *Id.* at 106, 305 S.E.2d at 545.

State v. Carter, 338 N.C. 569, 588, 451 S.E.2d 157, 167 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 263 (1995). However, "[i]t is not necessary that the modus operandi of the crime the [S]tate seeks to have admitted rise to the level of the unique and bizarre." *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988).

In the present case, the trial court conducted a *voir dire* on the admissibility of the "other crime" evidence. During this *voir dire*, Detective Kenneth Eatman of the Johnston County Sheriff's Department testified regarding the appearance of Leon Batten at the murder scene as follows:

On the male victim, Mr. Batten, he was wearing a shirt and at the time I observed the body the shirt was off of him as you normally wear a shirt. It was fully entwined around his—both hands. His arms were sort of out in front of him, and the shirt was down around his hands.

. . . .

. . . The shirt completely was covering up his hands. [His hands] could not be seen. It was around—from the wrist area down was covered up by the shirt.

Detective Eatman also testified regarding the appearance of Margaret Batten at the murder scene as follows:

The clothing on the female victim was in disarray. . . . Her coat and top clothing was down around the hand and arm area, up off the body.

. . . .

The hands were also covered up with clothing.

Further, evidence presented by the State tended to show that defendant stole Leon Batten's wallet sometime during or after his murder.

Thus, in both the robbery of Wiggins and the crimes committed against the Battens, there were at least two individuals involved who incapacitated the victims by pulling their clothing down around their elbows and hands, and at least one person was robbed during both events. Further, the evidence tended to show that defendant punched Wiggins in the eye during the robbery and that Leon Batten's body was found to have "areas of abrasion and bruising on his face." Based on our review of this evidence, we conclude that the similar acts and the close proximity of time in both the robbery of Wiggins and the crimes committed against the Battens tend to indicate that the same person was involved in both crimes. Thus, evidence of defendant's participation in the robbery of Wiggins was admissible to show identity under Rule 404(b).

Defendant also argues, however, that even if the evidence of defendant's involvement in the robbery of Wiggins were admissible under Rule 404(b), this evidence should still have been excluded under the balancing test of Rule 403.

As this Court recently stated in *Carter*:

> We are well aware of the propensity for unfair prejudice to a defendant when evidence is introduced that he has committed a crime separate and distinct from the crime or crimes for which he is being tried. However, the facts of each case will ultimately determine whether evidence of a defendant's former crime is pertinent in his prosecution for another independent crime. *State v. Shane*, 304 N.C. 643, 654, 285 S.E.2d 813, 820 (1982).

338 N.C. at 589, 451 S.E.2d at 168 (citation omitted).

In this case, the similarities between the robbery of Wiggins and the crimes committed against the Battens are sufficiently probative of identity, and we are satisfied that the probative value of the evidence of defendant's involvement in the prior robbery outweighs any potential for unfair prejudice against defendant. Defendant's assignment of error is overruled.

V.

[11] Defendant next contends that the trial court erred by allowing the prosecutor to cross-examine defendant about a letter he wrote to his wife four days prior to the murders. Defendant argues that the letter was irrelevant and highly prejudicial. We disagree.

"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 (1992). Having previously set out the tests for relevancy, we conclude that the statements contained in the letter to defendant's wife were relevant to show defendant's state of mind and possible motive in killing Leon Batten. The letter contained defendant's statements regarding his thoughts and feelings four days prior to the murders, including defendant's anger over discovering that his wife had allegedly been cheating on him. Specifically, defendant stated in the letter:

> As you might already know, some people have told me that you cheated on me while I was away. At first I was ready to just kill someone, anyone. But as the days went by I had the chance to think, and all I want to know is if what they said was it [sic] true. Through all this hurt that I have felt for some strange reason I still love you and want you. Think about what vows you and I made and then be truthful with yourself and then with me.

As previously noted, Patrick Byrd testified for the State that defendant told him that he and his three friends were at his trailer drinking when Leon Batten arrived. Upon his arrival, defendant had mentioned the fact that Mr. Batten had been "messing around" with his wife. According to Byrd's testimony, DeCastro hit Mr. Batten, and then defendant began to stab him.

In light of Patrick Byrd's testimony that immediately prior to stabbing Leon Batten, defendant speculated that Batten had been "messing around" with his wife, we conclude that defendant's statements in the letter regarding his anger and desire to kill someone as a result of his wife cheating on him, written four days prior to the murder, were relevant to show a motive for defendant's killing Mr. Batten. *See Corbett*, 339 N.C. 313, 451 S.E.2d 252 (holding that cross-examination of defendant concerning the fact he lied to his wife about being the father of the victim's child was admissible to show defendant had a motive to lie and possibly to murder). The relevance of this evidence is also apparent in the jury's finding of the mitigating circumstance

that defendant was under the influence of mental or emotional disturbance with regard to the murder of Leon Batten but not with regard to the murder of Margaret Batten.

Further, we conclude that the trial court did not abuse its discretion under Rule 403 by allowing the cross-examination of defendant concerning this letter. Defendant's assignment of error is without merit.

VI.

[12] Next, defendant contends that the trial court erred by allowing the prosecutor to cross-examine defendant concerning a prior false statement. Defendant argues the cross-examination went beyond the permissible scope of Rule 608(b). We disagree.

Rule 608(b) provides that specific instances of conduct of a witness may, "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning his character for truthfulness or untruthfulness." N.C.G.S. § 8C-1, Rule 608(b) (1992). This Court has established the following four prerequisites for admitting evidence of specific instances of conduct under Rule 608(b):

> (1) the *purpose* of producing the evidence is to impeach or enhance credibility by proving that the witness' conduct indicates his character for truthfulness or untruthfulness; and (2) the conduct in question *is in fact probative* of truthfulness or untruthfulness and is not too remote in time; and (3) the conduct in question did *not result in conviction*; and (4) the inquiry into the conduct *takes place during cross-examination.*

State v. Morgan, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986). "Because the only purpose for which this evidence is sought to be admitted is to impeach or to bolster the credibility of a witness, the only character trait relevant to the issue of credibility is veracity or the lack of it." *Id.* at 634, 340 S.E.2d at 90.

In the present case, after arguments of counsel regarding the prior false statement relating to an incident of assault involving defendant, the trial judge excluded the evidence of the assault while allowing questions concerning statements defendant made to hospital personnel and a commanding officer. The pertinent exchange was as follows:

Q. Well, Mr. Goode, I want to turn your attention to the early part of March of 1991. Is it not true that you were in the Marine Corps at that time?

A. Yes, Sir.

Q. And is it not true that prior to being questioned by the Naval Investigator that you had lied to hospital personnel and to the commanding officer about what had occurred?

[DEFENSE COUNSEL]: Objection.

A. Yes, Sir.

THE COURT: Overruled.

Q. And is it not true that prior to being questioned by the Naval Investigator that you had lied to hospital personnel and to the commanding officer about what had occurred?

[DEFENSE COUNSEL]: Objection.

A. Yes, Sir.

Q. And you admit that you lied, is that correct?

A. Yes, Sir.

Q. That's all. Thank you.

It is clear that defendant's false statements to the hospital personnel and commanding officer are indicative of defendant's truthfulness or untruthfulness. Also, the statements occurred less than a year before the crimes were committed in the present case. Further, these statements did not result in a conviction. Therefore, we conclude the cross-examination met the four prongs of the *Morgan* test and was properly admitted.

Furthermore, we disagree with defendant's contention that his testimony should have been excluded as more prejudicial than probative under the balancing test of Rule 403 of the North Carolina Rules of Evidence. The fact that defendant took the stand to testify in his own defense put his credibility at issue, and evidence that defendant previously lied to his commanding officer and hospital personnel is highly probative of defendant's character for truthfulness. We also note that the trial court excluded any reference to the assault that preceded defendant's false statements. Accordingly, defendant's assignment of error is overruled.

VII.

[13] Defendant next contends that the trial court erred by failing to intervene *ex mero motu* and instruct the jury to disregard a statement made by the prosecutor during closing arguments in the guilt-innocence phase of the trial. Defendant claims the statement was both legally inaccurate and highly prejudicial. We do not agree.

The arguments of counsel are left largely to the control and discretion of the trial judge, and counsel will be granted wide latitude in the argument of hotly contested cases. *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). "Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). "Because defendant did not object to the portions of the argument to which he now assigns error, 'review is limited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu*.' " *State v. McNeil*, 324 N.C. 33, 48, 375 S.E.2d 909, 924 (1989) (quoting *Gladden*, 315 N.C. at 422, 340 S.E.2d at 685), *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).

At trial, the State presented an acting in concert theory as one basis for defendant's guilt. Further, during his closing argument, the prosecutor made the statement, "he who runs with the pack is responsible for the kill." Defendant contends that this statement combined with the prosecutor's comments on the law of acting in concert prejudiced his ability to have a fair trial. We disagree.

In *State v. Craig*, 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983), we held that a prosecutor's argument to the jury during a capital murder case in which the prosecutor used an analogy comparing the defendants to "a pack of wolves" was not grossly improper. In *Craig*, the prosecutor used the analogy to illustrate how concert of action led to each of the defendants' responsibility for the murder. This Court held that the analogy was supported by the evidence and was phrased in a manner which was not inflammatory. *Id.* at 458, 302 S.E.2d at 747. Similarly, in this case, the prosecutor used the phrase "he who runs with the pack is responsible for the kill" to illustrate acting in concert. There was ample evidence to support this inference, and we find the trial court did not err by fail-

ing to intervene *ex mero motu* during the prosecutor's closing argument. This assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

VIII.

[14] In the sentencing proceeding of the trial, defendant contends that the trial court erred by excluding evidence of a codefendant's criminal record as a nonstatutory mitigating circumstance. Defendant argues the fact that his accomplice had an extensive prior criminal record for violent crimes makes it likely that defendant's participation in the murders was less than that of his accomplice. Defendant also contends that the trial judge improperly relied on the authority of *State v. Williams* in reaching its decision. *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). We disagree.

The trial court is required to submit a requested nonstatutory mitigating circumstance if a jury could reasonably find it to have mitigating value and there is substantial evidence to support a reasonable finding by the jury that the circumstance exists. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). This Court has defined a mitigating circumstance as

> a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, but which may be considered as extenuating, or reducing the moral culpability of the killing, or making it less deserving of the extreme punishment than other first-degree murders.

State v. Irwin, 304 N.C. 93, 104, 282 S.E.2d 439, 446-47 (1981) (citing *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981)). Mitigating circumstances, statutory and nonstatutory alike, focus on positive aspects of a defendant's character or behavior. *State v. Miller*, 339 N.C. 663, 455 S.E.2d 137 (1995).

Defendant suggests that the jury could infer that because his accomplice has a prior criminal record, he himself was less likely to commit the crime. However, his accomplice's criminal record has no bearing on defendant's character or propensity to commit the crime. The "circumstances of the offense and the defendant's age, character, education, environment, habits, mentality, propensities and criminal

record" generally are relevant to the issue of mitigation. *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *and by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 650 (1995). Furthermore, the statutory mitigating circumstance that "the murder was actually committed by another person and the defendant was only an accomplice in or accessory to the murder and his participation was relatively minor," *see* N.C.G.S. § 15A-2000(f)(4) (Supp. 1994), was submitted to the jury but not found to exist. Because the accomplice's prior criminal record does not meet the definition of a mitigating circumstance, we conclude it is irrelevant to the determination of the issue of mitigation here.

Defendant also contends that the trial court improperly relied on the authority of *Williams*, 305 N.C. 656, 292 S.E.2d 243, wherein this Court held that the punishment of a defendant's accomplice is not a mitigating circumstance which must be submitted to the jury. Defendant argues that *Williams* was overruled by the United States Supreme Court in *Parker v. Dugger*, 498 U.S. 308, 112 L. Ed. 2d 812, *reh'g denied*, 499 U.S. 932, 113 L. Ed. 2d 271 (1991), which allows "differential sentences" between accomplices to be considered as a mitigating circumstance. Defendant concedes that neither of these cases addresses the specific issue presented in this case. Therefore, as the above-mentioned cases are not controlling here, it is immaterial that the trial court cited to *Williams* in making its determination. Because we have already determined the requested nonstatutory circumstance does not mitigate or make defendant less culpable for the murders, we conclude that the trial court did not err in excluding it. Defendant's assignment of error is overruled.

IX.

[15] Defendant next assigns as error the trial court's refusal to admit the nonstatutory mitigating circumstance "lingering doubt" of guilt for the jury's consideration. We disagree.

> In order for defendant to succeed on this assignment, he must establish that (1) the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury. Upon such showing by the defendant, the failure by the trial judge to submit such

nonstatutory mitigating circumstance to the jury for its determination raises federal constitutional issues.

State v. Hill, 331 N.C. 387, 414, 417 S.E.2d 765, 778 (1992) (citing *Benson*, 323 N.C. at 325, 372 S.E.2d at 521), *cert. denied*, —— U.S. ——, 122 L. Ed. 2d 684, *reh'g denied*, —— U.S. ——, 123 L. Ed. 2d 503 (1993).

The United States Supreme Court has held that trial courts are not required to submit lingering doubt of guilt as a mitigating circumstance. *Franklin v. Lynaugh*, 487 U.S. 164, 101 L. Ed. 2d 155 (submission of doubt of guilt as mitigator not constitutionally required), *reh'g denied*, 487 U.S. 1263, 101 L. Ed. 2d 976 (1988). In *Franklin*, the United States Supreme Court held that lingering doubt as to the defendant's guilt does not involve the defendant's character or record, or the circumstances of the offense. *Id.* at 174, 101 L. Ed. 2d at 166. This Court adopted the precedent announced in *Franklin* in its decision in *Hill*, 331 N.C. 387, 417 S.E.2d 765, and it was properly applied in the present case.

Defendant argues that reliance on *Hill* is misplaced, as it is inconsistent with other decisions of this Court. Both cases defendant cites as being inconsistent with exclusion of "lingering doubt" as a mitigating circumstance, however, were decided prior to *Hill*. *See State v. Bray*, 321 N.C. 663, 365 S.E.2d 571 (1988); *State v. Payne*, 312 N.C. 647, 325 S.E.2d 205 (1985). Accordingly, we find no error.

X.

[16] Defendant also assigns as error the trial court's failure to intervene *ex mero motu* and instruct the jury to disregard the prosecutor's inflammatory argument at the close of the sentencing phase. Defendant contends that the prosecutor's characterization of the events occurring the night of the murders as a "feeding frenzy" was highly prejudicial and only offered to inflame the passions of the jury. We do not agree.

Although no objection was raised by defendant, "[a]n appellate court may review the prosecution's arguments, even though defendant raised no objection at trial, but the impropriety of the argument must be gross indeed 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. Kirkley*, 308 N.C. 196, 210, 302 S.E.2d 144, 152 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988), *and by State v. Rouse*, 339 N.C.

59, 451 S.E.2d 543 (1994). To establish an abuse of discretion, defendant must show that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993) (citing *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157, *reh'g denied*, 478 U.S. 1036, 92 L. Ed. 2d 774 (1986)), *cert. denied*, — U.S. —, 129 L. Ed. 2d 895, *reh'g denied*, — U.S. —, 129 L. Ed. 2d 924 (1994). "It is well settled that the arguments of counsel are left largely to the control and discretion of the trial judge and that counsel will be granted wide latitude in the argument of hotly contested cases." *Williams*, 317 N.C. at 481, 346 S.E.2d at 410. "Counsel is permitted to argue the facts which have been presented as well as reasonable inferences which can be drawn therefrom." *Id.*

The relevant portion of the prosecutor's closing argument following the sentencing phase proceeded as follows:

> Thank God, none of the family members happened upon the scene of this feeding frenzy until law enforcement arrived. You see, there's simply no way to anticipate or prepare for what [Mrs. Batten] went there to find. She arrived at the scene of her husband's brutal murder, to find defendant with the others. Yet, with the thirst not yet satisfied with the slaying of Mr. Batten. And sensing that Mrs. Batten was unarmed, unlike Detective Bass, the law enforcement officer, and that she would therefore be easy prey, she was pounced upon and you've seen [the] resulting carnage.

"In reviewing the remarks at issue in this case, we consider the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Daniels*, 337 N.C. 243, 277, 446 S.E.2d 298, 319 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 895 (1995). In *Craig*, 308 N.C. 446, 302 S.E.2d 740, this Court allowed the prosecutor to refer to the defendants' acts as those of a "wolfpack" to illustrate the especially heinous, atrocious, or cruel nature of the crime. In the present case, the prosecutor similarly uses the words "feeding frenzy" to emphasize the brutality and senselessness of the murders of an elderly and defenseless couple. This analogy was supported by the evidence that the victims were unsuspecting of the attack, unarmed, and stabbed repeatedly and that the victims' clothing was ripped and in disarray, with the only apparent gain of the defendant and his accomplices being a wallet and its contents. This assignment of error is overruled.

PROPORTIONALITY REVIEW

XI.

[17] 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).

In the present case, defendant was convicted of two counts of first-degree murder upon the theory of premeditation and deliberation. In one of the murders, defendant was also convicted on the theory of felony murder. In both of these murders, the jury found the aggravating circumstances that the murders were especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and that the murders were part of a course of conduct which included the commission by the defendant of other crimes of violence, N.C.G.S. § 15A-2000(e)(11). In the murder involving a felony, the jury also found the aggravating circumstance that the murder was committed by the defendant while in the commission of robbery with a dangerous weapon. N.C.G.S. § 15A-2000(e)(5). We conclude that the evidence supports each aggravating circumstance found. 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. Thus, the final statutory duty of this Court is to conduct a proportionality review.

One purpose of proportionality review "is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. at 164-65, 362 S.E.2d at 537. Another is to guard "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 others in the pool, which are defined in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983), and *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), that "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). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994).

This case is distinguishable from the cases in which this Court has found the death penalty disproportionate and entered a sentence of life imprisonment. First, the defendant was convicted of the murders of two individuals. "We have remarked before, and it bears repeating, 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. 56, 95, 388 S.E.2d 84, 107, *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). Further, the jury convicted the defendant on the theory of malice, premeditation, and deliberation in both of the murders, and also the felony murder rule in one of the murders. "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). Finally, the elderly victims would have been no match for the physical strength of defendant, a healthy twenty-two year-old man, and his accomplices.

We recognize that juries have imposed sentences of life imprisonment in several cases which are similar to the present case. However, "the fact that one or more cases is factually similar to the one under review, in which 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." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47 (1994). Our review of such cases reveals that they are distinguishable and do not render the sentence of death in this case disproportionate. None of those cases involved a defendant who committed double murders with regard to which the jury found the same aggravating circumstances to exist. It suffices here to say that we have examined all of the cases cited by defendant and conclude that each of them is distinguishable from the present case.

Further, this case is similar to cases in which we have found the death penalty proportionate. We have upheld a sentence of death where, as in this case, the jury found the aggravating circumstances involved in the present case. Here, it suffices to say that we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have *consistently* returned recommendations of life imprisonment. *E.g.*, *State v. Ingle*, 340 N.C. 108, 455 S.E.2d 664 (1995) (double murder as to which the jury found the aggravating circumstances that the murder was especially heinous, atrocious, or cruel and that the murder was part of a course of conduct involving other violent crimes—death sentence proportionate); *State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412 (1994) (double robbery-murder as to which the jury found the aggravating circumstances that the murder was part of a course of conduct including other violent crimes; that the murder was especially heinous, atrocious, or cruel; that the murder was committed while the defendant was engaged in homicide, rape, robbery, etc.; and that defendant was previously convicted of a violent felony—death sentence proportionate), *cert. denied*, --- U.S. ---, 131 L. Ed. 2d 738 (1995).

Based on the nature of this crime, and particularly the features noted above, we cannot conclude as a matter of law that the sentence of death was disproportionate. We hold that defendant received a fair trial and sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. RODNEY LEE MONTGOMERY

No. 265A90-2

(Filed 8 September 1995)

1. Homicide § 230 (NCI4th)— first-degree murder—sufficiency of evidence

There was substantial evidence to support findings that defendant was the perpetrator of the crimes charged, including first-degree murder, where the State's evidence showed that about one hour before the victim's body was found, defendant

was seen in the parking lot next to the apartment in which the crimes were committed; the police found pubic hairs consistent with those of defendant in front of and on the sofa and love seat in the victim's apartment; defendant lived with his sister not far from the victim's apartment; the murder weapon, a butcher knife, was found in a public parking lot located between the apartment complex where the victim lived and the housing area where defendant was residing at the time of the murder; the butcher knife contained human blood and fibers consistent with the fibers taken from the sweatshirt the victim was wearing at the time of her death; and a fingerprint lifted from a lens of the victim's eyeglasses found in the apartment matched one of defendant's fingerprints.

Am Jur 2d, Homicide §§ 425 et seq.

2. Burglary and Unlawful Breakings § 57 (NCI4th)— first-degree burglary—sufficiency of evidence

There was substantial evidence to support findings that defendant was the perpetrator of the crimes charged, including first-degree burglary, where the State's evidence showed that about one hour before the victim's body was found, defendant was seen in the parking lot next to the apartment in which the crimes were committed; the police found pubic hairs consistent with those of defendant in front of and on the sofa and love seat in the victim's apartment; defendant lived with his sister not far from the victim's apartment; the murder weapon, a butcher knife, was found in a public parking lot located between the apartment complex where the victim lived and the housing area where defendant was residing at the time of the murder; the butcher knife contained human blood and fibers consistent with the fibers taken from the sweatshirt the victim was wearing at the time of her death; and a fingerprint lifted from a lens of the victim's eyeglasses found in the apartment matched one of defendant's fingerprints.

Am Jur 2d, Burglary § 45.

3. Robbery § 52 (NCI4th)— armed robbery—sufficiency of evidence

There was substantial evidence to support findings that defendant was the perpetrator of the crimes charged, including

robbery, where the State's evidence showed that about one hour before the victim's body was found, defendant was seen in the parking lot next to the apartment in which the crimes were committed; the police found pubic hairs consistent with those of defendant in front of and on the sofa and love seat in the victim's apartment; defendant lived with his sister not far from the victim's apartment; the murder weapon, a butcher knife, was found in a public parking lot located between the apartment complex where the victim lived and the housing area where defendant was residing at the time of the murder; the butcher knife contained human blood and fibers consistent with the fibers taken from the sweatshirt the victim was wearing at the time of her death; and a fingerprint lifted from a lens of the victim's eyeglasses found in the apartment matched one of defendant's fingerprints.

Am Jur 2d, Robbery § 64.

4. Rape and Allied Sexual Offenses § 120 (NCI4th)—attempted rape—sufficiency of evidence

There was substantial evidence to support findings that defendant was the perpetrator of the crimes charged, including attempted first-degree rape, where the State's evidence showed that about one hour before the victim's body was found, defendant was seen in the parking lot next to the apartment in which the crimes were committed; the police found pubic hairs consistent with those of defendant in front of and on the sofa and love seat in the victim's apartment; defendant lived with his sister not far from the victim's apartment; the murder weapon, a butcher knife, was found in a public parking lot located between the apartment complex where the victim lived and the housing area where defendant was residing at the time of the murder; the butcher knife contained human blood and fibers consistent with the fibers taken from the sweatshirt the victim was wearing at the time of her death; and a fingerprint lifted from a lens of the victim's eyeglasses found in the apartment matched one of defendant's fingerprints.

Am Jur 2d, Rape §§ 88 et seq.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse. 25 ALR4th 1213.

5. Evidence and Witnesses § 1873 (NCI4th)— fingerprints—impression at time crime committed—sufficiency of evidence

The State submitted substantial evidence of circumstances from which the jury could find in a prosecution for murder, burglary, robbery, and attempted rape that defendant's fingerprints could only have been impressed at the time the crimes charged were committed where the State's evidence showed that the victim was wearing her eyeglasses all day on the day the crimes were committed; the victim was studying or reading most of that day; she was reading when the group left at around 10:00 p.m. for a party, leaving her alone in the apartment; the furniture was in order and the victim was sitting on the sofa with her eyeglasses on, reading the newspaper when the group left the apartment; when the group returned approximately an hour later, the apartment was in disarray, the victim's lifeless body was lying on the floor away from the sofa, which had been moved, and her eyeglasses were on the coffee table; no one else was in the apartment; and defendant's fingerprint was found on the inside lens of the victim's eyeglasses. This evidence, disclosing the circumstances under which the eyeglasses were found, when combined with other testimony placing defendant in the vicinity of the victim's apartment, constitutes substantial evidence from which the jury could find that defendant's fingerprints could only have been impressed on the lens between the hours of 10:00 p.m. and 11:05 p.m. Since the evidence also showed that the crimes were committed during the same period, the fingerprint evidence logically tends to show that defendant was present and participated in the commission of the crimes.

Am Jur 2d, Evidence §§ 569, 1482.

6. Evidence and Witnesses § 1870 (NCI4th)— fingerprint cards—on file before arrest

There was no error in a prosecution for first-degree murder, burglary, robbery, and attempted rape in the admission of testimony that an expert had compared a fingerprint from the crime scene with a fingerprint card from defendant on file before his arrest. Defendant's use of the fingerprint expert's report opened the door and created confusion which the State could clear up by introducing evidence that the report was based on a ten-print card that was on file prior to defendant's arrest for this crime.

Am Jur 2d, Evidence §§ 95, 569.

7. Burglary and Unlawful Breakings § 165 (NCI4th)— first-degree burglary—misdemeanor breaking or entering—evidence not sufficient

The trial court did not err by not submitting a charge of misdemeanor breaking or entering to the jury in a first-degree burglary prosecution. Although the indictment for first-degree burglary charged that defendant broke into and entered the victim's apartment with the intent to commit larceny and rape and defendant contended that the court should have instructed on misdemeanor breaking or entering because substantial evidence was presented from which the jury could have inferred that defendant possessed some intent other than to commit larceny, the question is whether there was any evidence of misdemeanor breaking or entering. The evidence was clear and positive that defendant entered the apartment with the intent to commit larceny, and the fact that he also may have intended to commit rape and murder does not constitute evidence that he entered without the intent to commit a felony.

Am Jur 2d, Burglary §§ 67, 69.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Lamm, J., at the 25 October 1993 Criminal Session of Superior Court, Mecklenburg County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed on 2 November 1994. Heard in the Supreme Court 20 June 1995.

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

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

FRYE, Justice.

Defendant, Rodney Lee Montgomery, was tried capitally upon proper indictments for first-degree murder, robbery with a dangerous weapon, first-degree burglary, and attempted first-degree rape. The jury found defendant guilty of first-degree murder on theories of both premeditation and deliberation and felony murder, first-degree burglary, robbery with a dangerous weapon, and attempted first-degree rape.

After a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury voted on the issues relating to aggravating and mitigating circumstances but was unable to reach a unanimous decision as to Issue Four and made no recommendation as to punishment. Judge Lamm then sentenced defendant to life imprisonment for the first-degree murder conviction. Defendant was sentenced to additional consecutive prison terms of fifty years for first-degree burglary, forty years for robbery with a dangerous weapon, and twenty years for attempted first-degree rape. Defendant raises three assignments of error on this appeal.

The State's evidence at defendant's trial tended to show the following facts and circumstances: On Saturday, 21 January 1989, Kimberly Piccolo, a student at the University of North Carolina in Charlotte (UNC-C), and her three roommates decided to invite several friends who lived in the dormitory to their apartment for a cookout. The apartment complex, which was located near the university campus, was primarily occupied by students. Piccolo studied with one of her roommates in the dining area until 4:00 p.m. In the late afternoon, Piccolo left the apartment. Upon returning to the apartment, she assisted her roommates in preparing food. They used a large chopping knife to cut vegetables. Afterwards, one roommate left the knife in the sink.

About an hour before the cookout, one roommate saw Piccolo coming out of the bathroom upstairs, where she had just taken a shower. Piccolo was dressed in her underpants. Later, at the cookout, she was dressed in sweatpants and a pink or red sweatshirt.

Guests began to arrive at approximately 8:30 p.m., and the last guest arrived at approximately 9:30 p.m., after the others had already eaten. Piccolo ate with the others, but most of the evening she sat on the sofa watching television while the others were at the table and in the kitchen. Everyone at the cookout consumed wine and beer with dinner, except for Piccolo who did not drink.

The group left at approximately 10:00 p.m. to walk to a party held at an adjoining apartment complex. They invited Piccolo to come along, but she said that she was not interested and needed to study. As the group left, Piccolo was on the sofa with her eyeglasses on, reading the newspaper. She was wearing a pink or red sweatshirt, sweatpants, and socks. At that time, the sectional sofa was pushed together into an L-shape, and the coffee table was centered with the sofa. Although the group had been in and out of the sliding balcony

door during the cookout, it was closed when they left for the party. However, the last person out the front door did not lock it.

That same evening around 10:00 p.m., Christy Webb, a neighbor of Piccolo, rode up to her apartment with her boyfriend, Steve Aumer. As Webb was walking away from her car, she was approached by a man who was wearing an over-sized dark-green Army jacket to which an identification badge was attached. The man asked Webb for change for a twenty-dollar bill. Webb stated that she did not have any change. The man then asked if she had any change upstairs in her apartment. At that point, Aumer got out of the car and told the man that Webb did not have any change. Aumer testified at trial that defendant was the man he saw in the parking lot that evening.

At approximately 11:05 p.m., the group returned to the apartment. Upon entering, they noticed the contents of several purses scattered on the floor in front of the door and on the kitchen counter. Only the living room light was on. While others began picking up the items on the floor, two of Piccolo's roommates went upstairs to their respective rooms. One roommate immediately discovered the body of Kimberly Piccolo lying on the floor next to her bed, and she screamed. The others ran to join her and saw the body. One roommate called the police while a guest checked Piccolo's body for a pulse. Two male guests checked all three floors to ascertain that no one else was in the apartment. Two other guests ran out into the parking lot and remained there until the police arrived.

When Piccolo's body was found, she was dressed in a sweatshirt, sweatpants which were inside out, and socks, but she was not wearing panties. The sofa on which Piccolo had been sitting when her roommates left had been moved out of place. The officers found a pair of panties lying on the sofa. A butcher knife was missing from the kitchen. Piccolo's eyeglasses were found on the coffee table. A fingerprint, which matched a print of defendant's left ring finger, was lifted from one of the lenses. Five pubic hairs, which were consistent with those of defendant, were found in front of and on the sofa and love seat. The police later found the missing butcher knife in a parking lot located between Piccolo's apartment and the house owned by defendant's sister; defendant was staying in this house with his sister at the time of the murder. Blood and fibers consistent with fibers from Piccolo's sweatshirt were on the knife.

On 10 February 1989, an officer showed Aumer a photographic lineup and interviewed him. Aumer immediately picked defendant's

photograph out of the lineup as the man who had spoken to Christy Webb. At trial, Aumer identified defendant as that man.

The police found that defendant's brother owned a green Army field jacket similar to the one defendant was seen wearing when he approached Christy Webb. Defendant's brother also owned a UNC-C Worker's ID card, which was of the type that could be attached to a lapel or pocket. This ID card was similar to the one which Aumer described as being attached to the jacket defendant was wearing when defendant approached Christy Webb.

An autopsy showed that Piccolo had received nine stab wounds that were clustered in her chest, arm, back, and abdomen and several defensive wounds on her hands. One stab wound went completely through her right hand. James M. Sullivan, M.D., the State's expert witness and the forensic pathologist who performed the autopsy on Piccolo's body, testified that the victim died from blood loss caused by the multiple stab wounds. In Dr. Sullivan's opinion, Piccolo probably died within fifteen minutes after receiving the most serious of the wounds. Dr. Sullivan testified that the knife found in the parking lot was consistent with the wounds the victim received. Another expert witness examined trace evidence collected at the apartment. In his opinion, four of the hairs taken from in front of and on the sofa and love seat were consistent in every degree with defendant's pubic hair.

Defendant at trial presented alibi evidence. Several of defendant's relatives testified that he was with them the entire evening of 21 January 1989. Further, defendant presented testimony by one witness that he had seen black males come and go from the apartment in the past. Defendant did not testify.

[1-4] Defendant first assigns as error the trial court's denial of his motion to dismiss all charges against him for insufficiency of the evidence. Defendant does not contend that there is insufficient evidence to show that the crimes charged were committed. Instead, defendant contends that the State presented insufficient evidence to support a finding beyond a reasonable doubt that he was the perpetrator of the offenses. Therefore, defendant contends that the convictions of murder, burglary, robbery, and attempted rape must be reversed.

On a defendant's motion for dismissal on the ground of insufficiency of the evidence, the trial court must 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. Vause, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). What constitutes substantial evidence is a question of law for the court. *Id.* To be "substantial," evidence must be existing and real, not just "seeming or imaginary." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Vause*, 328 N.C. at 236, 400 S.E.2d at 61. "If there is substantial evidence—whether direct, circumstantial, or both—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, 382-83 (1988).

In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference that can be drawn therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). The determination of the witnesses' credibility is for the jury. *See Locklear*, 322 N.C. at 358, 368 S.E.2d at 383.

"[C]ontradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 653. "The trial court's function is to determine whether the evidence will permit a reasonable inference that the defendant is guilty of the crimes charged." *Vause*, 328 N.C. at 237, 400 S.E.2d at 61.

In the present case, there was substantial evidence to support findings that defendant was the perpetrator of the crimes charged. The State's evidence showed that about one hour before the victim's body was found, defendant was seen in the parking lot next to the apartment in which the crimes were committed. The police found pubic hairs consistent with those of defendant in front of and on the sofa and love seat in the victim's apartment. Defendant lived with his sister not far from Piccolo's apartment. The murder weapon, a butcher knife, was found in a public parking lot located between the apartment complex where the victim lived and the housing area where defendant was residing at the time of the murder. The butcher knife contained human blood and fibers consistent with the fibers taken from the sweatshirt the victim was wearing at the time of her death. A fingerprint lifted from a lens of the victim's eyeglasses found in the apartment matched one of defendant's fingerprints.

[5] Defendant further contends that the State failed to prove that the fingerprint found on the victim's eyeglasses was impressed at the time the crimes were committed. This Court has considered the sufficiency of fingerprint evidence to identify defendant as the perpetrator in a number of cases. Where the State has relied solely on fingerprint evidence to establish that the defendant was the perpetrator of the crimes charged, this Court has held that the defendant's motion to dismiss should have been granted. *See, e.g., State v. Bass*, 303 N.C. 267, 278 S.E.2d 209 (1981) (where the only evidence tending to show that the defendant was ever at the scene of the crime was four of defendant's fingerprints found on the frame of a window screen on the victim's home, the State produced no evidence tending to show when they were put there, and the defendant offered evidence that he was on the premises at an earlier date); *State v. Scott*, 296 N.C. 519, 251 S.E.2d 414 (1979) (where the only evidence tending to show that defendant was ever in the victim's home was a thumbprint found on a metal box in the den on the day of the murder, and the niece of the deceased testified that during the week, she had no opportunity to observe who came to the house on business or to visit with her uncle); *State v. Smith*, 274 N.C. 159, 161 S.E.2d 449 (1968) (where the State had no evidence tending to show that the fingerprint of the defendant found on the victim's wallet could only have been impressed at the time the money was allegedly stolen from her wallet); *State v. Minton*, 228 N.C. 518, 46 S.E.2d 296 (1948) (where the defendant's fingerprint was found on broken glass from the front door of a store that had been unlawfully entered, and the defendant was lawfully in the store on the day the crime was committed).

On the other hand, where the State presented other evidence tending to show that the fingerprints could only have been impressed at the time the crimes were committed, this Court has found that the case was properly taken to the jury. *See, e.g., State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977) (where the defendant's fingerprint was found on the windowsill of the victim's house, the defendant was apprehended near the scene of the crime, and other evidence tied defendant to the break-in); *State v. Miller*, 289 N.C. 1, 220 S.E.2d 572 (1975) (where the State's evidence established that the defendant's right thumbprint was found on the lock at the scene of the crime, no other fingerprints were found at the scene, and the defendant falsely stated to the police that he had never been in the building which was broken into); *State v. Jackson*, 284 N.C. 321, 200 S.E.2d 626 (1973) (where the State's evidence showed that the defendant's fingerprint

was lifted from the lower sash of the window inside the kitchen of the apartment occupied by the victim, the victim identified the defendant's voice, and nothing appeared in the record to show that the defendant had ever been in the apartment occupied by the victim prior to the morning of the crimes charged); *State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972) (where the victims testified that they did not know the defendant and had never given him permission to enter their home and the defendant testified he had never been in their home, and the evidence showed that the flower pot where the defendant's fingerprints were found had been frequently washed); *State v. Tew*, 234 N.C. 612, 68 S.E.2d 291 (1951) (where the defendant's fingerprints were found at the scene of the crime and the testimony of the owner and operator of the service station tended to show that she had not seen the defendant before the date of the crime); *State v. Reid*, 230 N.C. 561, 53 S.E.2d 849 (where the defendant was never lawfully in the apartment of the victim, and the defendant's fingerprint was present on the inside of the window sill in the sleeping quarters of the victim), *cert. denied*, 338 U.S. 876, 94 L. Ed. 537 (1949).

As Justice Huskins succinctly stated in *State v. Miller*:

> These cases establish the rule that testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury. The soundness of the rule lies in the fact that such evidence logically tends to show that the accused was present and participated in the commission of the crime.
>
> What constitutes substantial evidence is a question of law for the court. What the evidence proves or fails to prove is a question of fact for the jury.

289 N.C. at 4, 220 S.E.2d at 574.

In the present case, the State submitted substantial evidence of circumstances from which the jury could find that defendant's fingerprints could only have been impressed at the time the crimes charged were committed. The State's evidence showed that the victim was wearing her eyeglasses all day on the day the crimes charged were committed; the victim was studying or reading most of that day; and she was reading when the group left at around 10:00 p.m. for the

party, leaving her alone in the apartment. When the group left the apartment, the furniture was in order and the victim was sitting on the sofa with her eyeglasses on, reading the newspaper. When the group returned approximately an hour later, the apartment was in disarray, the victim's lifeless body was lying on the floor away from the sofa, which had been moved, and her eyeglasses were on the coffee table. No one else was in the apartment. Defendant's fingerprint was found on the inside lens of the victim's eyeglasses. This evidence, disclosing the circumstances under which the eyeglasses were found, when combined with other testimony placing defendant in the vicinity of the victim's apartment, constitutes substantial evidence from which the jury could find that defendant's fingerprints could only have been impressed on the lens between the hours of 10:00 p.m. and 11:05 p.m. Since the evidence also showed that the crimes charged were committed during the same time period, the fingerprint evidence logically tends to show that defendant was present and participated in the commission of the crimes. Thus, we hold that the evidence was properly admitted and the trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence.

[6] Defendant next assigns as error the trial court's admission of evidence which informed the jury that defendant's fingerprints were on file before he was arrested or fingerprinted for these crimes. Defendant contends that this evidence was both "irrelevant and grossly prejudicial."

During its case-in-chief, the State introduced the testimony of a fingerprint expert that a latent lift taken from the victim's eyeglasses matched the print of defendant's left ring finger as it appeared on a Charlotte-Mecklenburg ten-print card prepared by the witness on 13 March 1989 at the Mecklenburg County jail. On cross-examination, defendant questioned the expert concerning a report which the expert had prepared on 1 February 1989. This report was based on a ten-print card which was prepared prior to defendant's arrest for the crimes here involved. Thereafter, on redirect examination of this witness, the court permitted the State to introduce, over defendant's objection, evidence that the expert had occasion to examine a print from defendant prior to 13 March 1989 and to compare the latent lift from the crimè scene with a ten-print card which was "previously on file."

Defendant contends that he was prejudiced by the court allowing the jury to hear evidence that his fingerprints were already on file

prior to his arrest for these crimes. Defendant further contends that the evidence was not relevant to any issues at trial and amounted to inadmissible character evidence under N.C.G.S. § 8C-1, Rule 404. Defendant argues that the only possible probative value of the evidence that a ten-print card of defendant's fingerprints was already on file prior to the witness' preparation of such card on 13 March 1989 was to suggest to the jury that defendant had been arrested and fingerprinted on a prior occasion and for another crime. Defendant contends that this testimony was impermissibly introduced as evidence of defendant's character trait or of prior crimes to show that he acted in conformity therewith on this particular occasion. We disagree.

In *State v. Albert*, we held that "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such later evidence would be incompetent or irrelevant if it had been offered initially." 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). We hold here that defendant opened the door to the State's introduction of evidence regarding the report prepared on 1 February 1989, which compared the latent prints found at the crime scene to defendant's known fingerprints already on file before defendant's fingerprints were taken upon his arrest for the crimes at issue here. Since defendant used this report to explain to the jury the number of latent prints lifted and the number matching defendant's known prints, the prosecutor could on redirect examination introduce evidence that at least one print of value did match defendant's known prints even at the time the report was originally generated on 1 February 1989, prior to defendant's arrest for the crimes at issue here. Defendant's use of the fingerprint expert's report created confusion which the State could clear up by introducing evidence that the report was based on a ten-print card that was on file prior to 13 March 1989.

In *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 883 (1994), the defendant was on trial for murder and had previously been convicted of attempted rape. On direct examination of the defendant, the defendant's counsel selectively read those portions of the trial transcript that were misleading and created inferences favorable to the defendant. We held that it was not error to allow the prosecutor to present additional portions of the transcript, including details of the attempted rape, to clear up any misleading information. *See also State v. Garner*, 330 N.C. 273, 410 S.E.2d 861 (1991) (where the defendant opened the door to evidence of prior convictions for violent acts when he presented evidence that

tended to show that he was level-headed and that the victim was violent); *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980) (where the defendant opened the door when his testimony left a false impression on the jury that could only be cleared up by allowing the State to admit otherwise inadmissible polygraph evidence).

Accordingly, we conclude that it was not error for the trial court to admit the evidence of the ten-print card that was previously on file. Defendant opened the door to the introduction of this evidence by questioning the expert witness regarding the report which was based on that fingerprint card. This testimony may have confused the jury since the fingerprint card referred to on direct examination was prepared subsequent to the report which was the subject of cross-examination. Thus, evidence of the ten-print card in question was admissible to clear up any confusion created by the introduction of evidence of the report by defendant on cross examination of the expert witness.

[7] In his last assignment of error, defendant contends misdemeanor breaking or entering should have been submitted as a possible verdict to the jury. This assignment of error has no merit. First-degree burglary is the breaking or entering of an occupied dwelling at night with intent to commit a felony therein. N.C.G.S. § 14-51 (1986); *State v. Noland*, 312 N.C. 1, 13, 320 S.E.2d 642, 650 (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). If at the time of a breaking and entering a person does not possess the intent to commit a felony therein, he may only properly be convicted of misdemeanor breaking or entering, a lesser included offense of first-degree burglary. *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985).

An indictment for burglary need not specify the particular felony that the accused intended to commit at the time of the breaking or entering if "the indictment . . . charges the offense . . . in a plain, intelligible, and explicit manner and contains sufficient allegations to enable the trial court to proceed to judgment and to bar a subsequent prosecution for the same offense," and it "informs the defendant of the charge against him with sufficient certainty to enable him to prepare his defense." *State v. Worsley*, 336 N.C. 268, 443 S.E.2d 68 (1994); *see* N.C.G.S. 15A-924(a)(5) (Supp. 1993). The intent to commit the felony must be present at the time of entrance, and this can but need not be inferred from the defendant's subsequent actions. *Peacock*, 313 N.C. at 559, 330 S.E.2d at 193.

The indictment for first-degree burglary charged that defendant broke into and entered the apartment of Kimberly Piccolo "with the intent to commit a felony therein, to wit: larceny and rape." The jurors were instructed that, in order to convict defendant of first-degree burglary, they must find that at the time of the breaking and entering, defendant intended to commit larceny. No lesser included offenses were submitted to the jury as possible verdicts, despite defendant's timely request. Defendant contends that because substantial evidence was presented from which the jury could have inferred that defendant possessed some intent at the time of the break-in other than to commit larceny, the judge should have instructed the jury on the lesser included offense of misdemeanor breaking or entering. Defendant contends that the failure to do so warrants a new trial.

This Court has said that a trial judge must instruct the jury on all lesser included offenses that are supported by the evidence, even in the absence of a special request for such an instruction, and that the failure to do so is reversible error which is not cured by a verdict finding the defendant guilty of the greater offense. *State v. Whitaker*, 316 N.C. 515, 342 S.E.2d 514 (1986). Only when the "evidence is clear and positive as to each element of the offense charged" and there is no evidence supporting a lesser included offense may the judge refrain from submitting the lesser offense to the jury. *Peacock*, 313 N.C. at 558, 330 S.E.2d at 193.

Defendant, relying on *State v. Gray*, 322 N.C. 457, 368 S.E.2d 627 (1988), contends that an instruction should have been submitted to the jury for the lesser included offense of misdemeanor breaking or entering since the evidence revealed that, in addition to money having been taken from a purse inside the residence, Kimberly Piccolo was assaulted and stabbed to death. Further, the condition of the victim's clothing and the presence of pubic hairs consistent with those of defendant, which were found in front of the sofa and on the love seat, was some evidence tending to show that the assailant attempted and intended to rape the victim. Thus, defendant contends that from the foregoing evidence, the jury could have rationally found that, at the time of the breaking and entering, defendant had the intent to commit rape or the intent to murder. The question in this case is whether there was any evidence of misdemeanor breaking or entering.

In *State v. Gray*, the defendant was tried for first-degree rape and felonious breaking or entering. The victim testified that she noticed

that the door to the back porch was open, her pocketbook was on the ironing board on the back porch, and her wallet was lying open beside it. She then testified that the defendant emerged from behind the door, holding a small handgun, and forced her to have sexual intercourse with him. The defendant testified that he had consensual sexual intercourse with the alleged victim. The victim testified that as he left her house, the defendant handed her some money and said, "here, I'm not a thief." *Id.* at 458, 368 S.E.2d at 628. This Court held that the misdemeanor breaking or entering charge should have been submitted to the jury since the defendant's testimony created conflicting evidence about whether a rape had occurred, and the victim's testimony created a question of whether the defendant intended to commit larceny. A new trial was granted because "[t]he jury was not compelled to find from the evidence that the defendant intended to commit rape at the time he entered the building." *Id.* at 461, 368 S.E.2d at 630. Because the evidence in *Gray* supported a finding of misdemeanor breaking or entering, the trial court erred in not submitting the lesser offense to the jury, and this error was not cured by a verdict finding the defendant guilty of the greater offense.

In the present case, the State's evidence that defendant stole money from a purse after he entered the apartment was substantial evidence that he had the intent to commit larceny when he entered the apartment. See *id.* at 461, 368 S.E.2d at 629 ("[E]vidence of what a defendant does after he breaks and enters a house is circumstantial evidence of his intent at the time of the breaking and entering."). The State's evidence at trial showed that the front door of the apartment and the sliding balcony door were closed and that defendant broke into or entered the apartment while it was occupied by the victim between 10:00 p.m. and 11:05 p.m. *See State v. Accor*, 277 N.C. 65, 175 S.E.2d 583 (1970) (where this Court recognized that the usual purpose of burglarizing a dwelling house at night is theft). The sofa in the living room was in disarray after the murder, suggesting a struggle or that the victim was surprised by defendant when he entered the apartment. The contents of several purses were scattered in the doorway to the apartment and in the victim's bedroom, and money was missing. Thus, the evidence was clear and positive that defendant entered the apartment with the intent to commit larceny, and the fact that he also may have intended to commit the felonies of rape and murder does not constitute evidence that he entered the apartment without the intent to commit a felony therein.

Accordingly, we conclude that there was no evidence supporting a finding of misdemeanor breaking or entering in the present case. Therefore, the trial court did not err by not submitting the misdemeanor breaking or entering charge to the jury.

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

NO ERROR.

STATE OF NORTH CAROLINA v. EDWARD EARL VICK

No. 7A94

(Filed 8 September 1995)

1. Judges, Justices, and Magistrates § 27 (NCI4th)— first-degree murder—judge's acceptance of codefendant's guilty verdict—no recusal

The trial court did not err by not recusing itself from a first-degree murder prosecution where the judge had accepted a guilty verdict in the trial of defendant's codefendant and found coercion as a mitigating factor, but found that the aggravating factors outweighed the mitigating factors. Defendant did not present substantial evidence of partiality or evidence that there was an appearance of partiality on the part of the judge. The judge was not the impetus of the filing of charges against defendant; the judge made no comments on the credibility of any witnesses or the validity of the charges against defendant; the recording of the guilty verdict was the jury's conclusion on the evidence; and the acceptance of the verdict, in the absence of any contentions that the verdict was improper, creates no grounds for recusal. Finally, defendant presented no compelling reason to justify a distinction between high-profile cases and other cases and requiring a judge to recuse himself from all other cases of codefendants in high-profile capital cases.

Am Jur 2d, Judges §§ 86 et seq.

2. Evidence and Witnesses §§ 1037, 765 (NCI4th)— first-degree murder—statement by defendant—self-serving—door not opened by State

There was no error in a first-degree murder prosecution where the court did not allow defendant to present an exculpatory statement made by defendant to an officer where defendant contended that the State opened the door when it introduced defendant's earlier remarks into evidence. Although it has been held that if the State submits parts of a defendant's confession the defendant must be allowed to present other parts of the statement even though they are self-serving, defendant's remarks here constituted two verbal transactions. The first remarks took place while defendant was being processed and fingerprinted, were unsolicited, and the conversation was terminated by the officer. The second remarks were made after a period of time had elapsed, after defendant had left one room and entered another, and after defendant had been given *Miranda* warnings and interrogation had begun.

Am Jur 2d, Evidence § 873.

3. Evidence and Witnesses §§ 1037, 765 (NCI4th)— first-degree murder—statement by defendant—self-serving—door not opened by State

There was no error in a first-degree murder prosecution where the court did not allow defendant to present an exculpatory self-serving statement made by defendant where defendant contended that the State opened the door by asking the officer about earlier remarks. The State does not open the door for the introduction of another statement made later in the day by simply introducing an earlier statement by a defendant; a party is only entitled to introduce evidence that would have been inadmissible if offered initially where the other party introduces evidence as to a particular fact that is covered by the subsequent statement.

Am Jur 2d, Evidence § 873.

4. Evidence and Witnesses § 1240 (NCI4th)— first-degree murder—defendant's statement at police station—not interrogation

The trial court did not err in a first-degree murder prosecution in the admission of statements made by defendant while he was being processed where the evidence showed that there is no

material conflict as to whether defendant was being interrogated during his fingerprint processing. An officer simply told defendant that he would talk to him later and answer any questions he might have and, even after defendant made these remarks, told him that he would talk with defendant later. The officer's comments were not intended nor reasonably expected to elicit an incriminating response.

Am Jur 2d, Evidence §§ 708 et seq., 749, 750.

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.

5. Evidence and Witnesses § 2284 (NCI4th)— first-degree murder—pathologist's qualifications—suffering of victim

The trial court did not err in a first-degree murder prosecution by allowing the State's pathologist to testify during the guilt phase of the trial as to the pain and suffering caused by the wounds to the victims. An expert witness qualified in the field of forensic pathology is qualified to testify about the pain caused by a traumatic injury.

Am Jur 2d, Expert and Opinion Evidence §§ 264-268.

6. Evidence and Witnesses § 191 (NCI4th)— first-degree murder—pathologist's testimony—suffering of victim

The trial court did not err in a first-degree murder prosecution by admitting testimony from the State's pathologist during the guilt phase concerning the pain and suffering caused by the wounds to the victims. Expert testimony concerning the pain and suffering of the victims in a first-degree murder case is relevant and admissible to assist the jury in ascertaining whether the defendant was acting with premeditation and deliberation.

Am Jur 2d, Evidence § 559.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries. 87 ALR2d 926.

7. Evidence and Witnesses § 1671 (NCI4th)— photograph of vehicle—foundation for admission

The trial court did not err in a first-degree murder prosecution by admitting photographs of defendant's automobile where

defendant contended that the witness's testimony did not indicate that she had any knowledge regarding the identity of the automobile other than that which she gained from viewing the photograph. A photograph depicting an automobile that the witness said "looked like" the defendant's automobile was sufficient to authenticate the photograph for the purpose of illustrating the witness's testimony. The fact that the witness stated that the automobile resembled a Toyota while defendant's automobile was a Volkswagen goes to the credibility of the evidence and not to its admissibility.

Am Jur 2d, Evidence §§ 960-974.

Authentication or verification of photograph as basis for introduction in evidence. 9 ALR2d 899.

8. Homicide § 226 (NCI4th)— first-degree murder—evidence of defendant as perpetrator—sufficient

The trial court did not err by denying defendant's motion to dismiss a first-degree murder prosecution for insufficient evidence placing him at the scene of the crime where the State's evidence at trial tended to show that defendant's automobile was parked at Vanessa Craddock's (the victim's) house minutes before the shootings; defendant was seen striking the victim immediately before shots were heard; several shots were heard and her son was heard crying; both the victim and her son were found dead from gunshot wounds; after the shots were heard, the blue automobile alleged to be defendant's sped from the victim's residence; and defendant told another woman that he had just come from "Van's" when he arrived at her residence minutes after the murders were committed.

Am Jur 2d, Evidence §§ 560-576.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from two judgments imposing sentences of life imprisonment entered by Duke, J., at the 28 July 1993 Criminal Session of Superior Court, Wayne County, upon verdicts of guilty of first-degree murder. Heard in the Supreme Court 12 May 1995.

Michael F. Easley, Attorney General, by Thomas F. Hicks, Special Deputy Attorney General, for the State.

Jeffrey B. Foster for defendant-appellant.

FRYE, Justice.

In a capital trial, Edward Earl Vick, defendant, was convicted by a jury on two counts of first-degree murder. Following a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court imposed two life sentences, to be served consecutively.

Defendant appeals to this Court making six assignments of error. We reject these assignments and uphold defendant's convictions and sentences.

The State's evidence at trial tended to show the following facts and circumstances: On 24 June 1987, Vanessa Craddock and her seven-year-old son, Rasean Rouse, were shot and killed at their home at 916 Fifth Street in Goldsboro, North Carolina. At the time of the murders, Desiree Davis lived next door in Apartment 918 with her children Demetrick, age eleven; Chris, age seven; and Ronique, age four. The Davis' apartment and Vanessa Craddock's apartment shared a common wall between the living rooms and kitchens of both residences.

On the day that Vanessa and Rasean were killed, Chris and Rasean played in the backyard of their apartments after they had eaten dinner. Shortly before dark, Vanessa called out to Rasean and told him that he had to come in to take a bath. Rasean went into his apartment, while Chris stayed outside. A few minutes later, Rasean came to the back door of his apartment. Chris approached Rasean, looked into the apartment, and saw defendant slap Vanessa three or four times. Rasean told Chris that defendant was slapping his mother.

Chris went next door to the Davis apartment, entered the back door, and began to get some water from the kitchen faucet. As he was running the water, Chris heard a noise coming from Vanessa's apartment that sounded like "cabinets slamming." He then went into the living room of the Davis apartment.

As it began to turn dark, Demetrick Davis went into his apartment. Rasean was already in his apartment. Demetrick lay down on the couch in his living room and began to watch television. Desiree was lying on a couch placed against the wall opposite him. Through his front window, Demetrick saw the headlights of an approaching automobile that pulled between the Davis apartment and Vanessa's apartment. Within seconds, an automobile door slammed. A few minutes later, Demetrick heard about three gunshots coming from

Vanessa's apartment. His mother commented that the shots sounded like cabinet doors slamming. Then they heard Rasean begin crying and say, "no, Mommie, no, no, Mommie, no!" Thereafter, two more shots rang out. The front door to Vanessa's apartment slammed and, approximately fifteen to twenty seconds later, Demetrick heard an automobile squealing tires as it sped away.

Approximately two minutes after the automobile pulled away from the parking lot, Wanda Broadhurst knocked on Desiree Davis' apartment door and everyone ran outside. Demetrick ran toward another apartment and found Rasean lying on a neighbor's walkway in the fetal position. Rasean was surrounded by blood, and a trail of blood led from Rasean's body to his apartment. Everyone then ran to John Sykes' apartment where Desiree Davis arrived moments later and announced that Vanessa Craddock was dead.

At approximately 9:00 p.m., Lillie Brown Artis was sitting in her automobile in the parking lot of the apartments on Fifth Street. Ms. Artis noticed a small blue automobile parked beside Vanessa's automobile in front of Apartment 916. She later identified the automobile as similar to the one operated by defendant. Suddenly, the blue automobile sped from the apartment, through the parking lot and down Fifth Street. Three to five minutes later, Ms. Artis heard Mrs. Sykes yelling that there was a little boy lying on a neighbor's porch. Someone called the rescue squad, and shortly thereafter police officers and rescue personnel arrived.

Upon arriving at the scene, police officers found the body of Rasean on the porch outside of Apartment 908. Rasean was clad only in white undershorts and covered with fresh blood. He had no vital signs. The body of Vanessa was discovered on the floor in the back bedroom of her apartment. Blood was coming from her head and she showed no vital signs.

In the living room of the apartment, there was a large pool of blood. There was also a trail of blood leading into the kitchen. The blood evidence suggested that Rasean had been shot in the kitchen, then walked into the living room where he hit the wall. He then fell onto the floor where the large pool of blood formed. After a few seconds, he got back up and headed out the front door. He walked about one hundred yards and collapsed on a neighbor's front porch.

Dr. John Butts, Chief Medical Examiner for the State of North Carolina, performed autopsies on Vanessa and Rasean. He observed

four gunshot wounds to Vanessa's head and one defensive gunshot wound to her left hand. The nature of the wound to her hand and the wound to the left side of her head suggested that the gun was inches away from her body when these shots were fired. Vanessa died as a result of multiple gunshot wounds.

Rasean had a gunshot wound to the left side of his head. The nature of this wound suggests that it was made with the gun inches from his head. After the bullet entered his temple, it passed through his head and struck his carotid artery. The hemorrhaging from this wound caused his death.

On the night of the murders, defendant, Collette Barnes, and their child, Christopher, arrived at Joyce Lofton's house in Barnes' blue Volkswagen automobile. Testimony at trial showed that by the shortest route one can drive from Vanessa's house to Lofton's house in less than three minutes. Defendant stated that they had been at "Van's" house and wanted to play cards but that they did not have a foursome. At defendant's request, Lofton and Barnes went to the grocery store to buy beer while defendant showered. Lofton and Barnes returned, and the three adults played cards until about eleven or eleven-thirty that night.

When defendant was arrested in February 1992, he called Ms. Lofton from the Wayne County jail and told her that she was his alibi. He also told her that he had arrived at her house before nine o'clock on the night Vanessa was murdered. He instructed her to call his lawyer.

Defendant presented no evidence at trial.

[1] For his first assignment of error, defendant argues that his motion requesting that the trial judge recuse himself from defendant's trial was improperly denied. He asserts that Judge Duke's acceptance of the guilty verdict in *State v. Collette Barnes* (91CRS16388)—the trial of defendant's codefendant, as well as a finding made by Judge Duke during the sentencing hearing of the Barnes case, created an adequate showing that Judge Duke should have recused himself. We disagree.

Collette Barnes was tried prior to defendant's trial on two counts of murder and two counts of accessory after the fact of murder. Judge Duke presided over that trial. The jury found Barnes guilty of two counts of accessory after the fact. At Barnes' trial, her attorneys offered evidence indicating that she was under the domination of defendant and that she committed these acts because of duress and coercion caused by defendant. In the sentencing phase, Judge Duke

found coercion as a mitigating factor but found that the aggravating factors outweighed the mitigating factors. Accordingly, Judge Duke sentenced Barnes to ten years' imprisonment on each count, the maximum sentence possible for each offense.

At the start of defendant's trial, defendant moved that Judge Duke recuse himself. Judge Duke heard the arguments and ordered that Judge Wright hear the motion for recusal. A hearing was held before Judge Wright on 7 July 1993 and defendant's motion for recusal was denied. In making this decision, Judge Wright distinguished the instant case from *State v. Fie*, 320 N.C. 626, 359 S.E.2d 774 (1987). Defendant contends that the principles articulated by this Court in *Fie* require that Judge Duke should have been recused. We disagree.

In *Fie*, this Court found that Judge Burroughs should have recused himself. Judge Burroughs presided over the trial of Donna Rowe. After the case, he wrote a letter to the district attorney suggesting that criminal charges be brought against Floyd Fie and Steve Harverson. The district attorney brought the charges, and Judge Burroughs was assigned both cases. Before trial, both defendants filed motions for recusal of Judge Burroughs, arguing that Judge Burroughs' letter to the district attorney showed the judge's disbelief in defense witnesses in the *Rowe* case—the same witnesses that would testify in the *Fie* and *Harverson* cases. The motion was denied and a divided panel of the Court of Appeals affirmed. This Court reversed the Court of Appeals, stating that, while a judge need not be disqualified from a hearing merely because he presided over the trial of a codefendant, a judge should recuse himself if the defendant presents substantial evidence that the trial judge has such "a personal bias, prejudice or interest that he is unable to rule impartially." *Id.* at 627, 359 S.E.2d at 775. We added that "a party has a right to be tried before a judge whose impartiality cannot reasonably be questioned." *Id.* (citing N.C. Code of Judicial Conduct, Canon 3(c)(1) (1973)).

Defendant here has not presented substantial evidence of partiality or evidence that there was an appearance of partiality on the part of Judge Duke. This case is not similar to *Fie*. Unlike Judge Burroughs, Judge Duke was not the impetus behind the filing of the charges against defendant. Judge Duke made no comments on the credibility of any witnesses or the validity of the charges against defendant.

Defendant contends that Judge Duke showed his lack of impartiality by accepting the jury's verdict in the *Barnes* case because

implicit in her conviction as an accessory was the assumption that defendant had committed the murders. However, the recording of the guilty verdict was the jury's conclusion on the evidence, not Judge Duke's finding. The judge must accept the verdict unless it is "incomplete, insensible or repugnant." *State v. Hampton*, 294 N.C. 242, 247, 239 S.E.2d 835, 839 (1978). The acceptance of the verdict, in the absence of any contentions that the verdict was improper, creates no grounds for recusal.

Defendant further contends that Judge Duke showed his partiality by finding as a mitigating factor that Barnes was acting under duress. However, Judge Duke was required to find all of the statutory mitigating factors for which there was credible, uncontradicted evidence. *State v. Jones*, 309 N.C. 214, 219, 306 S.E.2d 451, 454 (1983) (holding that "when evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge to simply ignore it would eviscerate the Fair Sentencing Act").

At her trial, Barnes presented credible, uncontradicted evidence that she was acting under duress. Because there was substantial evidence that Barnes was acting under duress, the fact that Judge Duke found duress as a mitigating factor does not in itself suggest partiality. Also, although Judge Duke found duress as a mitigating factor, he did not give the finding much weight. In sentencing Barnes, Judge Duke also found that the aggravating factors outweighed the mitigating factors and imposed the maximum sentences for both counts of accessory after the fact of murder.

Defendant also argues that this Court should draw a distinction between high-profile cases and other cases. Defendant argues that, in high-profile capital cases, a judge should recuse himself from all other cases of codefendants. We have not made such a distinction in the past, and defendant has presented no compelling reason to justify a departure from our precedent.

Defendant's second and fifth assignments of error concern a series of statements made to police officers upon defendant's arrest.

The State elicited evidence at trial that Sergeant Jay Sasser arrested defendant on 5 June 1991 for the murders of Vanessa Craddock and Rasean Rouse. Sergeant Sasser escorted defendant to a room at the Wayne County Sheriff's Department to be processed.

Captain Justin Heath testified on direct examination that, while defendant was being fingerprinted, he approached defendant and told defendant that he would like to talk to him after the fingerprinting was complete. Captain Heath added that he would then answer any questions that defendant may have concerning his arrest. Defendant indicated that he needed to talk to someone. He then said, "I don't understand. Why isn't Collette here. She was there that night with me." After repeating his statement that he would answer defendant's questions when the processing was complete, Captain Heath left the room.

On cross-examination of Captain Heath, defendant attempted to elicit testimony that he was escorted into Heath's office around ten or fifteen minutes after Heath left the processing room. Upon entering Heath's office, defendant was read his *Miranda* rights. After having waived these rights, defendant stated, "This is a mistake." He was then asked if he had an explanation for what happened, and he stated that he did not. The trial court ruled that the statements made in Captain Heath's office were not admissible on cross-examination of Captain Heath.

[2] As defendant's second assignment of error, he contends that the trial court erred in refusing to allow him to present the exculpatory statement made by defendant to Captain Heath after defendant had been Mirandized. Defendant agrees that his remarks to Heath were self-serving declarations and, therefore, would ordinarily be inadmissible. However, defendant contends that the State opened the door to these remarks when it introduced defendant's earlier remarks into evidence. Defendant advances two theories of how the State opened the door to the introduction of the self-serving statements made in Captain Heath's office.

First, defendant contends that the State opened the door because defendant's remarks in the processing room were part of the same statement. He argues that, even though there was a period of time between the remarks, they were part of the same verbal transaction and that they were so close in time that they constituted one verbal transaction. We disagree.

This Court has held that if the State submits parts of a defendant's confession, the defendant must be allowed to present other parts of the statement, although they are self-serving. *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); *see State v. Watts*, 224 N.C. 771, 32 S.E.2d 348 (1944) (hold-

ing that when the State introduces into evidence a statement made by a defendant, the defendant is entitled to have the rest of the statement introduced). However, these remarks must be part of the same verbal transaction.

Defendant's remarks in the processing room were distinct from his remarks after he had been Mirandized. The first remarks took place while defendant was being processed and fingerprinted. His comments were unsolicited and the conversation was terminated by Captain Heath. The second remarks were made after a period of time had elapsed, after defendant had left one room and entered into another, and after defendant had been Mirandized and an interrogation had begun. Therefore, defendant's remarks constituted two verbal transactions and were not admissible under *Watts* and *Davis*.

[3] Alternately, defendant contends that by asking Captain Heath about the first remarks made while defendant was being processed, the State opened the door to those remarks made in Captain Heath's office. This contention has no merit. This Court has held that by simply introducing into evidence a statement made by a defendant, the State does not open the door for the introduction of another statement made later that day by the defendant. *State v. Lovin*, 339 N.C. 695, 709, 454 S.E.2d 229, 237 (1995) (citing *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988)). A party is only entitled to introduce evidence that would have been inadmissible if offered initially where the other party introduces evidence that raises specific issues or raises evidence as to a particular fact that is covered by the subsequent statement. *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981).

In *Lovin*, the defendant was convicted of first-degree murder. After the murder, Lovin placed two calls to his girlfriend. The State, on direct examination of the girlfriend, introduced the contents of the first conversation. During the first conversation, the defendant stated jokingly that he had "raised a little hell that morning" and started laughing. On cross-examination, the defendant attempted to introduce self-serving statements made by the defendant in the second conversation. During this conversation, defendant told his girlfriend that he had shot a man in self-defense after the man had tried to force him to have sex. This Court held that the content of the second conversation could not be admitted because the State had not opened the door to the introduction of the contents of the second conversation. We stated that subsequent statements are only admissible if the State,

by eliciting testimony from the witness as to the first statement, "raises specific issues or evidence as to a particular fact or transaction" in the subsequent statement. *Lovin*, 339 N.C. at 710, 454 S.E.2d at 237.

In the instant case, the State had not opened the door for the introduction of the comments made after defendant had been Mirandized. The first remarks concerned defendant's request to see Colleen and his comment that they had been together on the night of the murders. The subsequent statement, however, was a statement by defendant that his arrest was a mistake. We reject defendant's second assignment of error.

[4] As his fifth assignment of error, defendant contends that the trial court erred in allowing the introduction of the statements made by defendant to Captain Heath while defendant was being processed. Defendant contends that these statements were made subsequent to his arrest and prior to his being advised of his constitutional right to remain silent. As such, defendant contends that the trial judge should have made specific findings of fact that these comments were voluntary before allowing them to be admitted into evidence at trial.

When the competency of evidence is challenged and the trial judge conducts a *voir dire* to determine admissibility, the general rule is that he should make findings of fact to show the basis of his ruling. *State v. Silver*, 286 N.C. 709, 213 S.E.2d 247 (1975). If there is a material conflict in the evidence on *voir dire*, he must do so in order to resolve the conflict. *State v. Smith*, 278 N.C. 36, 178 S.E.2d 597, *cert. denied*, 403 U.S. 934, 29 L. Ed. 2d 715 (1971). If there is no material conflict in the evidence on *voir dire*, it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. *State v. Ladd*, 308 N.C. 272, 302 S.E.2d 164 (1983); *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980); *State v. Riddick*, 291 N.C. 399, 230 S.E.2d 506 (1976); *State v. Biggs*, 289 N.C. 522, 223 S.E.2d 371 (1976). In that event, the necessary findings are implied from the admission of the challenged evidence. *State v. Whitley*, 288 N.C. 106, 215 S.E.2d 568 (1975).

The trial judge in the instant case held a *voir dire* hearing, after which he found that defendant's statements made to Captain Heath while defendant was being fingerprinted were admissible. The trial transcript indicated that Judge Duke stated that he would make find-

ings of fact when the jury was not present, but the record does not indicate if and when the trial court made these findings.

Defendant contends that there was a material conflict of fact as to whether the requirements of *Miranda* were met. We disagree. The statements in question were made after defendant was taken into custody but before he was read his *Miranda* rights. The failure to inform the defendant of his *Miranda* rights does not render the statement inadmissible unless the defendant was in custody and was subject to interrogation. *Ladd*, 308 N.C. at 279, 302 S.E.2d at 169. Interrogation reflects a measure of compulsion above and beyond that inherent in custody itself and is not limited to express questioning by law enforcement officials but extends to " 'any words or actions on the part of the police that the police should have known would be reasonably likely to elicit an incriminating response from the suspect.' " *Id.* at 280-81, 302 S.E.2d at 170 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300, 64 L. Ed. 2d 297, 307 (1980)).

The evidence presented during *voir dire* shows that there is no material conflict as to whether defendant was being interrogated during his fingerprint processing. Captain Heath simply told defendant that he would talk to him later and answer any questions defendant may have at that time. Even after defendant made the remarks in question, Heath stated that he would talk with defendant later. Captain Heath's comments were not intended nor reasonably expected to elicit an incriminating response from defendant. Prior decisions of this Court are consistent with this conclusion. *See State v. McQueen*, 324 N.C. 118, 377 S.E.2d 38 (1989) (casual conversation between an officer and the defendant, who had been apprehended after a chase, did not constitute an interrogation); *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984) (casual conversation between the defendant and a deputy where the deputy, asked whether the defendant knew the people in a cell, was held not to be interrogation when the defendant replied that they were the two who broke into the house with him that night). Defendant's fifth assignment of error is rejected.

[5] For his third assignment of error, defendant argues that the trial court erred in allowing the State's pathologist to testify during the guilt phase of the trial, over defendant's objection, as to the pain and suffering caused by the wounds to the victims. Defendant contends (1) that there was no proof of the witness' knowledge or qualifications to testify as to the painfulness of the victims' wounds; and

(2) that evidence of the victims' pain and suffering is not relevant in proving any element of the crime and serves solely to inflame the jury in violation of N.C.G.S. § 8C-1, Rule 403. We disagree with both of defendant's contentions.

First, defendant contends that testimony regarding the victims' pain was beyond the scope of the pathologist's expertise. The State's witness, Dr. Butts, Chief Medical Examiner for the State, was qualified as an expert in the field of forensic pathology. Defendant has not contested this. At trial, Dr. Butts defined forensic pathology as the branch of medicine that concerns itself mainly with traumatic injury to the human body caused by violence. We believe that an expert witness qualified in the field of forensic pathology is qualified to testify about the pain caused by a traumatic injury. This decision is consistent with prior case law. *See State v. Bearthes*, 329 N.C. 149, 162, 405 S.E.2d 170, 177 (1991) (holding that the medical examiner was competent to testify about the victim's pain and suffering).

[6] Second, defendant contends that the victims' pain and suffering is irrelevant in the guilt phase of a prosecution for murder. We disagree. This Court has held that expert testimony concerning the pain and suffering of the victims in a first-degree murder case is relevant and admissible to assist the jury in ascertaining whether the defendant was acting with premeditation and deliberation. *State v. Morston*, 336 N.C. 381, 397-98, 445 S.E.2d 1, 10 (1994); *see State v. Ginyard*, 334 N.C. 155, 159, 431 S.E.2d 11, 13 (1993); *State v. Bray*, 321 N.C. 663, 671, 365 S.E.2d 571, 576 (1988). In the instant case, defendant was charged with first-degree murder on the grounds of premeditation and deliberation. The evidence was relevant and admissible to show premeditation and deliberation. Accordingly, we reject defendant's third assignment of error.

[7] In his fourth assignment of error, defendant contends that the trial court erred by admitting photographs of defendant's automobile without laying the proper foundation. We reject this assignment of error.

At trial, Lillie Brown Artis testified that she had seen a vehicle parked beside Vanessa Craddock's automobile in the parking lot across from her apartment on the night of the murders. Ms. Artis described the automobile as being small and blue with a back similar in shape to an old Toyota automobile. On direct examination, she stated that State's Exhibit 128, a photograph of defendant's automobile, "fairly and accurately depicted" the automobile she saw on that

occasion. She testified that she could use the photograph to illustrate her testimony.

Defendant contends that Ms. Artis' testimony did not indicate that she had any knowledge regarding the identity of the automobile, other than that which she gained from viewing the photograph. Therefore, defendant contends that the State did not lay the proper foundation for the introduction of the photograph.

The Court of Appeals has held that a photograph depicting an automobile that the witness said "looked like" the defendant's automobile was sufficient to authenticate the photograph for the purpose of illustrating the witness' testimony. *State v. Grant*, 18 N.C. App. 722, 197 S.E.2d 898, *cert. denied*, 284 N.C. 122, 199 S.E.2d 661 (1973). In the instant case, Ms. Artis testified that the picture fairly and accurately depicted the automobile she saw on the night of the murders and stated that the photograph would help her illustrate her testimony. The fact that the witness stated that the automobile resembled a Toyota—while defendant's automobile was a Volkswagen—goes to the credibility of the evidence and not to its admissibility.

[8] In defendant's sixth assignment of error, he argues that the trial court erred by denying his motion to dismiss at the conclusion of the State's evidence. Defendant does not contend that there is insufficient evidence to show that the crimes were committed. Instead, defendant contends that the State presented insufficient evidence to support a finding beyond a reasonable doubt that he was the perpetrator of the offenses. In support of his contentions, he asserts that there is no physical evidence placing him at the scene of the crime and that the only eyewitness evidence placing him at the scene is the testimony of Chris Davis, an unreliable witness. As such, defendant contends that the State failed to present substantial evidence that defendant was in fact the perpetrator of the murders. Defendant's contention has no merit.

On a defendant's motion for dismissal on the ground of insufficiency of the evidence, the trial court must 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. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). What constitutes substantial evidence is a question of law for the court. *Id.* To be "substantial," evidence must be existing and real, not just "seeming or imaginary." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). Substantial evidence is relevant evidence that a reason-

able mind might accept as adequate to support a conclusion. *Vause*, 328 N.C. at 236, 400 S.E.2d at 61. "If there is substantial evidence—whether direct, circumstantial, or both—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, 382-83 (1988).

In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference that can be drawn therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). The determination of the witnesses' credibility is for the jury. *See Locklear*, 322 N.C. at 358, 368 S.E.2d at 383. "The trial court's function is to determine whether the evidence will permit a reasonable inference that the defendant is guilty of the crimes charged." *State v. Vause*, 328 N.C. at 237, 400 S.E.2d at 61.

The State presented substantial evidence to support a finding that defendant was the perpetrator of the murders of Vanessa Craddock and Rasean Rouse. The State's evidence at trial tended to show that defendant's automobile was parked at Vanessa Craddock's house minutes before the shootings; that defendant was seen striking Vanessa immediately before the shots were heard; that several shots were heard and Rasean was heard crying; that both victims were found dead from gunshot wounds; that after the shots were heard, the blue automobile alleged to be defendant's sped from the Craddock residence; and that defendant told Ms. Lofton that he had just come from "Van's" when he arrived at her residence minutes after the murders were committed. Accordingly, defendant's sixth assignment of error is rejected.

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

NO ERROR.

STATE OF NORTH CAROLINA v. CLARENCE RICHARDSON

No. 402PA93

(Filed 8 September 1995)

Homicide § 596 (NCI4th)— second-degree murder and assault—instructions—belief that killing necessary

The trial court did not err in a prosecution in which defendant was convicted of second-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury by instructing the jury that it could find that defendant acted in self-defense only if defendant reasonably believed that under the circumstances it was necessary "to kill" the victims. The self-defense instruction in this case did not read into self-defense an element that is not part of second-degree murder and did not impermissibly lessen the State's burden of disproving defendant's claim of self-defense. The instruction as given can be read consistently and sensibly without changing the language of the first element of self-defense to read that "it was reasonably necessary to shoot [or use deadly force] in order to save himself from death or great bodily harm." The language in *State v. Watson*, 338 N.C. 168, that indicates otherwise is expressly disavowed.

Am Jur 2d, Homicide §§ 485, 514; Trial § 1266.

Homicide: modern status of rules as to burden and quantum of proof to show self-defense. 43 ALR3d 221.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 112 N.C. App. 252, 435 S.E.2d 84 (1993), setting aside judgments entered by Lewis, J., at the 24 February 1992 Criminal Session of Superior Court, Mecklenburg County, upon defendant's conviction of two counts of second-degree murder and awarding defendant a new trial. Heard in the Supreme Court 9 January 1995.

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

Marc D. Towler, Assistant Public Defender, for defendant-appellee.

PARKER, Justice.

Defendant, upon proper bills of indictment, was convicted of one count of assault with a deadly weapon with intent to kill inflicting serious injury and two counts of second-degree murder in violation of N.C.G.S. § 14-32(a) and N.C.G.S. § 14-17, respectively. The trial judge imposed consecutive sentences of fifteen years' imprisonment, forty-five years' imprisonment, and life imprisonment. On defendant's appeal the Court of Appeals found reversible error in defendant's second-degree murder convictions and ordered a new trial. The State's petition for discretionary review of the Court of Appeals' decision was allowed by this Court on 2 December 1993.

The evidence at trial tended to show that Dr. James Kirkpatrick was a dentist in Ohio; he had come to Charlotte, North Carolina, on 17 July 1991 to visit his brothers, Brian and Barry Kirkpatrick. James, a former college varsity football player, was 6'6" tall and weighed 305 pounds. Brian Kirkpatrick was 5'11" tall and weighed 216 pounds. Barry Kirkpatrick was 6' tall and weighed 182 pounds. The brothers spent the evening of 17 July 1991 drinking alcohol and eating. Shortly before midnight, James, Brian, and Barry arrived at Leather and Lace, a private topless club in Charlotte, North Carolina. The brothers entered the foyer of the club but were denied admittance to the club by Dick Pincelli, an employee who believed James Kirkpatrick was intoxicated. James, Brian, and Barry began arguing with Pincelli.

Defendant Richardson was the manager of the club; he was 6'2" tall and weighed 180 pounds. He was made aware of the disturbance in the foyer and went to investigate along with a customer, Danny Thompson. Before entering the foyer, defendant went to his office and got a .45-caliber pistol. When defendant entered the foyer, the three brothers had already left the foyer and were outside the club in the parking lot. By this time Pincelli had called the police.

Defendant testified that as he stood in the foyer in front of the glass front door looking out into the parking lot, he saw Barry Kirkpatrick leaning against a glass pane to the left of the door. James and Brian Kirkpatrick were in the parking lot behind Barry, arguing with each other. As defendant opened the front door of the club to tell the Kirkpatricks to leave, Barry moved and pinned defendant's right arm between the door and the frame. While defendant was pinned James Kirkpatrick reached through the opening in the door and told defendant, "You f— with us, we will kill you." James then told Barry to let go of the door. As the door opened, defendant shot Barry and

then James; he shot at James a second time when James continued to advance towards him. At this time, according to defendant, Brian began running towards the front door; and defendant shot him also.

James Kirkpatrick testified that the brothers argued with Pincelli in the foyer of the club and then left when told the police had been called. According to James, the brothers were in the parking lot walking towards their car when they heard a voice coming from the front door of the club. James and Barry turned towards the voice, and Barry started to walk back towards the door. Barry walked up to the front glass door and put his hands on the door. James grabbed Barry's arm and tried to pull him away from the door, telling him, "It's not worth it." At this time Brian was standing behind James and Barry. James then heard four shots and realized he had been hit. James fell to the ground; he saw Barry lying on the ground next to him, turned over, and saw Brian also lying on the ground.

Defendant waited for the police to arrive; and when they did, he told them, "I did it. . . . They were all over me." Brian and Barry died at the scene from gunshot wounds to the chest. James lived but suffered serious injuries to his elbow, hip, and abdomen. On the night of the murders, James had a blood alcohol content equivalent to a breathalyzer reading of .21; Brian had a blood alcohol content equivalent to .14 on the breathalyzer; and Barry had a blood alcohol content equivalent to .19 on the breathalyzer.

The sole issue presented for our review is whether the trial court erred in instructing the jury that it could find that defendant acted in self-defense only if defendant reasonably believed that under the circumstances it was necessary "to kill" the victims. Defendant contended, and the Court of Appeals agreed, that the jury should have been instructed that the jury could find that defendant acted in self-defense if it found that defendant reasonably believed under the circumstances that it was "necessary to shoot [or use deadly force against] the deceased in order to save himself from death or great bodily harm." *State v. Richardson*, 112 N.C. App. 252, 259, 435 S.E.2d 84, 88 (1993). The State contends that the Court of Appeals erred in modifying the pattern jury instructions on self-defense for second-degree murder.

This Court has repeatedly held that a defendant is entitled to an instruction on perfect self-defense when evidence is presented tending to show:

"(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)); *see also State v. Watson*, 338 N.C. 168, 179-80, 449 S.E.2d 694, 701 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 569 (1995); *State v. Reid*, 335 N.C. 647, 670, 440 S.E.2d 776, 789 (1994); *State v. Maynor*, 331 N.C. 695, 699, 417 S.E.2d 453, 455 (1992); *State v. Gappins*, 320 N.C. 64, 71, 357 S.E.2d 654, 659 (1987); *State v. Mize*, 316 N.C. 48, 51, 340 S.E.2d 439, 441 (1986); *State v. Wilson*, 304 N.C. 689, 694-95, 285 S.E.2d 804, 807 (1982).

"Under the law of perfect self-defense, a defendant is altogether excused if all of the above four elements existed at the time of the killing." *Reid*, 335 N.C. at 670, 440 S.E.2d at 789. "[U]nder the law of imperfect self-defense, if the first two elements existed at the time of the killing, but defendant, although without murderous intent, was the aggressor in bringing on the affray or used excessive force, defendant is guilty at least of voluntary manslaughter." *McAvoy*, 331 N.C. at 596, 417 S.E.2d at 497.

In his brief defendant contends that the instruction given by the trial court "blurred the distinction between [an] unreasonable belief in the necessity to act in self-defense and [the] use of excessive force in self-defense, thereby denying defendant the possibility of a verdict of voluntary manslaughter where it was reasonably necessary to use deadly force, but not to kill."

In *McAvoy* the Court determined that if the defendant had an unreasonable belief that it was necessary to kill to save himself from

death or great bodily harm, the defendant was guilty of murder. *Id.* at 601, 417 S.E.2d at 500. The Court also concluded that if the defendant was reasonable in his belief that it was necessary to kill to save himself from death or great bodily harm but used more force than was reasonably necessary to protect himself, then defendant was guilty of manslaughter. *Id.* In *McAvoy* the defendant argued that elements two and four of the self-defense instruction are legally equivalent and that the same verdict should result from the disproof of either element. *Id.* at 596, 417 S.E.2d at 497. This Court rejected defendant's argument and determined that elements two and four are not legally equivalent. The Court held that the State's disproof of element two, that defendant's belief that it is necessary "to kill" to save himself from death or great bodily harm was reasonable, permits a conviction of murder; whereas, the State's disproof only of element four, that defendant did not use excessive force to protect himself from death or great bodily harm, permits a conviction of manslaughter. *Id.* at 601, 417 S.E.2d at 500.

Recognizing that we addressed this issue in *McAvoy*, defendant contends that *McAvoy* is not dispositive since the Court in *McAvoy* "left unaddressed the issue of what belief is necessary on the part of a defendant under element (2)." Defendant argues that if the belief in elements one and two is a belief that it is necessary "to kill," then there is no legal difference between elements two and four and the "problem of inconsistent verdicts arising from the equivalence of those two elements remains." On the other hand this problem is, according to defendant, eliminated if the belief in elements one and two is defined as belief in the "necessity to shoot (or use deadly force against)" the deceased. Defendant then identifies the conflict thusly: "[S]ince killing based upon an unreasonable belief in the need to kill in self-defense is identical to the use of excessive force, these two phrasings of one criterion should result in identical legal consequences." This very contention was rejected by this Court in *McAvoy*, where the Court stated:

> We agree with the holding in *Jones* that the defendant was "not entitled to an instruction on self-defense or voluntary manslaughter due to an honest but unreasonable belief in the necessity . . . to kill." [*State v. Jones*, 299 N.C. 103, 113, 261 S.E.2d 1, 8 (1980).] However, we do not adopt the *Jones* Court's reading of the language in [*State v. Clay*, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979),] when it says that "for all practical purposes, . . . one who . . . uses excessive force is guilty of voluntary manslaughter is

> . . . another way of stating that one who has an honest but unreasonable belief that it is necessary . . . to kill is guilty of voluntary manslaughter." [*Jones*, 299 N.C. at 112, 261 S.E.2d at 8.] The quoted language [in *Jones*] [from] *Clay* does not equate elements two and four.

331 N.C. at 599, 417 S.E.2d at 499.

A "reasonable apprehension of losing life or receiving great bodily harm . . . is all that the law requires of [a defendant] in order to excuse the killing of his adversary." *State v. Ellerbe*, 223 N.C. 770, 773, 28 S.E.2d 519, 521 (1944). In reviewing a claim of self-defense,

> "it should be ascertained by the jury, under the evidence and proper instructions of the court, whether [defendant] had a reasonable apprehension that he was about to lose his life or to receive enormous bodily harm. The reasonableness of his apprehension [that he was about to lose his life or to receive great bodily harm] must always be for the jury, and not the defendant, to pass upon."

Id. at 774, 28 S.E.2d at 522 (quoting *State v. Barrett*, 132 N.C. 1005, 1008, 43 S.E. 832, 833 (1903)).

The critical question for purposes of elements one and two of self-defense is whether defendant had a reasonable belief that he was in danger of great bodily harm or death. In a homicide case a defendant cannot argue that he was acting in self-defense when there is no evidence that he feared he was going to be killed or suffer great bodily harm. *Reid*, 335 N.C. at 671-72, 440 S.E.2d at 790. If, however, defendant had such a reasonable belief, then the law does not preclude him from killing in self-defense. The instrumentality or method of force employed by defendant which ultimately results in the victim's death is irrelevant for purposes of determining the reasonableness of defendant's belief under element two. Because the only justification for the use of deadly force is a reasonable belief that one is in danger of death or great bodily harm, "where the assault being made upon defendant is insufficient to give rise to a reasonable apprehension of death or great bodily harm, then the use of deadly force by defendant to protect himself from bodily injury or offensive physical contact is excessive force as a matter of law." *State v. Clay*, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979), *overruled on other grounds by State v. McAvoy*, 331 N.C. 583, 601, 417 S.E.2d 489, 500, *and by State v. Davis*, 305 N.C. 400, 415, 290 S.E.2d 574, 583 (1982).

In this case, in instructing on the first two elements of self-defense, the trial court instructed the jury to consider the circumstances as they appeared to defendant, including "the size, age, strength of the Defendant as compared to the victim; the fierceness of the assault, if any, . . . upon the Defendant; whether or not the victim had any weapon in his possession; and all other facts and circumstances." All of these considerations go to the reasonableness of defendant's belief that he was being threatened with loss of life or great bodily harm. The jury was also instructed:

> As a general rule, the law does not justify or excuse the use of a deadly weapon to repel a simple assault. This principle does not apply, however, where from the testimony it may be inferred that the use of such weapon was, or appeared to be, reasonably necessary to save the person assaulted from great bodily harm.

This instruction also focused the jury on the reasonableness of defendant's belief that he may suffer great bodily harm at the hands of the victim, not on the reasonableness of the force used.

After being instructed that defendant would not be guilty of murder or manslaughter if he acted under a reasonable apprehension of death or serious bodily injury and was not the aggressor and did not use excessive force, the jury was instructed as to the meaning of excessive force and how it affected a verdict of voluntary manslaughter. The jury was told:

> A defendant uses excessive force if he uses more force than it reasonably appeared to him to be necessary at the time of the killing. It is for you, the jury, to determine the reasonableness of the force used by the Defendant under all of the circumstances as they appeared to the Defendant at the time.

Pursuant to this instruction the jury was specifically told to evaluate the force used by defendant under element four, not elements one or two.

The instruction as given to the jury in this case distinguished between elements two and four. Requiring the State to disprove the reasonableness of defendant's belief that he was under threat of death or great bodily harm under element two allows the jury to consider the reasonableness of defendant's use of force under element four if the State fails to disprove element two. This understanding of the self-defense instruction is consistent with the Court's holding in *McAvoy* that there is a difference between elements two and four of

the self-defense instruction. *McAvoy*, 331 N.C. at 601, 417 S.E.2d at 500.

In *Watson* this Court once again addressed issues involving the self-defense instruction. This Court considered whether the defendant's motion to dismiss should be granted on the ground that the State failed to prove that defendant did not act in self-defense. *Watson*, 338 N.C. at 175, 449 S.E.2d at 699. This Court stated that in order to disprove the claim of self-defense, the State needed to prove beyond a reasonable doubt that the defendant did not believe it was necessary to kill to save himself from death or great bodily harm or that if the defendant had such a belief, it was unreasonable because the circumstances as they appeared to the defendant were not sufficient to create such a belief in the mind of a person of ordinary firmness. *Id.* at 180, 449 S.E.2d at 702. This Court concluded that the State may have disproved the first and second elements of self-defense because, based on the evidence, the "jury could have found that the victim did nothing to create a reasonable fear of imminent danger in the mind of a person of ordinary firmness." *Id.* at 181, 449 S.E.2d at 702. This Court was focusing on defendant's reasonableness in determining that a threat existed when determining that the State may have disproved elements one and two.

However, in *Watson* this Court also stated "that, as a general proposition, instructing a jury in terms of the need 'to use deadly force,' rather than 'to kill,' could be appropriate if the evidence supported such an instruction." *Id.* at 182-83, 449 S.E.2d at 703. The Court then went on to state that it was not necessary in that case to interject different language into the self-defense instruction, as it was clear that the defendant there intended to kill the victim. *Id.* at 183, 449 S.E.2d at 703.

The language in *Watson* indicating that in certain situations, the self-defense instruction should read that it was necessary "to shoot or use deadly force" was *dicta*, and that language is now expressly disavowed. We conclude that it is not necessary to change the self-defense instruction to read necessary "to shoot or use deadly force" in order to properly instruct a jury on the elements of self-defense. The first and second elements of self-defense require a consideration of whether the "victim did [something] to create a reasonable fear of imminent danger in the mind of a person of ordinary firmness." *Id.* at 181, 449 S.E.2d at 702. The fourth element of self-defense addresses the reasonableness of the defendant's choice of force used to protect

himself from death or great bodily harm. An instruction that defendant had a reasonable belief in the necessity "to shoot or use deadly force" rather than "to kill" is not necessary since the focus in elements one and two is on the reasonableness of defendant's belief that he must protect himself from death or great bodily harm, not the force used by defendant. Thus, defendant's argument is without merit.

In the alternative defendant argues that the instruction is erroneous in this case because it reads into self-defense a specific "intent to kill" element that is inconsistent with elements of second-degree murder. Defendant notes that a specific intent to kill is not required in second-degree murder and should not be read into a plea of self-defense where defendant is charged with second-degree murder but not first-degree murder. The Court of Appeals agreed with defendant on this point, stating that instructing the jury that

> "it appeared to the defendant and he believed it to be necessary to *kill* the deceased in order to save himself from death or great bodily harm," reads into this defense an element (intent to kill) that is not part of second degree murder.

Richardson, 112 N.C. App. at 258, 435 S.E.2d at 87.

Contrary to the Court of Appeals' decision and defendant's argument, we conclude that the self-defense instruction as given with the second-degree murder instruction does not interject a "specific intent to kill" element into self-defense that is not present in second-degree murder.

"While an intent to kill is not a necessary element of murder in the second degree, that crime does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death." *State v. Lang*, 309 N.C. 512, 524-25, 308 S.E.2d 317, 323 (1983). In interpreting the charge of second-degree murder, this Court has held that

> [n]either second degree murder nor voluntary manslaughter has as an essential element an intent to kill. In connection with these two offenses, the phrase "intentional killing" refers not to the presence of a specific intent to kill, but rather to the fact that the *act* which resulted in death is intentionally committed and is an act of assault which in itself amounts to a felony or is likely to cause death or serious bodily injury. Such an act of assault committed under circumstances sufficient to show malice is second

> degree murder. Such an act of assault committed in the heat of passion suddenly aroused by adequate provocation, or in the imperfect exercise of the right of self-defense, is voluntary manslaughter.

State v. Ray, 299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980).

This Court went on to hold that

> a killing in self-defense is necessarily an "intentional killing" insofar as it is accomplished by an intentional act. When asserted in response to a charge of intentional homicide such as second degree murder or voluntary manslaughter, a plea of self-defense is a plea of confession and avoidance. By it a defendant admits, for example, that he intentionally shot his assailant but that he did so justifiably to protect himself from death or great bodily harm.

Id. at 164, 261 S.E.2d at 797.

Contrary to the Court of Appeals' decision, the language in the self-defense instruction does not read into the defense an "intent to kill" that is not an element of second-degree murder. A killing in self-defense involves an admitted, intentional act, as does second-degree murder. However, simply because defendant admitted intentionally committing an act resulting in death does not mean that defendant has admitted forming a specific "intent to kill."

In this case the trial court instructed the jury:

> The essential elements of second degree murder then are these:
>
> First, that the Defendant intentionally and with malice killed the victim with a deadly weapon.
>
> So you would want to know what we mean by intentionally and what we mean by malice. An intentional killing refers not to the presence of a specific intent to kill, but rather to the fact that the act which resulted in death is intentionally committed and is an act of assault which in itself amounts to a felony, or is likely to cause death or serious bodily injury.

The trial court, in instructing on self-defense, stated that

> defendant[] would be excused of second degree murder on the grounds of self[-]defense if: first, it appeared to him, and he rea-

> sonably believed it to be necessary to kill the victim in order to save himself from death or great bodily harm at the hands of Brian, as you consider his case, or at the hands of Barry, as you consider his case; and, second, that the physical circumstances, physical facts and circumstances as they appeared to the Defendant at the time, were sufficient to create such a belief in the mind of a person of ordinary [firmness].

The jury was thus instructed that second-degree murder involved an "intentional killing," but it was also specifically instructed that an intentional killing did not refer to the "presence of a specific intent to kill." The jury was instructed that defendant would be excused of committing second-degree murder if he "reasonably believed it was necessary to kill the victim in order to save himself from death or great bodily harm." There is no reason to suppose that the jury read the self-defense language to include as an element that defendant formed a "specific intent to kill" the victims. The specific intent to kill that is not present in second-degree murder is the intent to kill with premeditation and deliberation, which is an element of first-degree murder. *State v. Hammonds*, 290 N.C. 1, 6, 224 S.E.2d 595, 599 (1976). No mention of such an element in second-degree murder was made in the instructions to the jury, and the jury was specifically instructed in this case that an intentional killing does not include a specific intent to kill. Reviewing the instructions given to the jury, we conclude that the jury would not have interpreted the self-defense instruction to include a specific intent to kill, an element not necessary for a conviction of second-degree murder. Thus, defendant was not prejudiced when he asserted self-defense in this case where he was charged with second-degree murder.

Defendant also argues that the self-defense instruction as given is erroneous because it lowers the State's burden of disproving self-defense. The Court of Appeals also agreed with defendant on this point, stating that the submission of this instruction

> renders impermissibly easier the State's burden of disproving the first element or the second element of perfect self-defense since the circumstances that would justify the reasonableness of an intent to kill in self-defense would be graver than those justifying the reasonableness of an intentional killing, as that phrase is defined.

Richardson, 112 N.C. App. at 258, 435 S.E.2d at 87.

To begin, we note again that the self-defense instruction as given does not include as an element a specific intent to kill. Additionally, the burden on the State in elements one and two is to disprove that defendant reasonably believed that he was being threatened with death or great bodily harm. As discussed in detail above, the focus of element two is the reasonableness of defendant's apprehension of death or great bodily harm, not the reasonableness of the force used in self-defense, which the jury is specifically instructed to consider under element four. Thus, the State's burden is not lessened by requiring it to disprove that defendant had a reasonable belief that it was necessary "to kill" in order to save himself from death or great bodily harm, rather than requiring the State to disprove that defendant had a reasonable belief that it was necessary "to shoot or use deadly force" to save himself from death or great bodily harm.

Finally, defendant argues that the self-defense instruction is erroneous because it incorrectly focuses on the result of the action taken in self-defense, rather than the necessity of the action itself. Defendant argues that only the action, here shooting, not the result, killing, need be justified as being necessary to satisfy the first and second elements of self-defense.

As discussed previously, elements one and two focus not on the action taken or on the result, but rather on defendant's reasonableness in believing that he had to protect himself from death or great bodily harm. In considering elements one and two, this jury was instructed to consider the circumstances that may have created the belief that there was a threat of death or great bodily harm: the "size, age, strength of the Defendant as compared to the victim; the fierceness of the assault . . . ; [and] whether or not the victim had any weapon in his possession." Requiring, as defendant urges, the instruction in elements one and two to focus on the reasonableness of the specific action taken by defendant could potentially make elements two and four involve similar considerations. Such an interpretation of the elements was disavowed in *McAvoy*, where this Court disagreed with defendant's contention that the self-defense instruction involved legally equivalent considerations in elements two and four. *McAvoy*, 331 N.C. at 597, 417 S.E.2d at 498. Element four specifically requires a jury to consider the force used by defendant. The self-defense instruction is consistent as written and given to the jury in this case. Modification of the wording in elements one and two is not necessary, and we specifically decline to do so.

In conclusion, we hold that the self-defense instruction given in this case did not read into self-defense an element that is not part of second-degree murder and did not impermissibly lessen the State's burden in disproving defendant's claim of self-defense. The self-defense instruction as given can be read consistently and sensibly without changing the language of the first element of self-defense to read that "it was reasonably necessary to shoot [or use deadly force] in order to save himself from death or great bodily harm." The language in *State v. Watson*, 338 N.C. 168, 449 S.E.2d 694, that indicates otherwise is expressly disavowed. The decision of the Court of Appeals vacating the trial court's judgments and awarding the defendant a new trial is reversed, and this case is remanded to that court for further remand to the Superior Court, Mecklenburg County, for reinstatement of the judgments.

REVERSED AND REMANDED.

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

DALLAS L. ISENHOUR, AND WIFE, SANDRA K. ISENHOUR v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, AND UNIVERSAL UNDERWRITERS GROUP

No. 47PA94

(Filed 8 September 1995)

1. Insurance § 528 (NCI4th)— automobile insurance—interpolicy stacking of fleet and nonfleet policies

The interpolicy stacking of fleet and nonfleet policies is permissible under N.C.G.S. § 20-279.21(b)(4).

Am Jur 2d, Automobile Insurance §§ 292, 329, 368, 432.

2. Insurance § 533 (NCI4th)— multiple coverage fleet insurance—umbrella coverage—underinsured motorists coverage

The insurer of a multiple coverage fleet insurance policy which includes umbrella coverage must offer the insured underinsured motorists (UIM) coverage equal to the liability limits under the umbrella coverage section if above the statutory minimum, and where there is no evidence that the insured either

rejected UIM coverage in writing for the umbrella section of the policy or selected a different limit, and the umbrella section provides bodily injury liability coverage of $2,000,000, the umbrella section of the policy provides UIM coverage pursuant to N.C.G.S. § 20-279.21(b)(4) in an amount equal to the $2,000,000 policy limits for bodily injury liability specified in the umbrella section.

Am Jur 2d, Automobile Insurance § 322.

"Excess" or "umbrella" insurance policy as providing coverage for accidents with uninsured or underinsured motorists. 2 ALR5th 922.

3. Insurance § 527 (NCI4th)— automobile insurance—fleet policy—person insured of second class—UIM coverage—wife not in vehicle—no UIM coverage

Where plaintiff-driver was using his employer's automobile with the employer's permission at the time of an accident, and the employer's vehicle was insured under a fleet policy, plaintiff-driver is a person insured of the second class for UIM purposes and is thus entitled to UIM coverage under the umbrella section of the fleet policy. However, the driver's wife was not a person insured of the second class and was not entitled to UIM coverage under the fleet policy since she was neither using the insured vehicle nor a guest in the vehicle at the time of the accident. N.C.G.S. § 20-279.21(b)(4).

Am Jur 2d, Automobile Insurnace §§ 219, 258, 267, 320.

4. Insurance §§ 529, 547 (NCI4th)— driver of employer's vehicle—UIM coverage—primary fleet insurance exceeding judgment—settlement with personal insurer for less than UIM limit—fleet UIM insurance not affected

Where plaintiff was driving his employer's automobile at the time of an accident, the employer's automobile was insured under a fleet policy issued by defendant-insurer which contained an "other insurance" clause providing that such insurance was primary except for a covered vehicle not owned by the insured, and plaintiff was insured under a nonfleet personal policy containing an "other insurance" clause stating that the insurance provided for a vehicle not owned by the insured was excess, the employer's fleet policy provided primary UIM coverage and plaintiff's personal policy provided secondary UIM coverage for plaintiff's injuries. Therefore, where the fleet policy provided UIM coverage

exceeding plaintiff's judgment against the tortfeasor, this is not a stacking case since plaintiff is entitled to satisfy his entire judgment from the fleet policy, and the employer's fleet insurer is not absolved of liability for UIM coverage because plaintiff settled with his personal insurer for an amount less than the UIM limit under his policy.

Am Jur 2d, Automobile Insurance § 434.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 113 N.C. App. 152, 437 S.E.2d 702 (1993), affirming an order granting summary judgment for defendants entered 10 November 1992 by Burroughs, J., in Superior Court, Catawba County. Heard in the Supreme Court 16 February 1995.

Pritchett, Cooke & Burch, by David J. Irvine, Jr., for plaintiff-appellants.

Hutchins, Tyndall, Doughton & Moore, by Kent L. Hamrick, for defendant-appellees.

FRYE, Justice.

On 29 April 1989, plaintiff Dallas Isenhour was injured when the vehicle he was operating collided with a vehicle driven by Willie Kate Clark. The vehicle Mr. Isenhour was operating was owned by his employer, Far East Motors, Inc. [hereinafter Far East Motors], and was a covered automobile under a multiple-coverage fleet insurance policy purchased by Far East Motors. The fleet policy was issued by defendants, Universal Underwriters Insurance Company and Universal Underwriters Group [hereinafter Universal].

On 12 March 1990, Dallas and Sandra Isenhour instituted an action against Willie Kate Clark for damages for personal injuries sustained in the accident. In the complaint, the Isenhours alleged, among other things, negligence in failing to keep a proper lookout and driving in a reckless manner. Mr. Isenhour asserted a claim for serious, painful, and permanent bodily injuries causing medical and other expenses and decreased earning capacity. Mrs. Isenhour asserted a claim for loss of consortium. At the time of the accident, both Clark and the Isenhours were insured by Nationwide Mutual Insurance Company [hereinafter Nationwide] under nonfleet personal automobile insurance policies.

The Isenhours' policy with Nationwide insured three vehicles and carried underinsured motorists (UIM) coverage limits of $100,000 per person/$300,000 per accident with a separate premium being paid for each vehicle. Ms. Clark's policy with Nationwide provided liability coverage limits of $50,000 per person/$100,000 per accident. On 11 July 1991, Nationwide paid to the Isenhours $50,000, the per-person liability limit under the Clark policy. Additionally, the Isenhours settled for $25,000 under the UIM portion of their Nationwide policy.

Thereafter, plaintiffs' attorney notified Universal of the Isenhours' intent to seek "additional compensation" under the UIM coverage in Far East Motors' policy with Universal. In a 17 July 1991 letter, plaintiffs' attorney informed Universal of his clients' demand for settlement of $1,200,000 and sent Universal copies of the complaint and other pertinent documents.

On 1 October 1991, plaintiffs' attorney notified Universal that the case was set on the 14 October 1991 trial calendar. Universal did not appear for trial. Universal sent plaintiffs' attorney a letter dated 31 January 1992 in which it denied it was a party to the suit and produced its insurance policy for review.

The trial court entered judgment in the underlying action against Ms. Clark on 10 March 1992 in the amount of $750,000 for Mr. Isenhour and $150,000 for Mrs. Isenhour. The judgment stated that the parties had waived trial by jury and specific findings of fact and conclusions of law and provided that the plaintiffs could recover from Ms. Clark to "the extent of underinsured motorist's [sic] coverage provided by an underinsured motorist carrier other than Nationwide Mutual Insurance Company," as per a partial release negotiated by the parties. This partial release limited Nationwide's total liability under the Clark and Isenhour policies to $75,000, the total amount of the settlement.

In a letter dated 12 May 1992, Universal notified plaintiffs' attorney that the maximum that might be available to the Isenhours under the Far East Motors fleet policy was $60,000 and that an umbrella provision in the policy did not apply to the Isenhours' claim. Universal explained that the coverage parts for the underlying policy and the umbrella policy were separate and distinct forms of coverage, adding that UIM coverage is added to the umbrella policy only by specific endorsement. Universal stated that only $60,000 in UIM coverage existed via specific endorsement and that no UIM coverage had been

endorsed onto the umbrella provision. Accordingly, Universal tendered $60,000 in settlement of the UIM claim under its fleet policy.

On 8 June 1992, the Isenhours filed suit against Universal alleging (1) gross negligence, (2) unfair and deceptive acts or practices in violation of N.C.G.S. § 58-63-15(11) and N.C.G.S. § 75-16, and (3) liability by virtue of N.C.G.S. § 20-279.21(b)(4). Universal filed its answer on 23 July 1992, denying liability and defending on the basis that (1) the policy is a fleet policy under N.C.G.S. § 20-279.21(b)(4) and cannot be stacked onto a nonfleet policy; (2) plaintiffs are not insureds under the policy; and (3) Universal was not a party to the underlying action against Clark, did not participate in the settlement agreement, and cannot be bound by that agreement.

Universal moved for summary judgment on 25 August 1992. Universal submitted two affidavits in support of its motion for summary judgment. In the first affidavit, Universal's underwriting manager stated that Universal's policy issued to Far East Motors was a fleet policy that insured a multiple and changing number of motor vehicles used in Far East Motors' business. In the second affidavit, Nationwide, which had issued policies to both Clark (the tort-feasor) and the Isenhours, stated that both policies were nonfleet personal automobile insurance policies.

On the basis of these two affidavits and the Court of Appeals' decision in *Watson v. American Nat'l Fire Ins. Co.*, 106 N.C. App. 681, 417 S.E.2d 814 (1992), *aff'd on other grounds*, 333 N.C. 338, 425 S.E.2d 696 (1993), the trial court granted summary judgment in favor of Universal and dismissed the Isenhours' claims on 10 November 1992. From the entry of summary judgment, plaintiffs appealed to the Court of Appeals.

The Court of Appeals held that its decision in *Watson* "bar[red] the coverage sought in this case and [that] the trial court correctly granted summary judgment." *Isenhour v. Universal Underwriters Ins. Co.*, 113 N.C. App. 152, 155, 437 S.E.2d 702, 704 (1993). We allowed plaintiffs' petition for discretionary review, and we now reverse the decision of the Court of Appeals which affirmed the trial court's entry of summary judgment in favor of defendants.

Defendants contend that the Court of Appeals properly affirmed the trial court's entry of summary judgment because the trial court and the Court of Appeals correctly applied the Court of Appeals' decision in *Watson*. We disagree.

In *Watson*, the Court of Appeals held that "fleet policies may not be stacked onto nonfleet policies" under N.C.G.S. § 20-279.21(b)(4). *Watson*, 106 N.C. App. at 686, 417 S.E.2d at 818. The Court of Appeals stated that

> the appellee's policy is a fleet policy under *Sutton* [*v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989)] and excluded from inter-policy stacking, since the stacking provisions of N.C.G.S. § 20-279.21(b)(4) cover only nonfleet private passenger motor vehicle insurance. *Aetna Casualty and Sur. Co. v. Fields*, 105 N.C. App. 563, 414 S.E.2d 69 [, *disc. rev. denied*, 331 N.C. 383, 417 S.E.2d 788] (1992). We recognize that inter-policy stacking is permitted so as to provide the innocent victim of an inadequately insured driver with an additional source of recovery; however, to allow stacking of a victim's fleet policy onto the nonfleet policy of the insured-tortfeasor is a result contemplated neither by the insurer when it wrote the fleet policy nor the legislature when it wrote the statute. We therefore hold that under N.C.G.S. § 20-279.21(b)(4) fleet policies may not be stacked onto nonfleet policies.

Watson, 106 N.C. App. at 686, 417 S.E.2d at 818.

This Court granted discretionary review of *Watson* and affirmed the Court of Appeals' decision on grounds different from those articulated by the Court of Appeals. *Watson v. American Nat'l Fire Ins. Co.*, 333 N.C. 338, 425 S.E.2d 696 (1993). We determined that the insurance policy at issue was exempt, via N.C.G.S. § 20-279.32, from the requirements of the Financial Responsibility Act, since the vehicle involved was operating under a certificate of convenience and necessity issued by the Interstate Commerce Commission. Accordingly, the plaintiff was entitled to "only such coverage as is provided in the policy." *Id.* at 340, 425 S.E.2d at 697. We noted that "[b]y its plain words N.C.G.S. § 20-279.32 says that N.C.G.S. § 20-279.21(b)(4) does not apply in this case." *Id.* The present case differs from *Watson* because N.C.G.S. § 20-279.21(b)(4) is applicable.

[1] This Court stated clearly in *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989), that no reason exists to distinguish between fleet and nonfleet policies under interpolicy stacking. Accordingly, we disavow the language of the Court of Appeals in *Watson* that the stacking provisions of N.C.G.S. § 20-279.21(b)(4) cover only nonfleet vehi-

cle insurance. Under *Sutton*, the interpolicy stacking of fleet and non-fleet policies is permissible. Therefore, the Court of Appeals erred by relying on its holding in *Watson* in holding that the coverage sought by the Isenhours was barred.

[2] We now proceed to the second issue, which is a matter of first impression for this Court. The issue is whether a multiple-coverage fleet insurance policy which includes umbrella coverage must offer UIM coverage equal to the liability limits under its umbrella coverage section.

We begin by looking at the nature and purpose of umbrella coverage. It is a form of insurance protection against losses in excess of the amount covered by other liability insurance policies. It provides coverage above basic or normal limits of liability. *Black's Law Dictionary* 808 (6th ed. 1990). The umbrella portion of the policy in this case, for example, provides in the insuring agreement that the insurer will pay for loss in excess of coverage provided in any underlying insurance; coverage provided in any other insurance available to an insured; and in the absence of such coverage, the retention shown in the declarations in the policy. As noted by John A. and Jean Appleman:

> Umbrella policies serve an important function in the industry. In this day of uncommon, but possible, enormous verdicts, they pick up this exceptional hazard at a small premium. Assuming one's automobile . . . polic[y] [has] liability limits of $100,000 or even $500,000, the umbrella policy may pick up at that point and cover for an additional million, five million, or ten million.

8C Appleman, *Insurance Law and Practice* § 5071.65 (1981).

Our analysis in this case is aided by a very recent decision of the New Jersey Supreme Court, which noted a split of authority among courts considering the issue. *See Doto v. Russo*, 140 N.J. 544, 659 A.2d 1371 (1995). States with statutes requiring insurers to write UM/UIM coverage only to the statutory minimum of liability coverage have held that such statutes do not apply to umbrella provisions. *See Continental Ins. Co. v. Howe*, 488 So. 2d 917 (Fla. Dist. Ct. App.) (construing Rhode Island law), *disc. rev. denied*, 494 So. 2d 1151 (Fla. 1986); *Moser v. Liberty Mut. Ins. Co.*, 731 P.2d 406 (Okla. 1986). The Kansas Supreme Court has noted that the rationale behind this position is that the amount of liability coverage is irrelevant if UM/UIM

coverage is only required in a minimum amount and that minimum is met. *See Bartee v. R.T.C. Transp., Inc.*, 245 Kan. 499, 511, 781 P.2d 1084, 1092 (1989).

On the other hand, states with statutes requiring UM/UIM coverage limits equal to those of liability coverage have held that such statutes are applicable to umbrella provisions. *See St. Paul Fire and Marine Ins. Co. v. Gilmore*, 168 Ariz. 159, 812 P.2d 977 (1991); *Chicago Ins. Co. v. Dominguez*, 420 So. 2d 882 (Fla. Dist. Ct. App. 1982), *disc. rev. denied*, 430 So. 2d 450 (Fla. 1983); *First State Ins. Co. v. Stubbs*, 418 So. 2d 1114 (Fla. Dist. Ct. App. 1982), *disc. rev. denied*, 426 So. 2d 26 (Fla.) *and disc. rev. denied*, 426 So. 2d 29 (Fla. 1983); *Cohen v. American Home Assur. Co.*, 367 So. 2d 677 (Fla. Dist. Ct. App.), *cert. denied*, 378 So. 2d 342 (Fla. 1979); *Bartee v. R.T.C. Transp., Inc.*, 245 Kan. 499, 781 P.2d 1084; *Southern Am. Ins. Co. v. Dobson*, 441 So. 2d 1185 (La. 1983); *Doto v. Russo*, 140 N.J. 544, 659 A.2d 1371; *House v. State Auto. Mut. Ins. Co.*, 44 Ohio App. 3d 12, 540 N.E.2d 738, *appeal dismissed*, 37 Ohio St. 3d 704, 531 N.E.2d 1316 (1988); *Cincinnati Ins. Co. v. Siemens*, 16 Ohio App. 3d 129, 474 N.E.2d 655 (1984) (Table No. 88-659).

Our analysis is further aided by a decision of the United States District Court for the Northern District of Ohio which construed North Carolina law with regard to the issue of whether an excess liability umbrella policy must offer UM/UIM coverage. In *Krstich v. United Services Auto. Ass'n*, 776 F. Supp. 1225 (N.D. Ohio 1991), the court found that the umbrella policy at issue "would be required to provide uninsured coverage under [North Carolina] law," since the policy was "a 'policy of bodily injury liability insurance' which covers 'liability arising out of the ownership, maintenance, or use' of a motor vehicle." *Id.* at 1234 (quoting N.C.G.S. § 20-279.21(b)(3) (Supp. 1988)). The court concluded that "[b]y operation of § 20-279.21(b)(3), it must, therefore, provide uninsured motorist coverage." *Id.* The court further concluded that the defendant was obligated to "provide underinsured motorist coverage 'in an amount equal to the policy limits for automobile bodily injury liability as specified in the owner's policy,' " since the umbrella policy therein "exceed[ed] the limits of subsection (b)(2) and . . . contain[ed] uninsured coverage as required by subsection (b)(3)." *Id.* (quoting N.C.G.S. § 20-279.21(b)(4)). The court found that "[u]nderinsured coverage is, therefore, mandatory in the amount of the liability policy's limit, here $1,000,000, pursuant to subsection (b)(4)." *Id.*

Under our statute, the policyholder is entitled to UM/UIM coverage only if the policyholder elects liability coverage above the statutory minimum. *See* N.C.G.S. § 20-279.21(b)(3), (b)(4). In *Sutton*, we said that "[a]n owner's policy of liability insurance must, subject to rejection by the insured, provide UIM coverage 'only with policies that are written at limits that exceed' minimum statutory limits and that afford uninsured motorist coverage." *Sutton*, 325 N.C. at 268, 382 S.E.2d at 765 (quoting N.C.G.S. § 20-279.21(b)(4) (Supp. 1988)). Under the version of our statute applicable to this case, if these statutory prerequisites for UIM coverage are met, the policyholder is entitled to UIM coverage "in an amount equal to the policy limits for automobile bodily injury liability as specified in the owner's policy."[1] N.C.G.S. § 20-279.21(b)(4) (Supp. 1988). Because the statute links the amount of UIM coverage to the amount of liability coverage, the increase of liability coverage through umbrella coverage provisions will naturally cause an insurer to offer UIM coverage in a higher amount. This result is in accord with the manifest purpose of the Financial Responsibility Act in North Carolina, which is to protect innocent victims who have been injured by financially irresponsible motorists. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

Accordingly, we hold that Universal was required to offer Far East Motors UIM coverage in the umbrella section of the fleet policy. The umbrella coverage section of the policy provided automobile bodily injury liability coverage in the amount of $2,000,000. Therefore, Universal was required to offer Far East Motors $2,000,000 in UIM coverage.

When a statute is applicable to the terms of an insurance policy, the provisions of the statute become a part of the policy, as if written into it. If the terms of the statute and the policy conflict, the statute prevails. *Sutton*, 325 N.C. 259, 382 S.E.2d 759; *Chantos*, 293 N.C. 431, 238 S.E.2d 597.

Under N.C.G.S. § 20-279.21(b)(4), the UIM coverage is the same as the policy limits for automobile liability unless the insured has rejected such insurance or selected a different limit, and this rejection or selection must be in writing. *Proctor v. N.C. Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 376 S.E.2d 761 (1989).

1. This statute has been amended, and now requires an insurer to offer UIM coverage in an amount "equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy." N.C.G.S. § 20-279.21(b)(4) (1992).

In the present case, there is no evidence in the record[2] that Far East Motors either rejected in writing UM or UIM coverage for the umbrella section of the policy or selected a different limit. Therefore, the umbrella section of the policy provides UIM coverage of $2,000,000, "an amount equal to the policy limits for automobile bodily injury liability as specified in the owner's [umbrella coverage section of the] policy," N.C.G.S. § 20-279.21(b)(4); *accord Proctor*, 324 N.C. 221, 376 S.E.2d 761.

[3] Under N.C.G.S. § 20-279.21(b)(3) and (b)(4), there are two classes of "persons insured":

> (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

Smith v. Nationwide Mut. Ins. Co., 328 N.C. 139, 143, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991). Members of the first class are "persons insured" for purposes of UM/UIM coverage regardless of whether the insured vehicle is involved in their injuries. *Id.* Members of the second class are "persons insured" only when the insured vehicle is involved in the insured's injuries. *Id.*

Turning to the present case, there is no contention that the Isenhours are persons insured of the first class under the Universal policy. The question becomes whether the Isenhours are "persons insured" of the second class under the UIM provisions of the Far East Motors fleet policy with Universal. It is undisputed that Mr. Isenhour was occupying a covered automobile owned by Far East Motors, the insured, and that Mr. Isenhour was using the automobile with the permission of Far East Motors when he was struck by the automobile driven by Ms. Clark. Thus, Mr. Isenhour is a person insured of the second class for UIM purposes and, accordingly, is entitled to coverage under the umbrella section of the fleet policy pursuant to N.C.G.S. § 20-279.21(b)(3) and (b)(4).

However, Mrs. Isenhour was not a person insured of the second class under the Universal policy. She was neither using the insured vehicle nor a guest in the vehicle at the time of the accident. Therefore, she is not entitled to UIM coverage under the Universal policy.

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2. This Court denied defendants' motion, made for the first time in this Court, to amend the record on appeal by introducing evidence of a purported rejection of such coverage by Far East Motors.

[4] The final issue on this appeal is whether Mr. Isenhour's failure to exhaust the UIM limits of his Nationwide policy precludes his claim against Universal. The Universal fleet policy providing UIM coverage contained the following clause in its endorsement:

> **MOST WE WILL PAY**
>
> We will pay under this endorsement only after the limits of any other applicable insurance policies or bonds have been exhausted by payment of judgments or settlements.

Universal contends that because Mr. Isenhour failed to claim all of the available UIM coverage under the Nationwide policy, he should be precluded from recovery under the Far East Motors policy. The Isenhours entered into a settlement agreement for $50,000 of liability coverage under the tort-feasor's Nationwide policy and $25,000 of UIM coverage under their personal Nationwide policy. The agreement purported to release the tort-feasor from any and all liability and further released Nationwide from any UIM claims by the Isenhours. Defendants here contend that because the Isenhours did not exhaust the limits of their UIM coverage under their Nationwide policy in the settlement agreement, Mr. Isenhour should not be allowed any recovery pursuant to the above endorsement.

We do not agree with Universal's contentions. The exhaustion requirement in Universal's "Most We Will Pay" clause relates to "applicable" insurance policies or bonds, such as liability insurance or UIM coverage of a lower tier than the insurance in question. Universal's obligation to pay under its UIM coverage does not arise until all sums available under any liability policies or bonds and any other UIM coverage which is of a lower tier has been exhausted. Universal does not argue that any liability policies and bonds have not been exhausted, but contends that the competing Nationwide UIM limits have not been exhausted. We agree, but this does not decide the issue before us.

In deciding this issue, we must first determine which policy provides primary coverage. If one policy provides primary coverage while the other provides excess coverage, then we must determine whether the primary policy is sufficient to satisfy Mr. Isenhour's $750,000 judgment. If the primary policy limits are sufficient to fully satisfy the judgment, no stacking issue arises in this case. On the other hand, if the policy providing primary coverage is not sufficient to satisfy the judgment, the fact that one policy is fleet and the other

nonfleet would not prohibit stacking the primary and excess coverage under the two policies so as to provide full payment of the judgment. *See Sutton*, 325 N.C. 259, 382 S.E.2d 759.

Here, we have two policies providing UIM coverage issued by different companies to different policyholders. "The liability of each company must be determined by the terms of its own policy, subject to such modification as may be imposed by statute or by authorized administrative regulation or order." *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 346, 152 S.E.2d 436, 440 (1967). To determine who is the primary carrier and who is the excess carrier, if any, we must examine the "Other Insurance" clauses in the competing policies. *Id.*

The Universal policy issued to Far East Motors provides in pertinent part:

> **OTHER INSURANCE**
>
> The insurance afforded by the endorsement is primary, except it is excess for any COVERED AUTO not owned by the INSURED or any trailer attached to it.

Based on the plain language of the Far East Motors Universal policy, it provides primary coverage because the automobile that Mr. Isenhour was driving at the time of the accident was a covered automobile owned by Universal's insured, Far East Motors.

The Nationwide policy issued to the Isenhours provides in pertinent part:

> **OTHER INSURANCE**
>
> . . . .
>
> [A]ny insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

Based on the plain language of the Isenhours' Nationwide policy, it provides excess coverage in this case, since the automobile Mr. Isenhour was driving at the time of the accident was not owned by him.

Accordingly, we hold that Far East Motors' Universal policy provides primary coverage and the Isenhours' Nationwide policy provides secondary coverage. Therefore, the liability of Nationwide, the excess insurer, does not arise until the limits of the Universal policy,

the primary coverage policy, have been exceeded. *See Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E.2d 436.

In support of its contention that Mr. Isenhour is precluded from recovery, Universal here cites *Eaves v. Universal Underwriters Group*, 107 N.C. App. 595, 421 S.E.2d 191, *disc. rev. denied*, 333 N.C. 167, 424 S.E.2d 908 (1992). In *Eaves*, Universal's garage liability policy contained a "Most We Will Pay" clause limiting its coverage to the minimum limits of the Financial Responsibility Act and an "Other Insurance" clause purporting to make its coverage excess over any other collectible insurance, while the competing policy issued by Amica Mutual Insurance Company also contained an "Other Insurance" clause purporting to make its coverage excess for any vehicle the insured did not own where other insurance was available. Because Universal's policy effectively defined its policy limits to exclude liability in the event there was other collectible insurance which met the minimum standards set by the Financial Responsibility Act, the Court of Appeals held that Universal did not provide any coverage to the plaintiffs in that case.

In *Eaves*, the Court of Appeals relied on *United Services Auto. Ass'n v. Universal Underwriters Ins. Co.*, 332 N.C. 333, 420 S.E.2d 155 (1992). In *United Services*, this Court examined two policies to determine which of them provided liability coverage for the accident in question. In that case, it was "apparent that in defining the limits for which it would be liable for an occurrence involving a person required by law to be insured, Universal agreed to cover only what was needed to comply with the financial responsibility law." *Id.* at 336, 420 S.E.2d at 157. This Court concluded that because United Services provided the coverage required to comply with the Financial Responsibility Act, the Universal policy did not provide any coverage in that case.

The present case is distinguishable from both *Eaves* and *United Services*. In the present case, both Universal and Nationwide contracted to provide coverage under the circumstances of this case, notwithstanding the fact that one is primary and the other secondary. Further, unlike *United Services* and *Eaves*, Universal here did not define its policy limits to exclude liability in the event there was other collectible insurance which met the minimum standards set by the Financial Responsibility Act. Accordingly, neither *United Services* nor *Eaves* is dispositive in this case. Therefore, we reject Universal's

contention that it was not required to pay until the Nationwide UIM policy limits were exhausted.

Since the policy limits available in the Universal policy are sufficient to satisfy Mr. Isenhour's portion of the judgment, this is not a stacking case. This case involves a question of coverage. The primary coverage under the Universal policy exceeds the judgment of $750,000 in Mr. Isenhour's favor. Therefore, Mr. Isenhour could satisfy his entire judgment without resorting to the Nationwide policy.

Thus, Universal is not absolved of liability simply because the Isenhours settled with Nationwide for less than the UIM policy limits. Accordingly, we hold that Mr. Isenhour is entitled to satisfy his portion of the judgment from the Universal policy.

For the foregoing reasons, the decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. TONY ANTHONY RATLIFF

No. 273A94

(Filed 8 September 1995)

1. Evidence and Witnesses § 2904 (NCI4th)— redirect examination—hearsay—competency to rebut cross-examination evidence

Where a witness testified at trial that defendant had stated that he was going to kill the victim, and defense counsel impeached the witness by questioning a detective about only a portion of a sentence in the witness's out-of-court statement to the effect that defendant never threatened the victim in her presence, the State was properly allowed to rebut the inference that the witness had made inconsistent statements by having the detective read the entire sentence stating that the victim had told the witness that defendant had threatened him but defendant had never threatened him in her presence, even if such testimony was hearsay.

Am Jur 2d, Evidence § 675; Witnesses § 1025.

2. Criminal Law § 465 (NCI4th)— closing argument—prosecutor's misstatement of law—no comment on defendant's failure to testify—harmless error

In a homicide prosecution in which defense counsel stated in closing argument that the State's failure to introduce at trial defendant's pretrial statement to the police strongly suggested that it would show defendant did not have the requisite intent for first-degree murder, the prosecutor's closing argument asking why the defense "didn't have this officer come up here and read the statement" constituted a misstatement of the law because defendant's statement to the police was a self-serving declaration that was inadmissible when offered by defendant, and the trial court erred by failing to sustain defendant's objection and instruct the jury to disregard the statement. This misstatement did not constitute a comment on defendant's failure to testify and thus did not violate defendant's constitutional rights so that the "harmless beyond a reasonable doubt" standard for judging prejudicial error did not apply. The combination of the overwhelming evidence of defendant's guilt of first-degree murder and the fact that the misstatement concerned a minor evidentiary issue in the case lead to the conclusion that there is no reasonable possibility that the error affected the outcome of the trial and that it was not prejudicial.

Am Jur 2d, Homicide § 463; Trial §§ 564, 611.

3. Evidence and Witnesses § 364 (NCI4th)— murder of ex-girlfriend's boyfriend—prior shooting of ex-girlfriend—admissibility to show chain of events

Evidence of defendant's shooting of his former girlfriend at the time of their breakup and his conviction and sentence arising out of that shooting was admissible to show the chain of events that led to defendant's murder of his former girlfriend's new boyfriend just three months after their breakup and ten days after defendant's release from jail for the events surrounding their breakup.

Am Jur 2d, Evidence §§ 341, 342, 435, 437; Federal Rules of Evidence §§ 93, 119; Trial § 526.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing life imprisonment entered by Cornelius, J., at the 4 October 1993 Criminal Session of Superior Court, Guilford 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 first-degree burglary was allowed 17 June 1994. Heard in the Supreme Court 10 April 1995.

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

John Bryson for defendant-appellant.

FRYE, Justice.

In a capital trial, defendant was convicted by a jury of first-degree murder and first-degree burglary. Following a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court imposed a sentence of life imprisonment for the first-degree murder conviction. Defendant was also sentenced to life imprisonment for the first-degree burglary conviction.

Defendant appeals to this Court making four assignments of error. We reject these assignments of error and uphold defendant's convictions for first-degree murder and first-degree burglary.

The State's evidence presented at trial tended to show the following facts and circumstances: Sharlene Wilson and the defendant, Tony Anthony Ratliff, were "boyfriend and girlfriend" for ten or eleven years. During this time, they lived together and had three children. Wilson and the children, as well as the defendant at one time, lived in a two-story apartment. During the time Wilson was involved with defendant, he was "somewhat" jealous. Wilson ended the relationship with defendant in April of 1992, after defendant shot her three times in the back. Wilson did not know why defendant shot her. She pressed charges against defendant for the shooting, and he served three months in jail for felonious assault.

On 9 October 1992, Wilson had another violent encounter with defendant. Wilson had been dressing in an upstairs bedroom. When she came downstairs, defendant hit her over the head with a glass vase. Wilson did not know that defendant was downstairs in the apartment at the time. After hitting her, defendant used a piece of the broken vase to cut Wilson. Her wounds to the head and neck required medical attention. Defendant told Wilson that he was "going to kill [the victim], too." Wilson pressed charges, and warrants were issued for defendant's arrest.

On 11 October 1992, Billy Ashford (Wilson's new boyfriend and the victim in this case), Wilson, her brother, and her children spent the day together. Wilson, her brother, and Ashford drank wine, beer, and liquor into the late evening. Shortly after midnight, Wilson and Ashford decided to go to bed. Ashford went upstairs while Wilson checked the downstairs windows and doors. Wilson ascertained that all the windows and doors were locked except for one window in the living room, which had a broken lock. Also present in the apartment was Wilson's brother, who had passed out on the couch, and the children, who were in their upstairs bedrooms.

Wilson was awakened later that night by noises in her bedroom. She saw Ashford on the floor and defendant standing in the bedroom holding two knives. Defendant came over to the bed and told Wilson to get up. After allowing Wilson to use the bathroom, defendant directed her downstairs and told her not to make any noise. They sat in the kitchen for fifteen to thirty minutes, and Wilson saw defendant put one of the knives away. Wilson asked if she could call an ambulance, and defendant told her "no," that he was "going to make sure he's dead." Wilson noticed that the other knife appeared to be a butcher knife from her kitchen. During the time they waited, defendant said, "I told you I was going to kill him, didn't I?" Defendant left through the front door, and Wilson woke her brother. While Wilson called the police, her brother went upstairs to check on Ashford and ascertained that he was dead. The police arrived approximately ten minutes later.

When Wilson gave a statement to the police, she stated that defendant did not have a key to the apartment and that she did not give defendant permission to enter her apartment that evening. She added that the curtain over the downstairs window was rearranged after the incident. A pathologist later determined that the victim had three stab wounds and multiple abrasions. All three stab wounds were in the chest area and had been inflicted by a knife. The victim bled to death as a result of these wounds.

Later, on the morning of 12 October 1992, defendant called the police and turned himself in. Defendant waived his rights to remain silent and to an attorney and gave a statement to the police in which he admitted killing the victim. At trial, the only contested issue was whether defendant had the requisite intent for first-degree murder.

Defendant did not testify. However, he presented evidence at trial that he had seen his sister the morning of the killings, after the police

had come to her house looking for him, and that she had encouraged him to turn himself in. Defendant also presented evidence that he was functioning within the mildly mentally retarded range and that he was very upset over the recent death of one brother from AIDS and the hospitalization of another brother who was also diagnosed with AIDS.

[1] As his first assignment of error, defendant argues that it was prejudicial error to allow the State to present an out-of-court statement made by Sharlene Wilson. We disagree.

During presentation of the State's case, Wilson testified that on 9 October 1992, defendant entered her apartment and struck her in the head with a vase as she descended her stairs. She added that defendant stated that he was "going to kill him, too," referring to Billy Ashford. The State offered this evidence to show premeditation and deliberation. The State then attempted to enter into evidence a conversation between Wilson and police detective Kim Soban for the purpose of corroborating this evidence. Defendant objected, arguing that the statement contained additional information that Wilson had not testified about and, therefore, that some of the statement was not corroborative. The trial court sustained the objection and excluded the statement.

On cross-examination of Detective Soban, defendant sought to introduce a portion of the statement into evidence for the purpose of impeaching Wilson's testimony that defendant told her that he was going to kill Ashford. The testimony was as follows:

> Q. (Mr. Wannamaker, defense counsel) Detective Soban, on page 9, during the course of discussions with him [sic], you said the following words—excuse me, to Sharlene—starting here where I've marked and to the middle of the page: Tony (defendant) never threatened him (the victim) in your presence or that you—then the sentence does not end, and Sharlene responded no, not in my presence—
>
> A. (Soban) That's correct.
>
> Q. —is that correct?
>
> A. Yes.
>
> MR. WANNAMAKER: Nothing further.

The State then sought to have the entire statement placed into evidence, arguing that defendant's counsel had selectively read only a portion of the sentence and that the State should be entitled to admit the whole statement to show that Wilson's words had been taken out of context. The trial court agreed with the State, thereby overruling defendant's objection and allowing the following exchange to take place.

> Q. [Mr. Lyle, prosecutor:] Detective Soban, what was the first part of that?
>
> A. I said, did he—had—so Billy (the victim) told you that Tony (the defendant) had threatened him but Tony never threatened him in your presence.

Defendant contends that the comments of Detective Soban are double hearsay and do not fall within the hearsay exceptions. As such, defendant contends the comments are inadmissible. Even assuming *arguendo* that the comments are hearsay, they are nonetheless admissible.

This Court has held that "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such later evidence would be incompetent or irrelevant if it had been offered initially." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981).

In *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518, *cert. denied*, —- U.S. —-, 129 L. Ed. 2d 883 (1994), the defendant was on trial for murder and had previously been convicted of attempted rape. On direct examination of the defendant, defendant's counsel selectively read those portions of the trial transcript that were misleading and created inferences favorable to the defendant. This Court held that it was not error to allow the prosecutor to present additional portions of the transcript, including details of the attempted rape, to clear up any misleading information. *Id.* at 335-38, 439 S.E.2d at 538; *see also State v. Garner*, 330 N.C. 273, 410 S.E.2d 861 (1991) (defendant opened the door to evidence of prior convictions for violent acts where he presented evidence that tended to show that he was level headed and that victim was violent); *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980) (defendant opened the door where his testimony left a false impression on the jury that could only be cleared up by allowing the State to admit otherwise inadmissible polygraph evidence).

In this case, defendant questioned the witness about only a portion of the sentence in the statement. From the part that was read aloud, the jury could infer that Wilson had made inconsistent statements, an inference that would be favorable to defendant. A full reading of the sentence, however, suggests an alternative interpretation of Wilson's answer and shows that her response was consistent with her testimony at trial. As such, the trial court did not err in admitting the remaining portion of the out-of-court statement.

[2] As defendant's second assignment of error, he argues that the trial court committed prejudicial error by allowing the State to make an incorrect statement of law in closing arguments. While we agree that the trial court erred in overruling defendant's objection to the prosecutor's arguments, we find that the error was not prejudicial.

Upon his arrest, defendant made a statement to the police. This statement was not introduced at trial. Defendant's counsel argued in closing argument that the State's failure to proffer the statement strongly suggested that the evidence was not presented because it would show defendant did not have the requisite intent for first-degree murder. Defendant now assigns error to a portion of the State's closing argument. The prosecutor argued as follows:

> Now, on the other hand, what they didn't say was, if it showed, if his statement was so damaging to the State and showed that it was second-degree or less, why didn't they put it on for him?
>
> MR. BRYSON: (defense counsel): Object.
>
> THE COURT: Overruled.
>
> MR. LYLE (prosecutor): Why didn't they have this officer come up here and read the statement? You ever think of that?
>
> MR. BRYSON: Object.

Defendant contends that the State was making an improper statement of the law. We agree. Defendant's statement to the police was a self-serving declaration, and it could not be admitted into evidence if offered by defendant. *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988). Incorrect statements of law in closing arguments are improper, and upon defendant's objection, the trial judge should have instructed the jury that the State's argument was improper. The trial court's failure to sustain defendant's objection and instruct the jury to

disregard the statement was error. *State v. Beach*, 333 N.C. 733, 430 S.E.2d 248 (1993).

Defendant contends that the prosecutor's misstatement was so closely connected to defendant's right not to testify that this error violated his constitutional right to due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Accordingly, defendant argues that this Court must determine whether this error was harmless beyond a reasonable doubt. We disagree.

The Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, forbids comment by the prosecutor on the defendant's failure to testify. *See State v. Randolph*, 312 N.C. 198, 205, 321 S.E.2d 864, 869 (1984). This right is also protected under Article I, Section 23 of the North Carolina Constitution. *State v. Castor*, 285 N.C. 286, 291, 204 S.E.2d 848, 852 (1974). In the instant case, the prosecutor was directly responding to the argument made by defendant relating to a specific piece of evidence. The argument did not relate to whether defendant himself sought to testify. As such, it simply constituted a misstatement regarding the parties' relative rights to introduce the statement, not a comment on defendant's failure to testify.

Because the error does not rise to the level of a violation of defendant's constitutional rights, this Court need not examine the error under a "harmless beyond a reasonable doubt" standard. Instead, in order to award defendant a new trial, we must find that

> there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . . The burden of showing such prejudice . . . is upon the defendant.

N.C.G.S. § 15A-1443(a) (1988); *see also State v. Harris*, 290 N.C. 681, 228 S.E.2d 437 (1976) (holding that prosecutorial misstatements of the law will not be the basis of a new trial unless the defendant shows the error was material and prejudicial).

The State contends that to the extent that the prosecutor's argument misstated the law, there is no reasonable possibility, in light of the overwhelming evidence showing defendant's guilt of first-degree murder, that had the argument not been made the jury would have acquitted defendant of the crime of first-degree murder. We agree.

The State presented substantial evidence that defendant had the intent necessary for first-degree murder. First, defendant made three damaging comments to Wilson. Three days prior to the murder, he stated his intent to kill the victim. The night of the murder, he would not let Wilson call an ambulance, stating that he wanted to make sure the victim was dead. Defendant also reminded Wilson on the night of the murder that he had stated earlier that he would kill the victim. The circumstances of the crime also strongly suggest premeditation. Defendant entered Wilson's apartment through a broken window, went to the kitchen and got a knife, and then proceeded upstairs, where he attacked the victim as he slept. Also, the prosecutor's misstatement went to a minor evidentiary issue in the case and not to the truth or falsity of any evidence in the case or the validity of the law under which defendant was being prosecuted. The combination of the overwhelming evidence against defendant and the nature of the error leads this Court to conclude there is no reasonable possibility that the error affected the outcome in this case. Thus, we find the error nonprejudicial.

[3] Defendant's third and fourth assignments of error relate to defendant's April 1992 assault of Wilson. Defendant contends that the trial court committed prejudicial error by allowing the State to introduce evidence that defendant had previously shot Sharlene Wilson, as well as by allowing the State to present evidence of defendant's conviction and sentence arising out of the shooting of Wilson. Defendant argues that the evidence was inadmissible because it could have only been used as character evidence. We disagree.

Evidence of another offense or prior bad act "is admissible so long as it is relevant to show any other fact or issue other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986). This Court has held that prior bad acts are admissible to show a chain of events. *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990). In *Agee*, we said that

> "[e]vidence, not a part of the crime charged but pertaining to the chain of events explaining the context, motive, and set-up of the crime, is properly admitted if linked in time and circumstance with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury."

Id. at 548, 391 S.E.2d at 174 (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)). In the instant case, defendant killed

his ex-girlfriend's new boyfriend, just three months after their breakup and ten days after defendant's release from jail for the events surrounding their breakup. The circumstances behind the dissolution of defendant's relationship with Wilson created a complete picture for the jury. They provided a "backdrop" for defendant's jealousy and anger toward Wilson and the victim.

Just as the facts surrounding the shooting of Wilson were used to show the chain of events that led to this crime, defendant's subsequent conviction and sentence also illustrate the events preceding the murder of the victim. Thus, we reject defendant's third and fourth assignments of error.

For the foregoing reasons, we find no prejudicial error in defendant's trial.

NO ERROR.

STATE OF NORTH CAROLINA v. ELWOOD GOODSON, JR.

No. 157A94

(Filed 8 September 1995)

1. Evidence and Witnesses § 264 (NCI4th)— first-degree murder—victim's reputation for violence—defense of accident

There was no error in a first-degree murder prosecution in the exclusion of testimony as to the victim's reputation for violence where defendant contended that the killing resulted from an accident. It was held in *State v. Winfrey*, 298 N.C. 260, and *State v. McCray*, 312 N.C. 519, that evidence of a victim's violent character is irrelevant in a homicide case when the defense of accident is raised. Although the Evidence Code subsequently provided in N.C.G.S. § 8C-1, Rule 404 that evidence of a pertinent trait of character of the victim is admissible, "pertinent" was not defined and left intact the rule which holds that the deceased's character is not pertinent in this case.

Am Jur 2d, Evidence § 373.

2. Evidence and Witnesses § 174 (NCI4th)— first-degree murder—defendant's care of victim after DWI arrest—details peripheral

There was no error in a first-degree murder prosecution in not allowing testimony concerning the victim's arrest for driving while impaired approximately two weeks before she was killed. Defendant offered this evidence to rebut the State's evidence that there was ill will between himself and his wife and was allowed to testify that he procured his wife's release and brought her home. This was the crucial testimony; the details were peripheral to what he was trying to prove.

Am Jur 2d, Evidence §§ 556, 558.

3. Criminal Law § 757 (NCI4th)— first-degree murder—definition of reasonable doubt

The trial court did not err in its definition of reasonable doubt in its instructions in a first-degree murder prosecution where the court instructed the jury that "[A] reasonable doubt is not a vain or fanciful doubt. . . . Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt." The adjectives "vain" and "fanciful" did not increase the strength of the evidence necessary to create a reasonable doubt, and the use of the adverbs "fully" and "entirely," which mean that the juror must be totally, wholly, and completely satisfied, does not lower the burden of proof to less than a reasonable doubt.

Am Jur 2d, Trial § 1079.

4. Criminal Law § 787 (NCI4th)— first-degree murder—instructions—accident

The trial court did not err in a first-degree murder prosecution in its instruction on accident where defendant contended that nearly two pages of the transcript are occupied by the final mandate as to the various degrees of homicide of which defendant could be found guilty, but there was only a passing reference to not guilty by reason of accident. The court correctly charged on accident immediately before giving the final mandate and referred to the defense of accident in the final mandate.

Am Jur 2d, Trial § 1079.

5. Criminal Law § 447 (NCI4th)— first-degree murder—prosecutor's argument—jury in role of victim—no error

There was no error in a first-degree murder prosecution where defendant contended that the prosecutor in his argument asked the jurors to imagine themselves in the role of the victim. Assuming that defendant is right in his contention regarding the argument, it was not error for the court not to intervene *ex mero motu* because nothing in the argument indicates that the prosecuting attorney sought to personalize the experience by assuming the role of the victim. The use of the word "your" (". . . having the gun stuck to the left side of your head and someone to your left pulling the trigger twice and blowing a hole through your head . . .") was at worst a *lapsus linguae* and could not have misled the jury.

Am Jur 2d, Trial §§ 664-667.

6. Criminal Law § 467 (NCI4th)— first-degree murder—prosecutor's closing argument—use of photographs

There was no error in a first-degree murder prosecution where photographs were introduced to illustrate the medical examiner's testimony and defendant argued that the prosecutor used those photographs to inflame the jury during closing arguments. The medical examiner used the photographs in describing how the bullet entered and excited the victim's skull and the prosecutor used them for the same purpose, drawing a reasonable inference as to the projectile's path based on this evidence.

Am Jur 2d, Trial § 648.

7. Evidence and Witnesses § 2067 (NCI4th)— first-degree murder—investigating officer—lack of blood on defendant

There was no error in a first-degree murder prosecution where defendant testified that he had cradled his wife's head as he drove to the police station after she had been shot, a deputy testified that there was no significant amount of blood on defendant's shirt, and testified that, in his professional opinion, he would have expected quite a bit of blood. The testimony was peripheral at best to the contested issues in the case and, while the deputy perhaps should not have used the expression "in my professional opinion," he recited only a truism which the jurors undoubtedly knew, that defendant would have had blood on his shirt if he had cradled his wife's bloody head.

Am Jur 2d, Expert and Opinion Evidence § 199.

8. Homicide § 323 (NCI4th)— first-degree murder—evidence sufficient—killing in heat of passion

There was no error in a first-degree murder prosecution where the trial court denied defendant's motions to dismiss for insufficient evidence of premeditation and deliberation. If there had been insufficient evidence of premeditation and deliberation, defendant would be guilty of second-degree murder and would not be entitled to have the case dismissed. Moreover, while defendant contended that the only inference that can be drawn is that he shot his wife under a violent passion aroused by sufficient provocation, there is no evidence in the case which shows sufficient provocation to arouse the passion of defendant so that he could not form the intent to kill over some period of time, however short, or that he was not in a cool state of blood.

Am Jur 2d, Homicide §§ 56 et seq., 439.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Duke, J., at the 25 October 1993 Criminal Session of Superior Court, Wayne County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 14 February 1995.

The defendant was tried for the first-degree murder of his wife in a case in which the State did not seek the death penalty. The evidence showed that the defendant and the deceased were married in 1974 and that their marriage was a stormy one. On the evening of 12 November 1992, the couple were arguing in a bar when the defendant told his wife, "I ought to kill you, woman." Later in the evening, the defendant drove his truck into the Town of Mount Olive and shouted to a policewoman to follow him. The policewoman followed the truck to the City Hall. The defendant then told the policewoman that he had shot his wife. The defendant's wife was seated on the passenger side of the truck and had been shot through the head. She died in the hospital.

A Mount Olive policeman testified that he went to the police station and talked to the defendant, who was distraught. He said the defendant told him:

> They were coming back from Goldsboro. They had been to a club up there. She wanted to go to another club or another party. He wanted to go home. He pulled the gun, said, I ought to kill you. He pulled the gun up, said he pulled it the first time. It would not go

off. He pulled it the second time and glass went out on the passenger side and his wife, you know, had been shot.

A pathologist testified that in his opinion the wound was a contact wound and that the gun was being held against the head of the victim when it was fired.

The defendant contended the shooting was accidental. He testified that his wife had attacked him on previous occasions while he was driving his truck and showed the jury two scars which he said resulted from her scratching him. He testified further that he and his wife began to argue as they were riding and that she became more and more angry. He was afraid she would strike him, and he removed a .38-caliber revolver from under the armrest in the truck. He realized that the gun had cocked as it was being removed. In order to uncock it, he held the hammer while he pressed the trigger and let the hammer slowly go down. He placed the pistol on his wife's arm, which was on the armrest, and pointed it at the floor of the truck. The defendant said that as he was completing the uncocking of the pistol, his wife jerked her arm and the gun went off.

The defendant was found guilty of first-degree murder. He appealed to this Court.

Michael F. Easley, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

Knox, Knox, Freeman & Brotherton, by H. Edward Knox; Duke & Brown, by John E. Duke; Jonathan S. Williams; and Adrian M. Lapas, for defendant-appellant.

WEBB, Justice.

[1] In his first assignment of error, the defendant argues two questions pertaining to evidence. He first says it was error for the court to exclude testimony as to the victim's reputation for violence.

The defendant contended that the killing in this case resulted from an accident. In *State v. Winfrey*, 298 N.C. 260, 258 S.E.2d 346 (1979), we held that evidence of a victim's violent character is irrelevant in a homicide case when the defense of accident is raised. The character of the deceased in such a case is not at issue. *See also State v. McCray*, 312 N.C. 519, 324 S.E.2d 606 (1985).

The Evidence Code, chapter 8C of the North Carolina General Statutes, became effective on 1 July 1984, after the trials of the above two cases. N.C.G.S. § 8C-1, Rule 404 provides in part:

(a) *Character evidence generally.*—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

. . . .

(2) Character of victim.—Evidence of a pertinent trait of character of the victim of the crime offered by an accused

. . . .

N.C.G.S. § 8C-1, Rule 404 (Supp. 1994). We do not believe this rule changes the law. We required before the rule was adopted that a character trait must be pertinent to be admissible. The rule does not define "pertinent," and we believe it left intact our rule which holds that the deceased's character is not pertinent in this case. It was not error to exclude this testimony.

[2] The defendant next argues that it was error not to allow him or a highway patrolman to testify about the details of the victim's arrest for driving while impaired approximately two weeks before she was killed. He offered this evidence to rebut the State's evidence that there was ill will between him and his wife. The defendant was allowed to testify that he procured his wife's release and brought her home after she had been taken to jail for driving while impaired. This was the crucial testimony for defendant to prove he had good will toward his wife. The details as to how she was arrested were peripheral to what he was trying to prove. It was not error to exclude this testimony.

This assignment of error is overruled.

[3] The defendant next assigns error to the court's definition of reasonable doubt in its preliminary instructions and in its charge to the jury. The defendant takes exception to the following instruction: "[A] reasonable doubt is not a vain or fanciful doubt. . . . Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt." The defendant, relying on *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990), *overruled by Victor v. Nebraska*, 511 U.S. —, 127 L. Ed. 2d 583 (1994), argues that this language lowers the standard for the State's burden of proof.

We find no error in these instructions. "Vain" is defined in *Webster's Ninth New Collegiate Dictionary* as "having no real value." Webster's Ninth New Collegiate Dictionary 1301 (1991). "Fanciful" is

defined as "marked by fancy or unrestrained imagination rather than by reason and experience." *Id.* at 448. The court, by using the two adjectives to demonstrate what is not a reasonable doubt, did not increase the strength of the evidence necessary to create a reasonable doubt. "Fully" is defined in *Webster's Ninth New Collegiate Dictionary* as "in a full manner or degree; completely." *Id.* at 497. "Entirely" is defined as "to the full or entire extent; completely." *Id.* at 415. We do not believe the use of adverbs that mean the juror must be totally, wholly, and completely satisfied lowers the burden of proof to less than a reasonable doubt.

This assignment of error is overruled.

[4] The defendant next assigns error to the charge of the court on accident. The court charged on accident immediately prior to giving its final mandate. At the end of the final mandate, the court charged that if the jury found the death was an accident, it should find the defendant not guilty. The defendant, relying on *State v. Dooley*, 285 N.C. 158, 203 S.E.2d 815 (1974), says that nearly two pages of the transcript are occupied by the final mandate as to the various degrees of homicide of which he could be found guilty, while there was only a passing reference to a verdict of not guilty by reason of accident. He says this was error.

The court correctly charged on accident immediately before giving the final mandate. It then referred to the defense of accident in the final mandate. We believe the jury must have understood the defense of accident. *Dooley* does not govern this case. In that case, the court did not charge in the final mandate that the jury should find the defendant not guilty if it found the defendant acted in self-defense. *Dooley*, 285 N.C. at 166, 203 S.E.2d at 820. We said, without a self-defense charge, the jury could have assumed a verdict of not guilty by reason of self-defense was not a permissible verdict. *Dooley*, 285 N.C. at 166, 203 S.E.2d at 820. In this case, the jury was told in the final mandate that if the jury believed the death of the victim was caused by an accident, it would find the defendant not guilty.

This assignment of error is overruled.

[5] The defendant next argues that he should have a new trial because of an improper jury argument by the prosecuting attorney. He concedes no objection was interposed when the argument was made, but he contends it was so egregious that the court should have intervened *ex mero motu*. *State v. Howell*, 335 N.C. 457, 439 S.E.2d 116 (1994).

The defendant says the prosecuting attorney asked the jurors to imagine themselves in the role of the victim, which was improper. He concedes there are no cases which so hold in this jurisdiction but cites cases from other jurisdictions. *State v. White*, 246 S.C. 502, 144 S.E.2d 481 (1965); *McReynolds v. Commonwealth*, 177 Va. 933, 15 S.E.2d 70 (1941).

The argument to which the defendant objects was as follows:

> If you look at the facts, it is very hard to believe anything the defendant said. He doesn't mention anything at all to anybody about the gun being to her head in any fashion until he took the stand and then he tried to explain it away but you look at the facts and it is very hard to reconcile what the physical facts are in his version. They just don't fit. What it does fit, what the physical facts do fit is with some one [sic] being a driver, pulling out a gun and someone sitting up in an almost upright position and having the gun stuck to the left side of *your* head and someone to *your* left pulling the trigger twice and blowing a hole through *your* head all the way out the window.

(Emphasis added.) The defendant argues that the prosecuting attorney, by using the terms "your head" and "your left," asked the jurors to put themselves in the place of the victim.

Assuming the defendant is right in his contention that a prosecuting attorney may not ask jurors to place themselves in the position of the victim, we do not believe it was error for the court not to intervene *ex mero motu*. Nothing in the argument indicates that the prosecuting attorney sought to personalize the experience by assuming the role of the victim. The use of the word "your" could not have misled the jury. At worst, it was a *lapsus linguae* that did no harm.

State v. Williams, 317 N.C. 474, 346 S.E.2d 405 (1986), upon which the defendant relies, is not helpful to him. In that case, the prosecutor's argument was not based on the evidence, which is not so in this case.

This assignment of error is overruled.

[6] The defendant also contends the prosecutor improperly utilized photographs introduced solely for the purpose of illustrating the medical examiner's testimony. The defendant asserts that during arguments, these photographs were employed to inflame the passions and prejudices of the jury.

The portion of the argument to which the defendant objects included:

> Now what do the facts show. The facts show clearly, particularly when you look at the autopsy pictures, that and you look at the overall picture where on the left side of her head was the entrance wound which the doctor described as a contact wound. It comes out on the right side, which is depicted by this picture and you see a little bit more clearly in this picture where the bullet comes in a little bit over the ear, comes out over here a little bit above her ear on the right side and keeps going through the window which would indicate I would argue to you someone sitting up in the pickup truck, someone to your left with a gun that's pointed on the left side of their head and sticking it and pulling the trigger as he said twice.

"A prosecutor in a criminal case is entitled to argue vigorously all of the facts in evidence, any reasonable inference that can be drawn from those facts and the law that is relevant to the issues raised by the testimony." *State v. Maynard*, 311 N.C. 1, 14-15, 316 S.E.2d 197, 205, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984); *accord State v. Quesinberry*, 325 N.C. 125, 140, 381 S.E.2d 681, 691 (1989), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 288, 401 S.E.2d 632 (1991). The photographs were admitted into evidence for illustrative purposes, and the medical examiner utilized them in describing how the bullet entered and exited the victim's skull. The prosecutor used the photographs for the same purpose and drew a reasonable inference as to the projectile's path based on this evidence. We find no error and certainly no error arising to the level of gross impropriety.

This assignment of error is overruled.

[7] The defendant next assigns error to the failure of the court to strike the testimony of George Ratcher, a deputy sheriff who investigated the case. Deputy Ratcher testified that the defendant told him that after his wife was shot, he cradled her head as he drove her to the police station. The following colloquy then occurred:

> Q. Now what do you recall Mr. Goodson saying concerning this shooting incident, sir?
>
> A. . . . It was noted that Goodson, although he said he craddled [sic] his wife, there was no significant amount of blood on his shirt.

Q. What do you mean no significant amount of blood?

A. . . . In my professional opinion if he had held her or craddled [sic] her, I would think there would be quite a bit of blood on his shirt.

The defendant argues that this was improper testimony designed to impeach him by saying he was lying. He says that Deputy Ratcher had no personal knowledge upon which to make the statement and that Ratcher's "professional opinion" was based on nothing. This testimony by Deputy Ratcher was peripheral at best to the contested issues in the case. He recited only a truism which the jurors undoubtedly knew, that if the defendant cradled his wife's bloody head, he would have had blood on his shirt. Perhaps Deputy Ratcher should not have used the expression "in my professional opinion," but we are confident this expression had no effect on the jury.

This assignment of error is overruled.

[8] The defendant's last assignment of error is to the denial of his motion to dismiss made at the close of the evidence and his motion to set aside the verdict. He says there was not sufficient evidence to support findings of premeditation and deliberation. If we were to hold there is not sufficient evidence of premeditation and deliberation, the defendant would not be entitled to have the case dismissed. He would be guilty of second-degree murder. *State v. Fleming*, 296 N.C. 559, 251 S.E.2d 430 (1979).

The defendant concedes there was sufficient evidence of an intent to kill. He says that the parties had been quarreling all night, and the only inference that can be drawn is that he shot his wife under a violent passion aroused by sufficient provocation. We do not believe there is any evidence in the case which shows sufficient provocation to arouse the passion of the defendant so that he could not form the intent to kill over some period of time, however short, or that he was not in a cool state of blood. The defendant was upset with his wife but not justifiably to the extent to excuse him of first-degree murder. *State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994).

This assignment of error is overruled.

NO ERROR.

VICTOR O. McINTYRE AND LOUISE M. McINTYRE v. LORING McINTYRE AND KATHRYN McINTYRE

No. 142PA94

(Filed 8 September 1995)

Divorce and Separation § 383 (NCI4th)— grandparents' visitation rights—child's family intact and no custody proceeding—no right to sue for visitation

The legislature intended to grant grandparents a right to visitation with a minor grandchild only in those situations specified in N.C.G.S. §§ 50-13.2(b1), 50-13.5 and 50-13.2A, that is, only in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative. Therefore, N.C.G.S. § 50-13.1(a) does not grant grandparents the right to sue for visitation rights with a minor child when the child's family is intact and no custody proceeding is ongoing.

Am Jur 2d, Divorce and Separation § 1002.

Grandparents' visitation rights. 90 ALR3d 222.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order entered 19 October 1993 by Cash, J., in District Court, Buncombe County. Heard in the Supreme Court 8 May 1995.

David P. Parker for plaintiff-appellants.

Brock, Drye & Aceto, P.A., by Michael W. Drye; and Craig L. Parshall, of counsel, for defendant-appellees.

WHICHARD, Justice.

On 4 December 1992 plaintiffs Victor and Louise McIntyre filed a complaint against defendants Loring and Kathryn McIntyre seeking visitation rights with defendants' two minor children, Meghan and Rachel McIntyre, who at that time were ages seven and four respectively. Defendant Loring McIntyre is plaintiffs' son. Plaintiffs, as grandparents of Meghan and Rachel McIntyre, alleged that it was in the "best interest of the minor children that the Plaintiffs be granted visitation pursuant to N.C.G.S. [§§] 50-13.1(a) and 50-13.2(b)(1)." Defendants' family was intact when plaintiffs filed their complaint and at all relevant times; no custody proceeding was ongoing.

On 3 February 1993 defendants moved to dismiss the complaint based on Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, alleging that the trial court lacked subject matter jurisdiction to interfere with defendants' right to determine with whom their children would associate. Defendants contended in their motion that either N.C.G.S. § 50-13.1(a) is unconstitutional or that plaintiffs, as grandparents, were not "the intended beneficiaries of the recent legislative amendment" to that statute. On 19 October 1993 Judge Gary Cash entered an order dismissing plaintiffs' complaint based on the conclusion that N.C.G.S. § 50-13.1(a) is unconstitutional in that it deprives defendants of their right to determine with whom their children will associate.

On 4 November 1993 plaintiffs gave notice of appeal to the Court of Appeals. On 31 March 1994 defendants petitioned this Court for discretionary review prior to a determination by the Court of Appeals. On 16 June 1994 this Court allowed defendants' petition.

Defendants argue that N.C.G.S. § 50-13.1(a), if applied here, is unconstitutional. Prior to reaching the constitutional issue, however, we must determine whether N.C.G.S. § 50-13.1(a) applies in this situation, that is, whether it allows grandparents to sue for visitation rights with a minor child when the child's family is intact and no custody proceeding is ongoing. If it does not, the trial court lacked subject matter jurisdiction over plaintiffs' suit.

N.C.G.S. § 50-13.1 was enacted in 1967 and amended in 1989 to add the last sentence. It provides in pertinent part:

> **§ 50-13.1. Action or proceeding for custody of minor child.**
>
> (a) Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. *Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both.*

N.C.G.S. § 50-13.1(a) (Supp. 1994) (emphasis added). Plaintiffs argue that the amendment which added the last sentence grants them the right to sue for visitation with their grandchildren even when no custody proceeding is ongoing. According to plaintiffs, in accord with the amendment, the first sentence of the statute should be read as follows: "Any . . . relative . . . claiming the right to [visitation with] a minor child may institute an action or proceeding for [visitation with]

such child, as hereinafter provided." We disagree with plaintiffs' interpretation and conclude that this statute does not apply to the fact situation presented.

This Court has stated:

> "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling; and this is true *a fortiori* when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage."

Food Stores v. Board of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (quoting 82 C.J.S. *Statutes* § 369, at 839-43 (1953)). By enacting N.C.G.S. § 50-13.1 in 1967, "the Legislature clearly sought to eliminate conflicting and inconsistent custody statutes and to replace them with a comprehensive act governing all custody disputes." *Oxendine v. Dept. of Social Services*, 303 N.C. 699, 706, 281 S.E.2d 370, 374 (1981). This statute "was intended as a broad statute, covering a myriad of situations in which custody disputes are involved." *Id.* at 707, 281 S.E.2d at 375. We therefore must view it as a general statute.

As we reaffirmed in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), the common law rule is that parents have a "paramount right . . . to custody, care and nurture of their children," *id.* at 402, 445 S.E.2d at 903, and that that right includes the right to determine with whom their children shall associate. *id.* at 403, 445 S.E.2d at 904-05. *See Moore v. Moore*, 89 N.C. App. 351, 353, 365 S.E.2d 662, 663 (1988) (holding that N.C.G.S. § 50-13.2(b1) authorizes the court to provide for visitation rights of grandparents when custody of minor children is at issue in ongoing proceeding but does not allow court to enter a visitation order when custody is not at issue; parents who have lawful custody of the minor children have the prerogative to determine with whom their children shall associate); *Acker v. Barnes*, 33 N.C. App. 750, 752, 236 S.E.2d 715, 716 (holding that paternal grandmother and aunt did not have right to seek visitation with minor children who

were in lawful custody of natural mother and adoptive father because parents in lawful custody of their minor children have the prerogative to determine with whom their children shall associate), *disc. rev. denied*, 293 N.C. 360, 238 S.E.2d 149 (1977). N.C.G.S. § 50-13.1(a), however, gives a trial court jurisdiction to determine custody: (1) in those situations where a parent's paramount right to custody may be overcome—for example, when the parent is unfit, has abandoned or neglected the child, or has died, *see Oxendine*, 303 N.C. at 706, 281 S.E.2d at 374 (holding that N.C.G.S. § 50-13.1 is not "restricted to custody disputes involved in separation or divorce"); and (2) when, by reason of separation or divorce, custody is at issue between the parents.

In contrast to the generality of N.C.G.S. § 50-13.1(a), several other statutes in chapter 50 address one aspect of a determination of legal custody, that of physical custody, here in the form of visitation rights of grandparents. See *Clark v. Clark*, 294 N.C. 554, 575-76, 243 S.E.2d 129, 142 (1978) ("Visitation privileges are but a lesser degree of custody."); *Charett v. Charett*, 42 N.C. App. 189, 193, 256 S.E.2d 238, 241 ("Custody and visitation are two facets of the same issue."), *disc. rev. denied*, 298 N.C. 294, 259 S.E.2d 299 (1979).

The legislature has enacted N.C.G.S. § 50-13.2(b1), which provides:

> **§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.**
>
> . . . .
>
> (b1) An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

N.C.G.S. § 50-13.2(b1) (1987). This statute allows a trial court to grant visitation rights to grandparents in a custody order.

The legislature also has provided that grandparents may make a motion in the cause for custody or visitation after the custody of a minor child has been determined. After an initial custody determination, the trial court retains jurisdiction of the issue of custody until the death of one of the parties or the emancipation of the youngest child. *Shoaf v. Shoaf*, 282 N.C. 287, 290, 192 S.E.2d 299, 302 (1972). N.C.G.S. § 50-13.5(j) provides:

> **§ 50-13.5. Procedure in actions for custody or support of minor children.**
>
> . . . .
>
> (j) Custody and Visitation Rights of Grandparents.—In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

N.C.G.S. § 50-13.5(j) (Supp. 1994).

Further, the legislature has enacted N.C.G.S. § 50-13.2A, which allows grandparents of a minor child who has been adopted by a stepparent or a relative of the child to institute an action for visitation. That statute provides:

> **§ 50-13.2A. Action for visitation of an adopted grandchild.**
>
> A biological grandparent may institute an action or proceeding for visitation rights with a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. A court may award visitation rights if it determines that visitation is in the best interest of the child. An

> order awarding visitation rights shall contain findings of fact which support the determination by the judge of the best interest of the child. Procedure, venue, and jurisdiction shall be as in an action for custody.

N.C.G.S. § 50-13.2A (1987).

These statutes address "a part of the same subject [as N.C.G.S. § 50-13.1(a)] in a more minute and definite way." *Food Stores*, 268 N.C. at 628, 151 S.E.2d at 586. We therefore must read these special statutes in conjunction with N.C.G.S. § 50-13.1(a) so as to harmonize them and give effect to a consistent legislative policy. Under them, a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative.

These special provisions therefore control our interpretation of N.C.G.S. § 50-13.1(a). The legislature's creation of special statutes to provide for grandparents' visitation rights suggests that it did not intend N.C.G.S. § 50-13.1(a) as a broad grant to grandparents of the right to visitation when the natural parents have legal custody of their children and are living with them as an intact family. *Accord Oxendine*, 303 N.C. at 707, 281 S.E.2d at 375 (holding that N.C.G.S. § 50-13.1(a) does not grant foster parents the right to challenge statutory grant of custody to the Department of Social Services because N.C.G.S. § 50-13.1 covers a "myriad of situations in which custody disputes are involved," and a narrow statute, N.C.G.S. § 48-9.1(1), was intended as an exception to the general grant of standing to contest custody in N.C.G.S. § 50-13.1). Rather, it appears that the legislature intended to grant grandparents a right to visitation only in those situations specified in these three statutes. Had it intended otherwise, it logically would have repealed these special statutes when it amended N.C.G.S. § 50-13.1(a), the general statute. *See Petersen*, 337 N.C. at 405-06, 445 S.E.2d at 906 (agreeing with trial court's reasoning in *Ray v. Ray*, 103 N.C. App. 790, 407 S.E. 2d 592 (1991), that interpreting N.C.G.S. § 50-13.1(a) as a broad grant to strangers of the right to bring custody or visitation actions "would nullify any need for G.S. [§§] 50-13.2(b1) and 50-13.2A, neither of which [has] been repealed").

The language of the 1989 amendment to N.C.G.S. § 50-13.1(a) does not change our interpretation of this statute. The amendment probably was added to provide that in certain contexts "custody" and "visitation" are synonymous; however, here it is clear that in the context of grandparents' rights to visitation, the two words do not mean the same thing. Reading N.C.G.S. § 50-13.1(a) in conjunction with

N.C.G.S. §§ 50-13.2(b1), -13.5(j), and -13.2A strongly suggests that the legislature did not intend "custody" and "visitation" to be interpreted as synonymous in the context of grandparents' rights. The three special statutes provide grandparents with the right to seek "visitation" only in certain clearly specified situations. Those situations do not include that of initiating suit against parents whose family is intact and where no custody proceeding is ongoing. A legislative intent contrary to that for which plaintiffs argue therefore seems clear.

For these reasons, we hold that N.C.G.S. § 50-13.1(a) does not grant plaintiffs the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact.

Plaintiffs assign error to the trial court's sustaining of defendants' objection to the introduction of the depositions of defendants prior to its ruling on the motion to dismiss. In light of our holding that the statute does not grant plaintiffs the right to sue defendants for visitation, we need not address this issue.

For the reasons stated, the order of the trial court is affirmed.

AFFIRMED.

SAVE OUR RIVERS, INC., AND JOHNNY R. WALKER, MARY E. WALKER, HELEN C. BAYLEY, GEORGE G. LANERI, ELIZABETH C. LANERI, PAT THOMPSON, DOUG THOMPSON, MORRIS BRYSON, JANICE McCLURE, ALENE MUNGER, KIM THOMPSON, EUNICE QUEEN, JOHN NORTHERN, JOYCE NORTHERN, NELLIE CARPENTER, CHRISTINE WEBB, BUTCH DEAL, W. M. MOSES, JAMES STEPHEN RABY, PEARL MOSES, BETA TILSON, HALLIE STILES, JACK McEACHIN, CLAIRE McEACHIN, JOSEPH J. JOHNSON, RUTH C. JOHNSON, ROBERT WATERS, JAMES BOWSER, PAUL E. GEER, FLORENCE GEER, CAROLINE RONEY, DANNY McDOWELL, VIRGIL L. WATKINS, ROSALIE K. WATKINS, RANDY KUSHIN, ROBERT J. WILLIAMS AND MARY EDWARDS, PETITIONERS V. TOWN OF HIGHLANDS, N.C. DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, DIVISION OF ENVIRONMENTAL MANAGEMENT, AND JONATHAN B. HOWES, SECRETARY, RESPONDENTS

No. 166PA94

(Filed 8 September 1995)

Administrative Law and Procedure § 63 (NCI4th)— modification of wastewater discharge permit—insufficient petition for contested case hearing

Petitioners were not entitled to a contested case hearing by the Office of Administrative Hearings (OAH) of a decision of the

Division of Environmental Management (DEM) granting a modification of respondent town's permit to discharge wastewater into a river to allow the relocation of its wastewater treatment plant because petitioners failed to satisfy the requirement of N.C.G.S. § 150B-46 that the petition explicitly state what exceptions are taken to the decision where the petition requested only that petitioners be allowed to present further evidence as to the adverse environmental impact on the river and surrounding area; this question was determined by the superior court; and the petition did not state that petitioners challenged the decisions of the DEM not to prepare an environmental impact review and to authorize relocation of the plant. This requirement of N.C.G.S. § 150B-46 was not met because petitioners attached to the petition the record of the OAH proceedings which identifies petitioners' exceptions to the agency's decision where the OAH proceedings were not made a part of the record on appeal.

Am Jur 2d, Administrative Law §§ 562-564.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 113 N.C. App. 716, 440 S.E.2d 334 (1994), reversing an order dismissing the petitioners' petition to obtain judicial review under N.C.G.S. § 150B-43 by Lewis (Robert D.), J., at the 13 July 1992 Session of Superior Court, Macon County. Heard in the Supreme Court 10 January 1995.

This case involves the issuance by the Division of Environmental Management (DEM) of the North Carolina Department of Environment, Health, and Natural Resources (DEHNR) of a modification of a permit to the Town of Highlands (Highlands or Town) to discharge wastewater into the Cullasaja River. On 21 January 1986, Highlands was granted a modification of its then existing permit to increase the capacity of its wastewater treatment plant (WWTP) from 248,000 gallons per day (gpd) to 500,000 gpd. The permit was also modified to allow Highlands at a later date to discharge its effluent into Cullasaja River below the dam at Lake Sequoyah as well as into Mill Creek, which is a tributary to Lake Sequoyah. In 1988 the permit was renewed.

In October 1990, Highlands applied to the DEM to have the permit modified to allow the Town to relocate the WWTP to a site near the

Cullasaja discharge point. A public hearing was held at which some of the petitioners appeared. Because this modification did not affect the amount or point of discharge already allowed, the DEM determined that it was a "minor construction activity" under the rules of the Environmental Management Commission. For this reason, the DEM found "no significant impact" and concluded no environmental assessment or environmental impact statement was required. It issued the permit modification on 3 April 1991.

On 1 May 1991, Save Our Rivers, Inc., filed a petition for a contested case hearing with the Office of Administrative Hearings (OAH). The respondents petitioned the Superior Court, Wake County, for a writ of certiorari, which was granted. The superior court then ordered the OAH to dismiss the petition on the ground the petitioners did not have a right to a contested case hearing by the OAH. On 3 August 1993, the Court of Appeals affirmed the order of the superior court in an unpublished opinion. *Town of Highlands v. Save Our Rivers, Inc.*, 111 N.C. App. 458, 434 S.E.2d 252 (1993).

On 28 February 1992, the petitioners petitioned the Superior Court, Macon County, for review pursuant to N.C.G.S. § 150B-43. Judge Robert D. Lewis accepted the petition although it was not timely filed and ruled that the only question raised by the petition was whether the case should be remanded to take further evidence. Judge Lewis held that the evidence the petitioners desired to introduce was not new, noncumulative evidence material to the issues. N.C.G.S. § 150B-49 (1987). He denied the petitioners' petition.

The Court of Appeals affirmed the portion of the order of superior court which held the petitioners could not present further evidence. It reversed that part of the order which held the appellees had not petitioned for judicial review of the issuance of an amended permit.

We granted discretionary review.

Roberts Stevens & Cogburn, P.A., by William Clarke, for petitioner-appellees.

Michael F. Easley, Attorney General, by Daniel F. McLawhorn, Special Deputy Attorney General, and David W. Berry, Associate Attorney General, for respondent-appellees North Carolina Department of Environment, Health, and Natural Resources, Division of Environmental Management; and Jonathan B. Howes, Secretary.

John C. Hunter for respondent-appellant Town of Highlands.

WEBB, Justice.

We note that the holding of the Court of Appeals in this case that the petitioners did not have the right to a contested case hearing in the OAH has been overruled in *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 447 S.E.2d 768, *reh'g denied*, 338 N.C. 314, 451 S.E.2d 634 (1994). There was no appeal in this case from the decision of the Court of Appeals. Although we now know it was erroneous, the holding of the Court of Appeals is *res judicata* and is the law of this case. *King v. Grindstaff*, 284 N.C. 348, 360, 200 S.E.2d 799, 808 (1973).

The question posed by this appeal is whether the petitioners in their petition to the superior court from the order of the DEM brought forward for review any question other than the petitioners' right to present additional evidence. We hold that they did not do so.

N.C.G.S. § 150B-46 provides, "[t]he petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks." N.C.G.S. § 150B-46 (1991). The petitioners say in their petition that the modification to the permit was granted "without any evaluation of potential adverse impacts on the environment of the Cullasaja River and Macon County and without any evaluation of alternative methods of wastewater treatment." They also say:

> 6. Petitioners bring this action now to protect and preserve their right to have the substantive issues herein reviewed by the Superior Court.
>
> 7. Petitioners are prepared to present evidence and would request that they be allowed to present evidence in connection with this Petition as authorized by NCGS 150B-49, to show that the potential for adverse impact on the environment of the Cullasaja River does exist if the Town of Highlands is allowed to proceed with the construction and operation of the Wastewater Treatment Plant.

In the prayer for relief, the petitioners said:

> WHEREFORE, Petitioners respectfully request that this Petition be allowed and that Petitioners be allowed to present additional evidence as to the potential adverse environmental impact on the Cullasaja River and that construction of and discharge from the proposed wastewater treatment plant of the Town of Highlands be stayed pending resolution of this matter.

As we read the petition, the only thing the petitioners requested was to be allowed to present further evidence. This question was determined by the superior court. The petitioners say at one place that the modified permit was issued without any evaluation of a potential adverse impact on the environment of the river and Macon County and at another place that they want to preserve the substantive issues for review. They do not say, however, that they challenge the decision of the DEHNR to authorize the construction of the plant or the decision of the DEM not to prepare an environmental review for the permit modification.

With respect to the second requirement of the statute, that the petition contain a statement as to what relief the petitioners seek, they asked only that they be allowed to present additional evidence. The petition does not satisfy the requirement of N.C.G.S. § 150B-49, that the petitioners explicitly state their exceptions to the proceedings. *See Vann v. N.C. State Bar*, 79 N.C. App. 173, 339 S.E.2d 97 (1986).

The petitioners contend and the Court of Appeals found that the requirements of N.C.G.S. § 150B-46 were met because the petitioners attached to the petition the record of the OAH proceedings which sufficiently identifies the petitioners' exceptions to the agency's decision. The Court of Appeals said it was obvious the petitioners were attacking the "agency's failure to perform an environmental assessment before modifying Highlands' permit because the agency determined the modification was a 'minor construction activity.' " *Save Our Rivers, Inc. v. Town of Highlands*, 113 N.C. App. 716, 724, 440 S.E.2d 334, 339. The difficulty for us is that the OAH proceedings were not made a part of the record on appeal. We cannot consider them. N.C. R. App. P. 9; *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976).

For the reasons stated in this opinion, we reverse that part of the decision of the Court of Appeals which holds the petitioners are entitled to further judicial review.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA v. GERMAN JERMAINE GRACE

No. 228A94

(Filed 8 September 1995)

1. Evidence and Witnesses § 113 (NCI4th)— felony murder—witness gunman in another armed robbery—excluded—no error

The trial court did not err in a first-degree murder prosecution arising from an armed robbery by excluding testimony that an accomplice who testified against defendant had held a gun on the victim in a prior robbery. Although defendant argued that this evidence was relevant to prove that the accomplice had used the gun in the robbery in this case, it was inadmissible under N.C.G.S. § 8C-1, Rule 404(b) and *State v. McNeil*, 326 N.C. 712. It was not error to exclude evidence that tended to prove a person other than the defendant had committed a crime when the evidence did not show the same person had committed both crimes.

Am Jur 2d, Evidence § 587.

2. Evidence and Witnesses § 3050 (NCI4th)— felony murder—witness gunman in another armed robbery—bias

There was no error in a first-degree murder prosecution arising from an armed robbery in the exclusion of evidence that an accomplice who testified against defendant had held the gun in a previous robbery. Although defendant contended that this evidence was admissible to show bias, if the witness had shot the victim in this case, defendant would be guilty of felony murder, the crime of which he was convicted.

Am Jur 2d, Witnesses §§ 901, 968.

3. Evidence and Witnesses § 308 (NCI4th)— felony murder—armed robbery—defendant's possession of gun

There was no error in a first-degree murder prosecution arising from an armed robbery where the court admitted testimony that a crowd gathered at a club eleven days after the murder, one of the crowd became belligerent, defendant approached the crowd and asked who was causing the trouble, the belligerent individual advanced on defendant, defendant fired several shots over his head, the crowd dispersed, defendant dropped the pistol as he was running from the scene, and the gun was recovered and identified as having been used in the murder. Defendant concedes

that his having dropped the pistol which was possibly used as the murder weapon was admissible, but contends that the evidence that he fired over a person's head was irrelevant. This was not prejudicial; it shows that defendant was not the aggressor and that he acted to protect himself and other people.

Am Jur 2d, Evidence §§ 452, 453.

4. Jury § 137 (NCI4th)— felony murder—armed robbery—jury selection—questions regarding race

There was no abuse of discretion in a first-degree murder prosecution arising from an armed robbery where defendant contended that he was not allowed to question potential jurors extensively enough as to their racial attitudes to determine whether to exercise challenges for cause or peremptory challenges. The questions which defendant was allowed to ask the potential jurors were sufficient to allow him to probe their racial attitudes. At the least, the questions which were not allowed would not have been of any further help in making this judgment.

Am Jur 2d, Jury §§ 273.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Greeson, J., at the 9 August 1993 Criminal Session of Superior Court, Guilford County, upon a jury verdict of guilty of first-degree murder in a case in which the defendant was capitally tried. Heard in the Supreme Court 13 March 1995.

The defendant was tried for the 9 December 1992 armed robbery and murder of a Domino's Pizza deliveryman. The evidence showed the defendant and four accomplices were looking for some place to rob. The five men were in front of Domino's Pizza, which was closed, when a delivery truck arrived.

The five men pulled the driver from the truck and robbed him. As the other men were leaving the scene, the defendant shot the victim three times. Two of the shots would have been fatal. The angle of the wounds indicated that the defendant was standing over the victim when the shots were fired.

The defendant was convicted of felony murder and robbery with a dangerous weapon. The jury could not reach a verdict after a sentencing proceeding, and the court sentenced the defendant to life in prison. Judgment was arrested on the robbery conviction.

The defendant appealed.

Michael F. Easley, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

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

WEBB, Justice.

[1] T he defendant first assigns error to a ruling on the evidence. Tim Rice had testified for the State that he was an accomplice of the defendant in the robbery and that the defendant shot the deliveryman. The defendant called a witness who testified he was in prison serving a sentence for armed robbery. He would have testified that the robbery for which he was serving had occurred approximately one month before the robbery involved in this case and that Tim Rice had held a gun on the victim in the previous robbery. The defendant assigns error to the exclusion of this testimony. We find no error.

The defendant argues that the evidence that Tim Rice had used a gun in the previous robbery was relevant to prove he had used the gun in the robbery in this case. This argument by the defendant runs afoul of N.C.G.S. § 8C-1, Rule 404(b), which says that evidence of other acts "is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C.G.S. § 8C-1, Rule 404(b) (1992); *see State v. Bogle*, 324 N.C. 190, 376 S.E.2d 745 (1989). If, as the defendant contends, there is some relevancy to this testimony, it is inadmissible under Rule 404(b).

This case is distinguishable from *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987), and *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988), upon which the defendant relies. In *Cotton*, we held it was error not to allow a defendant to introduce evidence that someone else had committed another crime because the evidence showed the same person had committed both crimes. Proof that someone else had committed the other crime was proof he had committed the crime for which the defendant was being tried. The defendant attempted to prove Tim Rice was the triggerman in this case because he had used a pistol in another case. In *McElrath*, we held it was error to exclude evidence that showed directly that someone else had committed the crime. The defendant did not attempt in that case to prove someone else had committed the crime for which he was being tried by showing the other person had committed some other bad act. This

case is more like *State v. McNeill*, 326 N.C. 712, 392 S.E.2d 78 (1990), in which we held it was not error to exclude evidence that tended to prove a person other than the defendant had committed a crime when the evidence did not show the same person had committed both crimes.

[2] The defendant also contends this testimony was admissible to show bias on the part of Tim Rice. He concedes that pursuant to N.C.G.S. § 8C-1, Rule 608(b), this extrinsic evidence cannot be used to attack the credibility of Tim Rice but says it can be used to show bias. The purpose for showing bias would be to show Tim Rice was not being truthful. This would be an attack on his credibility.

The defendant was hardly damaged by the exclusion of this evidence. If Tim Rice, rather than the defendant, shot the victim, the defendant would be guilty of felony murder for acting in concert with Tim Rice. *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979). This is the crime for which he was convicted.

This assignment of error is overruled.

[3] The defendant next assigns error to the admission of evidence in regard to an incident that occurred outside the Club Suavey in High Point eleven days after the murder for which the defendant was being tried. The evidence showed that a crowd had gathered outside the Club Suavey and that there was a belligerent person among them. Defendant approached the crowd and asked who was causing the trouble. The belligerent person then turned on the defendant and advanced toward him. The defendant fired several shots over the head of the man who was advancing on him. The crowd dispersed, and as the defendant was running from the scene, he dropped the pistol. The gun was recovered by an officer and was later identified as being used in the murder of the deliveryman for Domino's Pizza.

The defendant concedes that evidence showing he dropped a gun which was possibly used as the murder weapon in the crime charged was admissible against him. He says, however, that the evidence that he shot over a person's head was irrelevant and should have been excluded. *United States v. Burke*, 948 F.2d 23 (1st Cir. 1991). We have held that evidence of another crime is admissible if it shows the defendant was in possession of a gun used in the commission of the crime for which the defendant is being tried. *State v. Rannels*, 333 N.C. 644, 430 S.E.2d 254 (1993); *State v. Garner*, 331 N.C. 491, 417 S.E.2d 502 (1992). The evidence about which the defendant com-

plains was not prejudicial to him. It shows he was not the aggressor and that he acted to protect himself and other people at the Club Suavey.

This assignment of error is overruled.

[4] In his last assignment of error, the defendant contends that while the jury was being selected, he was not allowed to question potential jurors extensively enough as to their racial attitudes to determine whether to exercise challenges for cause or peremptory challenges. The defendant is black, and the victim was white. The defendant says he was only allowed to ask questions calling for conclusory answers.

The defendant cites as an example of the restrictive nature of the *voir dire* one instance where a potential juror had said that he did not believe a black man convicted of murdering a white should be sentenced to die because he was black. The defendant then asked the potential juror, "Why not?" and the court sustained an objection to this question. The defendant cites as a second example the sustaining of an objection to a question as to whether the potential juror would let the fact that she was black affect her verdict. The court then allowed the question in a different form. The court also sustained an objection to a question of a school teacher as to whether many of her black pupils had committed crimes.

The court allowed the following questions of other potential jurors: "You think if a black man is convicted of killing a white man he too ought to die?" "Would you be concerned of what your neighbors might say if you're part of a jury that let a black man go for killing a white man?" "You think you would feel pressure to find him guilty because you are black?" "Do you think you'd feel pressure to find him not guilty because you are black?" "[I]f a black man is convicted of murdering a white man, do you believe the black man should die?" "Would you in any way consider German Grace and the victim's race as evidence of German's guilt?" "Would you consider German Grace's race of being black and the victim's race being white as evidence of German's guilt?" "In deciding German Grace's guilt or innocence, would you consider his race is black and the deceased's race is white as any evidence of German's guilt or innocence?" "Do you think that it [death penalty] should be imposed in a case where the defendant is black and the victim is white?"

We believe the questions which defendant was allowed to ask the potential jurors were sufficient to allow him to probe their racial atti-

tudes. At the least, the questions which were not allowed would not have been of any further help in making this judgment. The court did not abuse its discretion. *State v. Robinson*, 330 N.C. 1, 12, 409 S.E.2d 288, 294 (1991).

We do not agree with the defendant that *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992), has changed the rule of *Robinson*. *Morgan* dealt with a reverse *Witherspoon* question and did not otherwise question the discretion of trial judges in conducting jury selection proceedings.

This assignment of error is overruled.

NO ERROR.

MOORE v. FRENCH

[341 N.C. 646 (1995)]

STEPHEN LOUIS MOORE	)	
	)	
v.	)	ORDER
	)	
JAMES B. FRENCH, Respondent	)	

No. 392P95

(Filed 26 September 1995)

The Court having reviewed Defendant's (Pro Se) Petition for Writ of Habeas Corpus and the supporting documents, the petition is allowed for the sole limited purpose of remanding this matter to the Superior Court, Rutherford County, with the direction that this file be brought to the attention of the judge presiding at the 2 October 1995 term of Superior Court, Rutherford County, in order that a day certain may be set for the purpose of bringing the defendant before the Superior Court to inquire into the legality of his further incarceration and for such orders as the presiding judge may deem proper.

By order of the Court in Conference, this 26th day of September, 1995.

Orr, J.
For the Court

CALTON v. CALTON

No. 222P95

Case below: 118 N.C.App. 439

Petition by intervenor-plaintiff (Phillip Byron Calton) for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

CORN v. NESBITT

No. 274P95

Case below: 119 N.C.App. 253

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

DALTON v. ANVIL KNITWEAR

No. 294P95

Case below: 119 N.C.App. 275

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995. Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 1995.

DAVIS v. MESSER

No. 298P95

Case below: 119 N.C.App. 44

Petition by defendant (Leonard Messer) for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995. Petition by defendant (Town of Waynesville) for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

DAVISON v. CUMBERLAND COUNTY BD. OF EDUC.

No. 332P95

Case below: 119 N.C.App. 604

Petition by defendants (Cumberland County) for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

EASTERN APPRAISAL SERVICES v. STATE OF NORTH CAROLINA

No. 239P95

Case below: 118 N.C.App. 692

Motion by defendants (State of NC, James E. Long and NC Insurance Guaranty Association) to dismiss the appeal for lack of substantial constitutional question allowed 5 October 1995. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

FCR GREENSBORO, INC. v. C & M INVESTMENTS

No. 355P95

Case below: 119 N.C.App. 575

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 1995.

FIRST HEALTHCARE CORP. v. RETTINGER

No. 230A95

Case below: 118 N.C.App. 600

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 5 October 1995.

FOSTER v. BOISE CASCADE

No. 330P95

Case below: 119 N.C.App. 798

Parties' joint motion to withdraw petition for discretionary review allowed 5 October 1995.

GOVERNMENT EMPLOYEES INS. CO. v. NEW SOUTH INS. CO.

No. 367P95

Case below: 119 N.C.App. (15 August 1995)

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

GRAY v. ORANGE COUNTY HEALTH DEPT.

No. 309P95

Case below: 119 N.C.App. 62

Petition by petitioner (John D. Gray) for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

HORTON v. CAROLINA MEDICORP

No. 383PA95

Case below: 119 N.C.App. 777

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1995.

IN RE APPEAL OF BELK-BROOME CO.

No. 343PA95

Case below: 119 N.C.App. 470

Petition by respondent (Catawba County) for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1995.

IN RE APPEAL OF MAY DEPARTMENT STORES CO.

No. 344PA95

Case below: 119 N.C.App. 596

Petition by respondent (Forsyth County) for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1995.

IN RE ESTATE OF PATE

No. 293P95

Case below: 119 N.C.App. 400

Petition by respondent (Margaret Clark Pate) for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

IN RE STRADFORD

No. 371P95

Case below: 119 N.C.App. 654

Motion by Attorney General to dismiss appeal by respondent (Johnny Stradford) for lack of substantial constitutional question allowed 5 October 1995. Petition by respondent (Johnny Stradford) for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

JENKINS v. RICHMOND COUNTY

No. 188P95

Case below: 118 N.C.App. 166
340 N.C. 568

Motion by defendants for sanctions pursuant to Rule 34 denied 5 October 1995. Motion by plaintiffs for reconsideration of petition for discretionary review denied 5 October 1995.

JOHNSON v. CENTRAL CAROLINA REALTY

No. 334P95

Case below: 119 N.C.App. 442

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

LOVE v. TYSON

No. 395P95

Case below: 119 N.C.App. 739

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

LYON v. MAY

No. 374P95

Case below: 119 N.C.App. 704

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 5 October 1995. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

MORETZ v. MILLER

No. 289P95

Case below: 119 N.C.App. 442

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

NCNB NATIONAL BANK v. DELOITTE & TOUCHE

No. 286P95

Case below: 119 N.C.App. 106

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 1995.

OLLIS v. RICHMOND HILL, INC.

No. 345P95

Case below: 119 N.C.App. 605

Petition by petitioner (Judy Ollis) for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

ONLEY v. NATIONWIDE MUTUAL INS. CO.

No. 241P95

Case below: 118 N.C.App. 686

Petition by defendant (Employers Mutual Casualty) for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

PUCKETT v. HOME QUARTERS WAREHOUSE

No. 354P95

Case below: 119 N.C.App. 605

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 1995.

RICHARDSON v. N.C. DEPT. OF CORRECTION

No. 250A95

Case below: 118 N.C.App. 704

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 15 September 1995.

ROYSTER v. CULP, INC.

No. 353PA95

Case below: 119 N.C.App. 598

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1995.

SHERRIFF v. SHERRIFF

No. 326P95

Case below: 119 N.C.App. 400

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

SLOAN v. MILLER BLDG. CORP.

No. 262P95

Case below: 119 N.C.App. 162

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

SOLES v. CITY OF RALEIGH CIVIL SERVICE COMM.

No. 280PA95

Case below: 119 N.C.App. 89

Petition by intervenor-appellant (City of Raleigh) for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1995.

STATE v. ADAMS

No. 320P95

Case below: 119 N.C.App. 605

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

STATE v. ALKANO

No. 263A95

Case below: 119 N.C.App. 256

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 October 1995.

STATE v. BALDWIN

No. 261P95

Case below: 117 N.C.App. 713

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 1995.

STATE v. BISHOP

No. 376P95

Case below: 119 N.C.App. 695

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 October 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

STATE v. BLOCKEN

No. 324P95

Case below: 119 N.C.App. 605

Notice of appeal by defendant (substantial constitutional question) dismissed ex mero motu 5 October 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

STATE v. BROOKS

No. 381P95

Case below: 119 N.C.App. 798

Petition by defendant (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995. Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 October 1995.

STATE v. CODY

No. 302P95

Case below: 119 N.C.App. 442

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

STATE v. INGLE

No. 98A93-2

Case below: Rutherford County Superior Court

Petition by defendant, or in the alternative, next friend, Tina Ingle Thompson, for writ of certiorari to review the order of the Rutherford County Superior Court denied 21 September 1995.

STATE v. KIRKLAND

No. 272A95

Case below: 119 N.C.App. 185

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 5 October 1995.

STATE v. LAMSON

No. 216P95

Case below: 118 N.C.App. 588

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

STATE v. MORGANHERRING

No. 340A95

Case below: Wake County Superior Court

Application by defendant for writ of habeas corpus dismissed 13 September 1995.

STATE v. PARKER

No. 312P95

Case below: 119 N.C.App. 606

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995. Petition by defendant for writ of certiorari to review the decision of the Court of Appeals denied 5 October 1995. Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 5 October 1995. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

STATE v. SOLES

No. 290P95

Case below: 119 N.C.App. 375

Notice of appeal by defendant (substantial constitutional question) dismissed 5 October 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

STATE v. SPENCER

No. 372P95

Case below: 119 N.C.App. 662

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

STATE v. WAGNER

No. 227P95

Case below: 118 N.C.App. 734

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

STATE v. WEST

No. 342P95

Case below: 119 N.C.App. 562

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 October 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

STATE v. WORRELL

No. 351P95

Case below: 119 N.C.App. 592

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

STEWART v. PARISH

No. 96P95

Case below: 118 N.C.App. 175
340 N.C. 263

Motion by plaintiffs for suspension of the rules denied 5 October 1995. Motion by plaintiffs for reconsideration of denial of petition for discretionary review dismissed 5 October 1995.

TITLE INS. CO. OF MINN. v. SMITH, DEBNAM, HIBBERT AND PAHL

No. 366A95

Case below: 119 N.C.App. 608

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 5 October 1995. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 5 October 1995.

U.S. FIDELITY & GUARANTY CO. v.
COUNTRY CLUB OF JOHNSTON COUNTY

No. 321P95

Case below: 119 N.C.App. 365

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

WALLACE v. JARVIS

No. 364P95

Case below: 119 N.C.App. 582

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

WELBORN v. CLASSIC SYNDICATE, INC.

No. 370P95

Case below: 119 N.C.App. 799

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

WHITLEY v. SOLOVIEFF

No. 325P95

Case below: 119 N.C.App. 607

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1995.

STATE OF NORTH CAROLINA v. JAMES CARL RICHARDSON

No. 126A93

(Filed 6 October 1995)

1. **Homicide § 588 (NCI4th)— felony murder—imperfect self-defense—instruction not given—no error**

There was no error in a first-degree murder prosecution where the trial court refused to instruct the jury on imperfect self-defense on the felony murder charge. Self-defense, perfect or imperfect, is not a defense to first-degree murder under the felony murder theory, and only perfect self-defense is applicable to the underlying felonies, assault with a deadly weapon with intent to kill inflicting serious injury and discharging a weapon into occupied property. The purpose of the felony murder rule is to deter even accidental killings from occurring during the commission of a dangerous felony; to allow self-defense, perfect or imperfect, to apply to felony murder would defeat that purpose, and if a person is killed during the perpetration or attempted perpetration of a felony, then the defendant is guilty of first-degree felony murder, not second-degree murder or manslaughter.

Am Jur 2d, Homicide § 519.

2. **Evidence and Witnesses § 2302 (NCI4th)— felony murder—expert testimony as to intent—no prejudice**

There was no prejudicial error in a first-degree murder prosecution where a psychologist was not allowed to give an opinion as to whether defendant had the capacity to form the specific intent at the time of the shooting but defendant was convicted only of felony murder, which does not require an intent to kill as an element that must be satisfied for a conviction. Moreover, while the term "specific intent to kill" is not a precise legal term with a definition which is not readily apparent and a medical expert may properly be allowed to testify as to an opinion that a defendant could not form the specific intent to kill, there is no evidence that defense counsel here ever attempted to ask a question relating to defendant's specific intent to kill and did not at any point during the trial seek to make an offer of proof.

Am Jur 2d, Expert and Opinion Evidence §§ 193, 194.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction. 16 ALR4th 666.

3. Evidence and Witnesses § 787 (NCI4th)— felony murder—testimony of threat to defendant—hearsay—exclusion not prejudicial

There was no prejudicial error in a first-degree murder prosecution where the trial court sustained the State's objection to testimony by defendant that a member of the victim's family had threatened to kill defendant. Defendant elicited essentially the same evidence through other witnesses, including defendant's own voice and words referring to the threatening telephone call during negotiations between defendant and police.

Am Jur 2d, Appellate Review § 753.

4. Jury § 194 (NCI4th)— felony murder—juror's traffic case dismissed by prosecutor—challenge for cause denied

The trial court did not abuse its discretion in a first-degree murder prosecution by not dismissing for cause a juror whose traffic case was dismissed by one of the two prosecutors in this case while the trial was under way. The prosecutor dismissed the traffic charge in accordance with normal routine procedures for handling minor infractions once an insurer had verified payment of all claims, the trial court conducted an inquiry of the juror and the employee in the prosecutor's office who had witnessed the communication between the prosecutor and the juror, and the court found that the incident did not bias the juror in favor of the State and that the juror could be fair. Defendant did not establish that the judge's determination was so arbitrary that it could not have been the result of a reasoned decision.

Am Jur 2d, Jury §§ 266, 267.

5. Criminal Law §§ 1216, 1240 (NCI4th)— assault—mitigating factors—provocation—threat—not found

The trial court did not err when sentencing defendant for assault with a deadly weapon with intent to kill by not finding the mitigating factors of strong provocation and a threat insufficient to constitute a defense but which significantly reduced culpability where the evidence did not establish either as a matter of law.

Am Jur 2d, Criminal Law §§ 598, 599.

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

6. Homicide §§ 612, 707 (NCI4th)— instructions—imperfect self-defense—voluntary manslaughter—reasonable belief in need to kill

The trial court did not err by instructing the jury that it could return a verdict of voluntary manslaughter for imperfect self-defense only if defendant reasonably believed it was necessary to kill in self-defense. This issue has consistently been decided contrary to defendant's position; moreover, any error in the voluntary manslaughter instruction fails to rise to plain error since in finding defendant guilty solely of first-degree murder based on the felony murder rule the jury specifically rejected premeditated and deliberate murder, second-degree murder, and voluntary manslaughter.

Am Jur 2d, Homicide § 519.

7. Appeal and Error § 164 (NCI4th)— criminal charges— sufficiency of evidence—no motion to dismiss at close of evidence

There was no plain error in submitting charges of first and second-degree murder to the jury where defendant had moved to dismiss all charges at the close of the State's case but did not renew the motion at the close of all of the evidence. Although N.C.G.S. § 15A-1446(d)(5) provides that questions of insufficiency of the evidence may be the subject of appellate review even when no objection or motion has been made at trial, Rule 10(b)(3) of the Rules of Appellate Procedure provides that a defendant who fails to make a motion to dismiss at the close of all the evidence may not attack on appeal the sufficiency of the evidence at trial. To the extent that N.C.G.S. § 15A-1446(d)(5) is inconsistent with N.C. R. App. P. 10(b)(3), the statute must fail.

Am Jur 2d, Appellate Review § 614; Trial §§ 905, 1053.

8. Appeal and Error § 155 (NCI4th)— cross-examination—details of prior conviction—no objection—issue not preserved

Defendant did not preserve for appeal the question of whether the trial court erred by allowing the prosecutor's cross-examination of defendant regarding a prior conviction where the transcript does not clearly reflect that defendant objected to the

admitted statements, and no specific grounds for an objection were apparent from the context.

Am Jur 2d, Trial § 406.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Guice, J., at the 4 January 1993 Criminal Session of Superior Court, Henderson County. Defendant's motion to bypass the Court of Appeals on his conviction for assault with a deadly weapon with intent to kill was allowed 5 May 1994. Heard in the Supreme Court 14 March 1995.

Michael F. Easley, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor, Assistant Appellate Defender, for defendant-appellant.

ORR, Justice.

On 28 March 1992, Denny Waters was shot and killed by defendant James Carl Richardson while sitting in the driver's seat of his car. Defendant also shot and wounded Ricky Waters, Denny's brother and a passenger in the car. The shooting was a culmination of a year-long obsessive pattern of behavior by defendant toward his ex-girlfriend, Renee Scherf. At the time of the shooting, Renee Scherf was dating Ronald Waters, the brother of Denny and Ricky.

Defendant was indicted for first-degree murder and for assault with a deadly weapon with intent to kill inflicting serious injury. He was tried capitally at the 4 January 1993 Criminal Session of Superior Court, Henderson County, and was found guilty of first-degree murder under the felony murder theory, with discharging a firearm into occupied property and assault with a deadly weapon with intent to kill inflicting serious injury as the underlying felonies. He was also found guilty of assault with a deadly weapon with intent to kill. After the jury returned its verdicts, the trial judge sentenced defendant to consecutive terms of life imprisonment on the conviction for first-degree murder and ten years' imprisonment for first-degree assault with a deadly weapon with intent to kill.

Defendant appeals the first-degree murder conviction to this Court, which subsequently granted defendant's motion to bypass the Court of Appeals on the assault conviction. Defendant presents no arguments related to the assault conviction. After reviewing the tran-

scripts, record and briefs, we find no error in defendant's assignments and, accordingly, uphold defendant's conviction for murder in the first degree and sentence of life imprisonment.

The State's evidence leading up to 28 March 1992, the day of the shooting, tended to show the following: Renee Scherf met defendant in December 1990 and began dating him in January 1991. They began living together shortly thereafter and continued to live together for two to three months until she moved into a trailer by herself located in the same trailer park where defendant lived.

In September 1991, Ms. Scherf met and began dating Ronald Waters. In an effort to keep her distance from defendant, who had begun harassing and stalking Mr. Waters, Ms. Scherf started visiting Mr. Waters at his Landrum, South Carolina, home, which was approximately twenty-six miles from where Ms. Scherf and defendant lived in Saluda, North Carolina. In November 1991, Ms. Scherf moved into Mr. Waters' home.

From approximately 22 March 1991 until 28 March 1992, defendant exhibited obsessive, harassing, threatening, stalking, and confrontational behavior towards Ms. Scherf, Ronald Waters, and the Waters' family at their homes, their places of employment, and numerous other locations. Such behavior was evidenced by incidents where defendant "chronically" called Ms. Scherf and followed Mr. Waters. Defendant issued threats to Mr. Waters such as stating that "no one come [sic] between him and his woman," that Mr. Waters "would pay dearly for what [he] [had] done," or asking Mr. Waters if Ms. Scherf was "worth getting killed over." Also during this one-year period, defendant shot out the front windshield and rear window of Mr. Waters' car and broke Mr. Waters' front windshield with a brick.

Specifically, Ms. Scherf testified that, on three occasions, she called defendant to appeal to him to leave her alone and to seek counseling. She testified that defendant responded to her attempts by telling her that "[e]ither [she] would get killed, Ron would get killed, [they] both would die, or [they] would break up." Defendant also stated that he would not stop harassing or following her and the Waters family until "he was satisfied," that his "mind was made up," and that she "can't appeal to [him]. [He's] beyond that now." Further, defendant stated that if any member of the Waters family came to the trailer park, he would "shoot them if they mess with [him]" and that if she and Mr. Waters did not break up, somebody was going to get hurt.

On another occasion, Ms. Scherf testified that defendant came to Mr. Waters' home when Ms. Scherf was there alone. After Ms. Scherf confronted defendant with a shotgun and yelled at him to leave her alone, defendant left a letter on the porch railing and disappeared. At trial, Ms. Scherf identified State's Exhibit No. 5 as the fourteen-page letter that defendant left for her on the evening of 25 March 1992, which she had turned over to the police. Ms. Scherf read the letter from defendant aloud at trial. In the letter, defendant stated:

> I guess I'll start by saying this letter is I intended to explain why I feel why I have to do what I'm going to do. . . .
>
> I still feel every bit of the love I had for you then, and now even more so. I know I had a lot to do with the way our relationship turned out and I'll accept most of the blame, but I know it was marred badly by the people who had influence on you. And when you told me the other night [w]hat my stepmother told you that infuriates me also, as hard as I was trying to win you over and getting your respect and trust everyone around us was blowing me out of the water. That's one of the reasons I'm doing what I'm doing. I'm going to teach them not to get involved and to leave people alone. I really was trying hard, Renee.
>
> . . . .
>
> . . . You said that the fellow has a big heart. No he doesn't, not unless it's only for women. He's never loved anyone as much as I love you, because if he did, his conscience would allow him enough compassion to know how I feel and he'd back out. All these things and more than I can stand to write are the reason for why I will do what I feel I have to do. These things, these feelings have haunted me ever since we've been apart and it's more than I can stand any more. It's enough to know that my faults were poison, but everyone else's involvement was totally unnecessary and it has kept me from the opportunity of redeeming myself to you. Well, when it's all finally done and over, maybe then everyone will know how much I loved you. I love you more than life itself and I hope you will always remember that. All my love, Jim.

The State also presented extensive witness testimony tending to show that, at various times, defendant harassed the Waters family by following or positioning himself near them. Sometimes children were in the vehicles that were followed. Specifically, on one occasion, Melinda Waters, Ronald Waters' sister, testified that she saw the bar-

rel of a gun in defendant's hand during one of her encounters with defendant.

On the day of the shooting, 28 March 1992, Melinda informed Ricky and Denny, two other brothers, that she had seen defendant's car parked up the street from their mother's house. Ricky got into Denny's car, and they went to check on defendant. Defendant's car was gone, so they drove uptown. Shortly thereafter, Melinda spotted defendant. Ricky and Denny followed Melinda to a Food Lion parking lot at the edge of Columbus. Ricky testified that the purpose in following her was to see where defendant went. They were concerned because defendant had been close to their mother's house when he had no business being there.

Denny and Ricky saw defendant come into the parking lot toward Melinda's car, so they pulled between defendant's car and Melinda's car. Ricky testified that they did not block defendant in, but rather, pulled between the two cars because it looked as though defendant was headed toward Melinda's car. Denny stopped, and he and Ricky exited the car. Denny told defendant that he wanted to talk to him. Defendant drove off suddenly, and Denny and Ricky followed.

Defendant proceeded onto Interstate 26 towards Hendersonville, North Carolina, with the Waters brothers following. Denny and Ricky discussed giving defendant "a dose of his own medicine." The vehicles subsequently left I-26 and got onto Highway 64, making a U-turn on the highway, and headed towards downtown Hendersonville. Defendant made another U-turn and went all the way through Hendersonville, running several red lights in the process. Denny and Ricky continued to follow him. Ricky testified that the drive through Hendersonville was not a high-speed chase and that Denny did not tailgate defendant.

Ricky further testified that eventually, at approximately 8:50 p.m., defendant stopped at a red light, and Denny stopped his car four or five feet behind defendant's car. Defendant got out of his car with a rifle in his hand; he walked towards the rear of his car and towards the front of Denny's car, pointing the gun at Denny and Ricky. As defendant approached them, nothing was said by anyone. Suddenly, defendant started firing the rifle straight towards Ricky and Denny. Ricky testified that defendant's first shot burst the windshield and that Denny was hit somewhere around his eye. Ricky testified that he reached for Denny and saw another shot coming from defendant's direction. Three shots were fired quickly with just a couple of sec-

onds between shots. Defendant returned to his car and drove off. Ricky was shot in his left shoulder, and Denny was fatally wounded. The front windshield had three bullet holes in it.

Defendant's version of the events surrounding the shooting contrasts with Ricky's. According to defendant, on the day of the shooting, he was being harassed and threatened by Melinda, Denny and Ricky. At one point, according to defendant, Denny ran up to defendant's car, tried to open defendant's door and told him to get out of the car. Then defendant testified that he "floored" the car. As he did, somebody hit his car or kicked it, making a noise like a thud or a thump at the back quarter panel.

Defendant testified that he then got on the highway and continued to the interstate. He headed straight up the interstate going north, with the Waters brothers following close behind him, maybe six or seven feet behind him. At one point, when they were side-by-side on I-26, defendant asked through his open window what they wanted. Defendant testified that one of the men shouted, "You know what we want," and either "We're going to kill your ass," or "We're going to kick your ass." Defendant then heard a loud noise that he testified sounded like a gunshot. Defendant accelerated and drove into downtown Hendersonville to look for a police officer, but did not see one. As he continued driving, he noticed that he was about to run out of gas. At that point, defendant testified that he "panicked." Defendant testified that he had his gun beside him and stopped the car. He cocked his Marlin .30-.30 rifle and exited his car. He looked at the Nissan and thought he saw the passenger (Ricky Waters) holding something shiny that he thought was a handgun. Defendant then raised the rifle to his hip and fired three times. He cocked the rifle a fourth time, but then decided not to shoot again. He got into his car, drove off, subsequently bought some gas, then drove home. After seven hours of negotiating with the police, defendant surrendered.

Harold Poston, M.D., a board-certified anatomic and clinical pathologist, performed the autopsy on Denny Waters. He testified that Denny suffered three separate injuries. He testified that Denny had a large wound that penetrated through the facial bones between the bridge of the nose and the corner of the left eye, and through the skull, disrupting or destroying much of the brain matter. Another wound was through the soft tissue of the neck that just grazed the neck bones and the base of the skull and may have caused some

impact damages on the base of the skull. The third wound was a defect across the cheek that could be called a graze wound.

Defendant brings forward eight assignments of error.

I.

[1] In his first assignment of error, defendant contends that the trial court erred in not instructing the jury on imperfect self-defense on the felony murder charge. The trial court instructed the jury on perfect and imperfect self-defense on the charge of first-degree murder under the theory of malice, premeditation and deliberation. However, when the trial court instructed the jury on felony murder, it limited the self-defense instruction to perfect self-defense for the underlying felonies as embodied in the pattern jury instruction, N.C.P.I.—Crim. 308.45 (1986). Defendant does not complain about the form of these instructions; rather, he limits this assignment of error to the court's failure to instruct on imperfect self-defense for felony murder.

Our legislature has defined felony murder as:

> A murder which shall be . . . committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree . . . .

N.C.G.S. § 14-17 (Supp. 1994). As this Court has stated, "premeditation and deliberation are not elements of the crime of felony-murder." *State v. Wall*, 304 N.C. 609, 613, 286 S.E.2d 68, 71 (1982). Thus, the elements necessary to prove felony murder are that the killing took place while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies. "By not requiring the State to prove the elements of murder, the legislature has, in essence, established a *per se* rule of accountability for deaths occurring during the commission of felonies." *State v. Bell*, 338 N.C. 363, 386, 450 S.E.2d 710, 723 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 861 (1995).

The felony murder rule was promulgated to deter even accidental killings from occurring during the commission of or attempted commission of a dangerous felony. The rationale of the felony murder rule is

> that one who commits a felony is a bad person with a bad state of mind, and he has caused a bad result, so that we should not worry too much about the fact that the fatal result he accomplished was

quite different and a good deal worse than the bad result he intended.

Wall, 304 N.C. at 626, 286 S.E.2d at 78 (Copeland, J., dissenting).

In the instant case, defendant contends that his acts with respect to the underlying felonies (see the trial court's instruction below) were committed in self-defense and that the trial court instructed as to perfect self-defense on the underlying felonies submitted. He suggests that the trial court erred because the trial court believed that the doctrine of self-defense in felony murder is limited to the application of that doctrine to the underlying felonies, and imperfect self-defense does not apply to those felonies.

The trial court instructed as follows:

> [I]f you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally, and not in self-defense, committed the felony of discharging a firearm into an occupied motor vehicle, or committed the felony of assault with a deadly weapon with intent to kill inflicting serious injury, or the felony of assault with a deadly weapon with intent to kill, or the felony of assault with a deadly weapon inflicting serious injury, and that while committing the felony of discharging a firearm into an occupied motor vehicle, or the felony of assault with a deadly weapon with intent to kill inflicting serious injury, or the felony of assault with a deadly weapon with intent to kill, or the felony of assault with a deadly weapon inflicting serious injury, the defendant killed a victim and that the defendant's act was a proximate cause of the victim's death and that the discharging of firearm into an occupied motor vehicle, or the assault with a deadly weapon with intent to kill inflicting serious injury, or the assault with a deadly weapon with intent to kill, or the assault with a deadly weapon inflicting serious injury were committed or attempted with the use of a deadly weapon and that the defendant did not act in self-defense, it would be your duty to return a verdict of guilty of first degree murder based on the felony murder rule.
>
> However, if you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first degree murder based on the felony murder rule.

The jury found defendant guilty of first-degree murder based on the felony murder rule and then indicated that the felonies underlying the

conviction of first-degree murder based on the felony murder rule were discharging a firearm into occupied property and assault with a deadly weapon with intent to kill inflicting serious injury. However, had the jury found that defendant acted in self-defense on the underlying felonies submitted, it could not have found defendant guilty of felony murder.

We hold that the trial court correctly instructed on the felony murder rule and on self-defense as it related to the underlying felonies. Self-defense, perfect or imperfect, is not a defense to first-degree murder under the felony murder theory, and only perfect self-defense is applicable to the underlying felonies.

Defendant relies on a line of decisions of this Court culminating in *State v. Bell*, 338 N.C. 363, 450 S.E.2d 710, as supporting the applicability of self-defense to first-degree murder under the theory of felony murder and, thus, the need to instruct on imperfect self-defense during the felony murder jury charge. In North Carolina, imperfect self-defense arises

> if the defendant believed it was necessary to kill the deceased in order to save himself from death or great bodily harm, and if the defendant's belief was reasonable because the circumstances at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but the defendant, although without murderous intent, was the aggressor or used excessive force, the defendant would have lost the benefit of perfect self-defense. In this situation he would have shown only that he exercised the imperfect right of self-defense and would remain guilty of at least voluntary manslaughter. *State v. Wilson*, 304 N.C. 689, 695, 285 S.E.2d 804, 808 (1982).

State v. Bush, 307 N.C. 152, 159, 297 S.E.2d 563, 568 (1982). Upon review, we conclude that the cases upon which defendant relies should be read to mean that self-defense is available in felony murder cases only to the extent that self-defense relates to applicable underlying felonies as in the case *sub judice*.

As previously stated, the purpose of the felony murder rule is to deter even accidental killings from occurring during the commission of a dangerous felony. To allow self-defense, perfect or imperfect, to apply to felony murder would defeat that purpose, and if a person is killed during the perpetration or attempted perpetration of a felony, then the defendant is guilty of first-degree felony murder—not

second-degree murder or manslaughter. It is only certain applicable underlying felonies that can be subject to an instruction on perfect self-defense. An imperfect self-defense instruction would not be proper. This assignment of error is overruled.

II.

[2] Defendant's next assignment of error is that the trial court erred in refusing to permit the psychologist to give an opinion as to whether defendant had the capacity to form the specific intent to kill at the time of the shooting. Defendant contends that the trial court's ruling was prejudicial in light of *State v. Daniel*, 333 N.C. 756, 429 S.E.2d 724 (1993), *State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1989), and *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988). Defense counsel's stated purpose for offering expert testimony was (1) to establish defendant's incapacity to deliberate at the time of the crime, and (2) to establish defendant's state of mind as it concerned his fear of death or great bodily harm. The State contends that defendant has not preserved this issue for appellate review and that, even if he has, the jury's verdict renders it moot. We agree with the State's contentions.

While we have held "that testimony by medical experts relating to precise legal terms such as 'premeditation' or 'deliberation,' definitions of which are not readily apparent to such medical experts, should be excluded," *Daniel*, 333 N.C. at 763-64, 429 S.E.2d at 729, we concluded that

> the term "specific intent to kill" is not one of those precise legal terms with a definition which is not readily apparent. Consequently, we have concluded previously that a medical expert may properly be allowed to testify to his or her opinion that a defendant could not form the specific intent to kill.

Id. at 764, 429 S.E.2d at 729. After examining the record as a whole, we conclude that there is no evidence that defense counsel ever attempted to ask a question relating to defendant's specific intent to kill. Moreover, at no point during the trial did defense counsel seek to make an offer of proof, as required by N.C.G.S. § 15A-1446(a), to preserve the substance of any specific intent to kill testimony for appellate review.

Defense counsel did specifically ask Dr. Sansbury whether he had an opinion as to defendant's state of mind during the chase and at the time of the shooting. Dr. Sansbury stated:

> What I saw was this kind of fear, this disintegration of ego. When I say that, that is the inability to—to—to maintain self-control, that he was starting to fall apart. He tried to avoid the situation. He tried to make sure that he didn't have to express his aggression directly. He hunted for a policeman.
>
> But I think what happened was that he got pushed to the point where his psychological defenses were no longer working and then his reality testing started to deteriorate, and at that point in time I think what happened was we saw the kind of the borderline elements become a part of that. When he finally could not defend against the situation any more and felt like he was going to have to have a showdown with these guys, he started experiencing all this anger that had been there for many years. And so when he killed these people, shot this man, at that point in time, he was doing the only thing he thought he could do.

Dr. Sansbury further testified that defendant's fear and rage overwhelmed his defense mechanisms and concluded that at that time, defendant could not form any plans that were outside his fear and rage. Any plans would be impulsive, inefficient and poorly organized.

Defendant has failed to establish that exclusion of potential "specific intent to kill" testimony was so erroneous as to be prejudicial. Ultimately, defendant was convicted only of felony murder, not first-degree premeditated and deliberate murder. Felony murder, by its definition, does not require "intent to kill" as an element that must be satisfied for a conviction. *See State v. Beamer*, 339 N.C. 477, 481, 451 S.E.2d 190, 192 (1994). Therefore, evidence that defendant could form no such intent had no effect on defendant's conviction. We, therefore, overrule this assignment of error.

III.

[3] Defendant's third assignment of error is that the trial court erred by sustaining the State's objection to testimony by defendant that a member of the Waters family had threatened to kill him. During defendant's testimony on direct examination, defense counsel asked defendant about a telephone call defendant received on the night of 14 January 1992 from a man who identified himself as Ronald Waters' brother, although the caller did not give his name. The particular question the prosecutor objected to was, "What did he tell you?" contending that the substance of the call was inadmissible hearsay. Defense counsel stated that the evidence was not being offered for

the truth of the matter, but instead to prove defendant's state of mind after he received the call and to explain why he started carrying a gun. The court sustained the prosecutor's objection.

On *voir dire*, defendant testified that the caller asked defendant why he was giving Ronald so many problems and why defendant had shot out the windows of Ronald's car. The caller then said, "I'm going to come up there and . . . I'm not going to shoot your windows out. I'm going to shoot your brains out." Defendant further testified outside the presence of the jury that, based on the call, he started carrying a gun every day. He said he did not know who might be threatening him "other than it was a member of the [Waters] family . . . or professed to be." As a result of the call, he was scared.

The trial court sustained the prosecutor's objection and allowed defendant to testify only that defendant received a telephone call and that after the call, he was scared and began to carry a gun. After all the evidence was presented, the trial court entered an order on the record giving its reason for the ruling.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. N.C.G.S. § 8C-1, Rule 801(c) (1992). However, as this Court stated in *State v. Reid*, it is well established that

> [w]hen evidence of a statement by someone other than the testifying witness is offered for a purpose other than to prove the truth of the matter asserted, the evidence is not hearsay. Statements of one person to another are not hearsay if the statement is made to explain the subsequent conduct of the person to whom the statement was made.

Reid, 335 N.C. 647, 661, 440 S.E.2d 776, 784 (1994) (citation omitted). Assuming *arguendo* that the trial court erred in not allowing the statement to be admitted, the error was harmless because defendant elicited substantially the same evidence through other witnesses.

> "It is a well-settled rule that 'if a party objects to the admission of certain evidence and the same or like evidence is later admitted without objection, the party has waived the objection to the earlier evidence.' " *State v. Wingard*, 317 N.C. 590, 599, 346 S.E.2d 638, 644 (1986) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 30 (1982)).

Reid, 335 N.C. at 663, 440 S.E.2d at 785.

In this case, Renee Scherf was asked on cross-examination whether defendant told her that some man had called him and threatened to "blow his brains out." She responded affirmatively. She further testified that defendant said that although the caller was anonymous, he thought or knew it was Stevie Waters, one of Ronald's brothers. He knew it was the Waters family threatening him, telling him that if he did not stay away, they would kill him. Renee further testified that defendant seemed scared by the call and that it was in this context that he said that he would defend himself if he had to.

Dr. Sansbury also testified that defendant described a threatening phone call he had received in mid-January. Dr. Sansbury thought defendant said it was from Ms. Scherf's boyfriend's brother. Dr. Sansbury testified that at that time, defendant feared for his life and felt as though his life was threatened and, thus, started carrying a gun with him. As corroborative evidence, defendant's father testified that defendant told him he had received a death threat from the Waters family. Detective Norton testified that defendant's father told him that defendant had received death threats from the Waters family. Finally, additional evidence of the alleged threatening phone call was presented to the jury through the tape recording and transcript of the telephone negotiations between defendant and police. The tape and transcript include defendant's statement that Ronald's brother threatened his life and said he was going to "blow [defendant's] brains out." The jury had before it defendant's own words and voice from the tape and transcript referring to the threatening phone call, even if it did not have his full testimony in this regard, as well as ample evidence from several other reliable witnesses. This assignment of error is overruled.

IV.

[4] Defendant's fourth assignment of error is that the trial court abused its discretion when it denied defendant's challenge for cause of an impaneled juror. The juror's traffic case was dismissed by one of the two prosecutors in this case while the trial in the instant case was under way. Defendant contends that the contact was sufficient for a challenge for cause because of the appearance of impropriety. We disagree.

While there is no statutory provision covering the situation when a party seeks to challenge a juror after impanelment, *State v. McLamb*, 313 N.C. 572, 575, 330 S.E.2d 476, 478 (1985), N.C.G.S. § 15A-1215(a) allows the trial court to replace a juror with an alter-

nate juror should the original one become disqualified or be discharged for some reason.

When a juror has contact with someone who may have an interest in the case, the judge has the duty "to determine whether such contact resulted in substantial and irreparable prejudice to the defendant. It is within the discretion of the trial judge as to what inquiry to make." *State v. Willis*, 332 N.C. 151, 173, 420 S.E.2d 158, 168 (1992).

> 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. 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.

State v. Yelverton, 334 N.C. 532, 543, 434 S.E.2d 183, 189 (1993) (citation omitted). Absent a showing that the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision, *McLamb*, 313 N.C. at 576, 330 S.E.2d at 479, the decision must stand. The test is whether the challenged juror is "unable to render a fair and impartial verdict." N.C.G.S. § 15A-1212(9) (1988).

On 11 January 1993 while the trial was under way, prosecutors Alan Leonard and Jill Rose notified the trial court that one of the jurors had had contact that morning with Ms. Rose concerning a traffic citation that the juror had received on 25 November 1992. At an earlier appearance in district court, the juror did not have the paperwork she needed from her insurance company. Consequently, at a later date, she took the insurance letter to the district attorney's office, where she happened to encounter Ms. Rose. Ms. Rose referred her to an employee, who proceeded to read the letter to Ms. Rose. Ms. Rose then stated that the letter was "adequate." The employee took the ticket, and the juror went back into the courtroom to continue with this trial. In accordance with normal routine procedures for handling minor infractions once an insurer had verified payment of all claims, the prosecutor dismissed the traffic charge against the juror. The trial court conducted an inquiry of the juror and the employee in the prosecutor's office who had witnessed the communication between the juror and Ms. Rose. During *voir dire*, the trial court asked the following questions of and elicited the following responses from the challenged juror:

THE COURT: Your involvement with this case, with the district attorney's office, that is your own personal matter. Is that going to have any influence on your verdict in the case that you're now sitting on, this first degree murder case and assault with a deadly weapon with intent to kill, inflicting serious injury?

JUROR: No, sir.

THE COURT: That is not going to cause you to lean any more to the state than you would to the defendant?

JUROR: No, sir.

THE COURT: Are you telling me that you will not be influenced in anything in this case except by the evidence as it is produced here in court?

JUROR: Right.

. . . .

MR. LEONARD: You're saying then that you're still in a position to be a fair and impartial juror in this case, ma'am?

JUROR: Oh, yes.

. . . .

The trial court made findings of fact consistent with the testimony of the juror and the employee except the trial court found that the juror's initial contact with the employee occurred before 17 December 1992. The trial court found that the incident did not bias the juror in favor of the State and that she could be a fair juror. Thus, we hold that defendant has not established that the judge's determination of the juror's continuing fitness "was so arbitrary that it could not have been the result of a reasoned decision." *McLamb*, 313 N.C. at 576, 330 S.E.2d at 479. This assignment of error is overruled.

V.

[5] Defendant's fifth assignment of error is that the trial court erred in failing to find as statutory mitigating factors (1) that the defendant committed the offense of felonious assault under a threat which was insufficient to constitute a defense but significantly reduced his culpability, N.C.G.S. § 15A-1340.4(a)(2)(b) (1988); and (2) that the defendant acted under strong provocation, N.C.G.S. § 15A-1340.4(a)(2)(i). In *State v. Jones*, this Court held that under the Fair Sentencing Act, a trial court must find a statutory mitigating fac-

tor if that factor is supported by uncontradicted, substantial, and credible evidence. *Jones*, 309 N.C. 214, 218-19, 306 S.E.2d 451, 454 (1983). "To show that the trial court erred in failing to find a mitigating factor, the evidence must show conclusively that this mitigating factor exists, i.e., no other reasonable inferences can be drawn from the evidence." *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988). Even "uncontradicted, quantitatively substantial and credible evidence may simply fail to establish, by a preponderance of the evidence, any given factor in aggravation or mitigation. While evidence may not be ignored, it can be properly rejected if it fails to prove, as a matter of law, the existence of the mitigating factor." *State v. Blackwelder*, 309 N.C. 410, 419, 306 S.E.2d 783, 789 (1983).

In the instant case, defendant argues that only one inference can be drawn from the evidence presented at trial— that defendant shot in reaction to the Waters brothers' threats and provocation. We disagree.

Defendant's evidence, if believed, showed at best that on 28 March 1992, Denny and Ricky Waters blocked defendant's car in a parking lot in Columbus; that Denny and Ricky Waters then chased defendant on I-26 from Columbus to Hendersonville; that they continued to chase defendant in Hendersonville through red lights and U-turns; that Ricky Waters admitted that they intended to beat defendant up that night, "to whip his ass"; that police found a loaded pistol in their car after the shooting, with the barrel pointing up between the open center console and the driver's seat; and that Ricky Waters admitted that their conduct in chasing defendant made defendant "snap."

On the other hand, the State's evidence showed that defendant was obsessed with Renee and Ronald's relationship and that he sought to provoke a confrontation on numerous occasions. More importantly, on the night of the shooting, several witnesses testified that defendant did not look nervous, frightened, excited, upset or shaking; that there was no hollering, screaming or words shouted back and forth between the two vehicles; that Denny and Ricky did not threaten defendant in any way; that their windows did not come down; that the car doors of the Nissan did not open; that the Waters brothers did not try to exit their car before defendant exited his car; that no one was around the Waters' car; that the road was free and clear with respect to defendant's vehicle; that defendant was aiming a high-powered .30-.30 rifle when he fired all three shots; that no one

returned fire at the defendant, threw a knife or rock, or exhibited any other aggressive behavior toward the defendant; and that after the third shot, defendant got into his car, hesitated a moment and then drove off in a fairly normal manner.

Therefore, we hold that the evidence does not establish as a matter of law the existence of either mitigating factor. The evidence entitled the trial court to reject defendant's version of the events surrounding the shooting and supported the decision to not submit the challenged mitigating factors. This assignment of error is overruled.

VI.

[6] Next, defendant contends that the trial court committed plain error by instructing the jury that it could return a verdict of voluntary manslaughter for imperfect self-defense only if defendant reasonably believed it was necessary to kill in self-defense. That is, unless defendant had a reasonable belief in the need to kill Denny Waters in self-defense, the only homicide offenses for which he could be convicted were first-degree or second-degree murder. Defendant concedes that this issue has consistently been decided contrary to his position. *State v. Moore*, 339 N.C. 456, 465, 451 S.E.2d 232, 236-37 (1994); *State v. Rose*, 335 N.C. 301, 330, 439 S.E.2d 518, 534, *cert. denied*, — U.S. —, 129 L. Ed. 2d 883 (1994); *State v. Maynor*, 331 N.C. 695, 700, 417 S.E.2d 453, 456 (1992); *State v. McAvoy*, 331 N.C. 583, 601, 417 S.E.2d 489, 500-01 (1992). We decline defendant's request to revisit our earlier, well-reasoned holdings in *Rose*, *McAvoy*, and *Maynor*.

Moreover, "any error in the voluntary manslaughter instruction fails to rise to plain error since in finding defendant guilty solely of first-degree murder based on the felony-murder rule, the jury specifically rejected premeditated and deliberate murder, second-degree murder, and voluntary manslaughter." *Moore*, 339 N.C. at 465, 451 S.E.2d at 237. This assignment of error is overruled.

VII.

[7] Defendant's seventh assignment of error is that the trial court committed plain error by submitting the charges of first-degree and second-degree murder to the jury. Defendant moved to dismiss all charges at the close of the State's case for insufficient evidence. The trial court denied the motion. Defendant did not renew his motion to dismiss at the close of all the evidence. Thus, under Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure, the issue of insuffi-

ciency was not preserved for appellate review. N.C.G.S. § 15A-1446(d)(5) provides that questions of insufficiency of the evidence may be the subject of appellate review even when no objection or motion has been made at trial. However, Rule 10(b)(3) provides that a defendant who fails to make a motion to dismiss at the close of all the evidence may not attack on appeal the sufficiency of the evidence at trial. We have specifically held in this regard that: "To the extent that N.C.G.S. § 15A-1446(d)(5) is inconsistent with N.C. R. App. P. 10(b)(3), the statute must fail." *State v. Stocks*, 319 N.C. 437, 439, 355 S.E.2d 492, 493 (1987). This assignment of error is overruled.

VIII.

[8] Defendant's final assignment of error is that the trial court erred in overruling defense counsel's objection to the prosecutor's cross-examination of defendant about what defendant asserts were details of a prior conviction.

During direct examination, defendant testified that he had a prior conviction in Hendersonville in 1982 for maintaining a vehicle for possession of marijuana. Defendant did not testify on direct examination about any details of the conduct for which he was convicted. On cross-examination, the prosecutor asked, "And you had a pistol wrapped up in a shirt under the seat with the marijuana?" Defendant answered, "Yes, I did." In the next entry in the trial transcript, the trial court declared "Overruled." The trial transcript does not contain an objection by defense counsel.

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

N.C. R. App. P. 10(b)(1). Here, the transcript does not clearly reflect that defendant even objected to the admitted statements, and no specific grounds for an objection were apparent from the context. *State v. Howell*, 335 N.C. 457, 471, 439 S.E.2d 116, 124 (1994). Defendant has, therefore, failed to preserve the question for appellate review. Accordingly, this assignment of error is overruled.

In summary, defendant was convicted by a jury after a fair trial, free from prejudicial error.

NO ERROR.

PHYLLIS TANT BRAY AND HUSBAND, WILBUR GLOVER BRAY v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 401PA94

(Filed 6 October 1995)

Insurance § 515 (NCI4th)— business auto policy—family member/household-owned vehicle exclusion—public policy—UM coverage for owner's wife

An injured driver who was the wife of the individual insured by a business auto policy and who lived in the same household as the insured was a "person insured" of the first class under the UM provisions of N.C.G.S. § 20-279.21(b)(3) (Supp. 1988) without regard to whether she was an occupant of any vehicle; therefore, a family member/household-owned vehicle exclusion for UM coverage in the business auto policy was against the public policy of the Motor Vehicle Safety and Responsibility Act and was ineffective to deny insured's wife UM coverage because she was driving an auto owned by the insured but not covered by the business auto policy. Where there was no written rejection of UM coverage by the insured, the policy is deemed pursuant to N.C.G.S. § 20-279.21(b)(3) to provide UM coverage equal to the policy's general liability coverage of $300,000, such coverage is mandatory, the coverage above the statutory minimum of $25,000 is not voluntary under N.C.G.S. § 20-279.21(g), and the family member/household-owned vehicle exclusion is not valid as to coverage above the statutory minimum but is unenforceable as to the total $300,000 UM coverage in the policy.

Am Jur 2d, Automobile Insurance §§ 294, 311, 312.

Validity, under insurance statutes, of coverage exclusion for injury to or death of insured's family or household members. 52 ALR4th 18.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 115 N.C. App. 438, 445 S.E.2d 79 (1994), modifying and affirming an order granting plaintiffs' motion for partial summary judgment entered 26 March 1993 by Strickland, J., in Superior Court, Beaufort County. Heard in the Supreme Court 13 April 1995.

Law Offices of G. Henry Temple, Jr., by G. Henry Temple, Jr., Kimberly W. Rabren, and Laura C. Brennan, for plaintiff-appellees and -appellants.

Poyner & Spruill, L.L.P., by George L. Simpson, III, and Randall R. Adams, for defendant-appellee and -appellant.

FRYE, Justice.

Plaintiff Wilbur Glover Bray purchased a personal automobile policy for his 1985 Nissan automobile from Allstate Insurance Company (Allstate), which provided uninsured motorist (UM) coverage in the amount of $25,000 per person/$50,000 per accident and medical payments coverage of $500. Mr. Bray also purchased two business insurance policies—an automobile policy and a garage policy—from defendant North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) for his automobile repair business. The two policies each provided liability coverage up to $300,000 per person/per accident.

On 10 July 1990, an automobile driven by Stacy Katherine Gold struck the Nissan automobile owned by plaintiff Wilbur Bray and driven by his wife, plaintiff Phyllis Tant Bray. Mrs. Bray was injured in the accident. It is undisputed that Ms. Gold's negligence was the sole proximate cause of the accident and that Ms. Gold was an uninsured motorist.

Plaintiffs brought an action against Ms. Gold seeking to recover damages for Mrs. Bray's personal injuries and Mr. Bray's loss of consortium. Plaintiffs served Allstate and Farm Bureau as their UM carriers pursuant to N.C.G.S. § 20-279.21(b)(3)(a), and both insurance companies filed answers in Ms. Gold's name. Allstate subsequently paid Mrs. Bray its $25,000 UM policy limit and its $500 medical payments limit, and Mrs. Bray signed a release in favor of Allstate which preserved her right to seek further recovery against Ms. Gold and Farm Bureau. At trial, Farm Bureau stipulated Ms. Gold's liability and defended solely on the issue of damages. The jury returned a verdict against Ms. Gold awarding $285,000 to Mrs. Bray and $15,000 to Mr. Bray. The trial court entered judgment on the verdict and assessed costs against Farm Bureau.

Plaintiffs then brought this action against Farm Bureau seeking to enforce the judgment under the UM provisions in Mr. Bray's two business insurance policies. Plaintiffs also alleged in their complaint that

Farm Bureau had committed unfair trade practices and asked for punitive damages. Plaintiffs moved for partial summary judgment, alleging that they were entitled to $274,500 plus costs and interest under the UM provisions of Mr. Bray's two business insurance policies after crediting their $300,000 judgment with the $25,500 paid to plaintiffs by Allstate. The trial court granted plaintiffs' motion and ruled under N.C.G.S. § 1A-1, Rule 54(b) that this order was a final judgment as to that claim. From this order, Farm Bureau appealed to the Court of Appeals.

The Court of Appeals held that Mrs. Bray was entitled to $25,000 UM coverage under Mr. Bray's garage policy pursuant to an endorsement to the policy. As to this issue, we granted Farm Bureau's petition for discretionary review. Farm Bureau contended that neither the policy nor the endorsement provided any UM coverage. In plaintiffs' response to Farm Bureau's petition, plaintiffs contended that the garage policy provided $300,000 UM coverage by virtue of N.C.G.S. § 20-279.21(b)(3). We conclude that discretionary review was improvidently allowed with respect to this issue. Our discussion of the remaining two issues in this case will therefore be limited to the business automobile policy and does not relate to the garage policy.

The Court of Appeals also held that the "family member/household-owned vehicle" exclusion for UM coverage in Mr. Bray's business automobile policy was repugnant to the purpose of UM and underinsured motorist (UIM) coverage and was therefore invalid. We agree and affirm the Court of Appeals as to this issue.

The Court of Appeals further held that Mr. Bray's business automobile policy provided only $25,000 UM coverage to Mrs. Bray since such coverage was limited to the statutory minimum of $25,000 per person/$50,000 per accident on the grounds that coverage beyond the statutory minimum was "voluntary" and governed by the terms of the policy, which included the "family-owned vehicle" exclusion. We reverse the Court of Appeals on this issue and hold that Mrs. Bray is entitled to $300,000 UM coverage under the business automobile policy.

Defendant contends that the Court of Appeals erred in holding that the "family member/household-owned vehicle" exclusion for UM coverage in the business automobile insurance policy issued to plaintiff husband is repugnant to the purpose of UM and UIM coverage and is therefore invalid.

"When examining cases to determine whether insurance coverage is provided by a particular automobile liability insurance policy, careful attention must be given to the type of coverage, the relevant statutory provisions, and the terms of the policy." *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991). In the present case, the type of coverage at issue is UM coverage. The business automobile policy in question, which was issued by Farm Bureau to Mr. Bray, included UM coverage. The relevant statute at the time of the automobile accident is N.C.G.S. § 20-279.21(b)(3) (Supp. 1988), supplemented by other provisions of § 20-279.21.

The UM section of the business automobile policy issued by Farm Bureau to Mr. Bray contains the following provisions:

A. COVERAGE

1. We will pay all sums the "insured" is legally entitled to recover as damages from the owner or driver of:

   a. an "uninsured motor vehicle" because of "bodily injury" sustained by the "insured" and caused by an "accident" . . . .

B. WHO IS AN INSURED

1. You.

2. If you are an individual, any "family member."

. . . .

C. EXCLUSIONS

This coverage does not apply to:

. . . .

4. "Bodily injury" sustained by you or any "family member" while "occupying" or struck by any vehicle owned by you or any "family member" that is not a covered "auto."

. . . .

F. ADDITIONAL DEFINITIONS

The following are added to the DEFINITIONS Section:

1. "Family member" means a person related to you by blood, marriage, or adoption who is a resident of your household, including a ward or foster child.

The coverage section of the policy extends coverage to family members of individual insureds, while the exclusions section purports to take coverage away from a "family member" who sustains bodily injury while "occupying" or when struck by any vehicle that is not a covered "auto" and is owned by the individual insured or any "family member" of the insured. Thus, under the express terms of the business automobile policy, Mrs. Bray, as the wife of the individual insured, would be excluded from coverage under the circumstances of this case since she was occupying an automobile owned by Mr. Bray, the individual insured, and that automobile was not a covered "auto" under the policy.

However, when a statute is applicable to the terms of an insurance policy, the provisions of the statute become a part of the policy as if written into it. If the terms of the statute and the policy conflict, the statute prevails. *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989); *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977). At the time of the accident, N.C.G.S. § 20-279.21(b)(3) provided in relevant part:

> For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, express or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of such motor vehicle.

N.C.G.S. § 20-279.21(b)(3) (Supp. 1988).

> Under this statute there are two classes of "persons insured":
>
> (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

Smith, 328 N.C. at 143, 400 S.E.2d at 47. Members of the first class are "persons insured" for the purposes of UM coverage regardless of whether the insured vehicle is involved in the insured's injuries. *Id.*

Members of the second class are "persons insured" only when the insured vehicle is involved in their injuries. *Id.*

Turning to the present case, the question becomes whether Mrs. Bray was a "person insured" of the first class under the UM provisions of N.C.G.S. § 20-279.21(b)(3). It is undisputed that Mr. Bray is the named insured under the Farm Bureau business automobile policy. It is also undisputed that Mrs. Bray is the spouse of Mr. Bray and that they reside in the same household. Therefore, Mrs. Bray was a "person insured" of the first class under the UM statute.

As a person insured of the first class, Mrs. Bray was entitled to UM benefits under Mr. Bray's business automobile policy whether she was struck by an uninsured motor vehicle while riding in an insured vehicle, or on a motorcycle, or just walking down the street. *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 418 S.E.2d 221 (1992). Thus, under subsection (b)(3) of N.C.G.S. § 20-279.21, Mrs. Bray is a person insured of the first class without regard to whether she was an occupant of any vehicle.

The family member/household-owned vehicle exclusion attempts to limit Mrs. Bray's coverage to situations where she is not in an automobile owned by a member of the same household except when she is in a "covered auto." This exclusion is vehicle-oriented and stands in sharp contrast to the essentially person-oriented statutory scheme for UM/UIM coverage. *See Smith*, 328 N.C. 139, 400 S.E.2d 44; *see also Bass*, 332 N.C. 109, 418 S.E.2d 221. We therefore hold that this vehicle-oriented exclusion is repugnant to the statute and is ineffective to limit the UM coverage in this case.

In *Smith*, this Court addressed the question of whether a family member/household-owned vehicle exclusion in a policy's liability section was effective to limit UIM coverage. 328 N.C. at 149, 400 S.E.2d at 51. The Court, after noting the difference between liability insurance and UM/UIM insurance, concluded that the family member/household-owned vehicle exclusion in the liability coverage section is not effective to deny UIM coverage to a family member injured while a passenger in a family-owned vehicle not listed in the policy. *Id.* The Court in *Smith* declined to decide whether a family member/household-owned vehicle exclusion clearly stated in the UM/UIM section of a policy is contrary to the statute since there was no such exclusion in the UM/UIM section in that case. *Id.* at 150, 400 S.E.2d at 51.

In the present case, the family member/household-owned vehicle exclusion is clearly stated in the policy's UM endorsement, so the question is whether this exclusion is effective to deny UM coverage for injuries sustained by an innocent victim of an accident with an uninsured tort-feasor. The Motor Vehicle Safety and Financial Responsibility Act is a remedial statute to be liberally construed in order that the beneficial purpose intended by its enactment may be accomplished. *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763; *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 535, 155 S.E.2d 128, 130-31 (1967). Since the primary purpose of the act is to compensate innocent victims of financially irresponsible motorists, allowing the family member/household-owned vehicle exclusion to deny UM coverage would contravene the purpose of the act. We therefore agree with the Court of Appeals that the policy's family member/household-owned vehicle exclusion for UM coverage is repugnant to the purpose of UM and UIM coverage and is therefore invalid. We hold that the family member/household-owned vehicle exclusion for UM coverage is against the public policy of the Motor Vehicle Safety and Financial Responsibility Act.

We note that our decision is in accord with the position taken by many other jurisdictions. The highest courts of several states have held the family member/household-owned vehicle exclusion invalid as contrary to the public policy of similar UM statutory schemes. *See, e.g.*, *State Farm Auto. Ins. Co. v. Reaves*, 292 Ala. 218, 292 So. 2d 95 (1974); *Harvey v. Travelers Indem. Co.*, 188 Conn. 245, 449 A.2d 157 (1982); *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971); *Lindahl v. Howe*, 345 N.W.2d 548 (Iowa 1984); *Bishop v. Allstate Ins. Co.*, 623 S.W.2d 865 (Ky. 1981); *Bradley v. Mid-Century Ins. Co.*, 409 Mich. 1, 294 N.W.2d 141 (1980); *Lowery v. State Farm Mut. Auto. Ins. Co.*, 285 So. 2d 767 (Miss. 1973); *Jacobson v. Implement Dealer Mut. Ins. Co.*, 196 Mont. 542, 640 P.2d 908 (1982); *State Farm Mut. Auto. Ins. Co. v. Hinkel*, 87 Nev. 478, 488 P.2d 1151 (1971); *Beek v. Ohio Cas. Ins. Co.*, 73 N.J. 185, 373 A.2d 654 (1977); *Chavez v. State Farm Mut. Auto. Ins. Co.*, 87 N.M. 327, 533 P.2d 100 (1975); *Hughes v. State Farm Mut. Auto. Ins. Co.*, 236 N.W.2d 870 (N.D. 1975); *Cothren v. Emcasco Ins. Co.*, 555 P.2d 1037 (Okla. 1976); *State Farm Mut. Auto. Ins. Co. v. Williams*, 481 Pa. 130, 392 A.2d 281 (1978); *Hogan v. Home Ins. Co.*, 260 S.C. 157, 194 S.E.2d 890 (1973); *Allstate Ins. Co. v. Meeks*, 207 Va. 897, 153 S.E.2d 222 (1967); *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wash. 2d 327, 494 P.2d 479 (1972); *Welch v. State Farm Mut. Auto. Ins. Co.*, 122 Wis. 2d 172,

361 N.W.2d 680 (1985). A few courts, interpreting statutes different from those in North Carolina, have reached an opposite conclusion. *See, e.g., Holcomb v. Farmers Ins. Exchange*, 254 Ark. 514, 495 S.W.2d 155 (1973); *Shipley v. American Standard Ins. Co. of Wis.*, 183 Neb. 109, 158 N.W.2d 238 (1968); *Hill v. Nationwide Mut. Ins. Co.*, 535 S.W.2d 327 (Tenn. 1976).

Notwithstanding our conclusion that the family member/household-owned vehicle exclusion is against the public policy of the Motor Vehicle Safety and Financial Responsibility Act, defendant contends that the Court of Appeals correctly held that the exclusion may nevertheless be applied to the UM coverage above the statutory minimum liability limits. Plaintiffs contend that the Court of Appeals erred in reversing the trial court's finding that they were entitled to $300,000 in UM coverage. The Court of Appeals held that Mrs. Bray's coverage under the business automobile insurance policy is limited to $25,000, since "the 'family member' exclusion is valid as to the coverage beyond the statutory minimum of $25,000." *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 115 N.C. App. 438, 445, 445 S.E.2d 79, 83 (1994). We reverse the Court of Appeals on this issue and hold that the family member/household-owned vehicle exclusion for UM coverage, being against the public policy of the Motor Vehicle Safety and Financial Responsibility Act, is unenforceable as to the $300,000 UM coverage in the policy.

In the present case, the liability limits of the business automobile policy were $300,000, and the parties have stipulated that there was no written rejection of UM coverage by the Brays. Under N.C.G.S. § 20-279.21(b)(3), the insured is entitled to purchase UM coverage in an amount equal to general liability coverage. Unless the insured rejects in writing UM coverage, the policy is deemed to provide UM coverage equal to the general liability coverage. N.C.G.S. § 20-279.21(b)(3). To the extent that UM coverage is offered in this case, it is offered pursuant to the requirements of N.C.G.S. § 20-279.21(b)(3), and in that sense, it is mandatory, not voluntary, coverage. Accordingly, N.C.G.S. § 20-279.21(g),[1] which relates to vol-

1. N.C.G.S. § 20-279.21(g) provides:

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this Article. With respect to a policy which grants such excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

untary coverage, does not apply. Thus, Mrs. Bray was entitled to $300,000 of UM coverage, an amount equal to the liability limits of the policy.

For the foregoing reasons, the decision of the Court of Appeals is affirmed with respect to the family member/household-owned vehicle exclusion and reversed with respect to the amount of coverage under the business automobile policy, and the case is remanded to that court for further remand to the Superior Court, Beaufort County, for modification of the order of the Superior Court in accordance with the Court of Appeals' decision with respect to the garage policy (BAP 2803436) and reinstatement of the order of the Superior Court with respect to the business automobile policy (BAP 2053683).

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART; AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

STATE OF NORTH CAROLINA v. TRINA SISK BUTLER

No. 503A94

(Filed 6 October 1995)

1. Criminal Law § 49 (NCI4th)— accessory before the fact—murder, breaking and entering, robbery—aiding principal—evidence sufficient

The trial court did not err in a prosecution for being an accessory before the fact to felonious breaking and entering, robbery with a dangerous weapon, and first-degree murder by denying defendant's motions to dismiss where defendant conceded that the principal committed the offense and that defendant was not present when the offense was committed, and, contrary to defendant's contention, the evidence, viewed in the light most favorable to the State, tends to show that defendant counseled, encouraged and aided the principal in the commission of the crimes against the victim.

Am Jur 2d, Criminal Law §§ 168-172.

2. Criminal Law § 1133 (NCI4th)— accessory before the fact—murder, breaking and entering, robbery—sentencing—aggravating factors—position of leadership or dominance

The trial court did not err in sentencing defendant as an accessory before the fact to first-degree murder, felonious breaking or entering, and armed robbery by finding as an aggravating factor that she occupied a position of leadership or dominance over the principal, Pratt, where the evidence tends to show that defendant was twenty-nine years old at the time Pratt murdered the victim; Pratt was still a teenager; when they began to generally discuss robbery, defendant was the only person with the knowledge necessary to bring about and influence the success of the criminal enterprise; and defendant informed Pratt that the victim kept a trunk of money in his house and drove Pratt, who had no other apparent means of transportation, to the victim's house and pointed out the house and told Pratt that no one was home.

Am Jur 2d, Criminal Law §§ 598, 599.

3. Criminal Law § 1114 (NCI4th)— accessory before the fact—murder, breaking and entering, armed robbery—sentencing—aggravating factors—lack of remorse

The trial court did not err when sentencing defendant for being an accessory before the fact to murder, breaking or entering, and armed robbery by finding lack of remorse as an aggravating factor where defendant contended that the court erred by focusing solely on lack of remorse at the time of the offense. The only evidence of remorse was the testimony of a pastor who visited defendant in jail. However, the fact that defendant showed remorse while in jail carries little weight; it is relatively easy for one facing a life sentence to be remorseful. Defendant not only exhibited a lack of remorse at the time of the offense, but also exhibited no hint of remorse in the five days following the murder prior to her arrest, during which time she was aiding the principal in attempting to cover up the murder and planning the next crime, the break-in and theft of money from her grandmother's home.

Am Jur 2d, Criminal Law §§ 598, 599.

4. Criminal Law § 1271 (NCI4th)— accessory before the fact—murder, breaking and entering, armed robbery—sentencing—mitigating factors—good character

The trial court did not err when sentencing defendant for being an accessory before the fact to murder, breaking or entering, and armed robbery by not finding the mitigating factor of good character where defendant's only character witness was a relative who did not meet defendant until shortly before her trial, when defendant married the witness's brother and moved into his home while released on bond. The witness's opinion was based solely upon what friends and family members thought of defendant. The character evidence presented by defendant was not the kind of evidence that is so manifestly credible that it required the trial court to find good character as a mitigating factor.

Am Jur 2d, Criminal Law §§ 598, 599.

5. Criminal Law § 1079 (NCI4th)— accessory before the fact—murder, breaking and entering, armed robbery—sentencing—weighing of factors

The trial court did not abuse its discretion in a prosecution for being an accessory before the fact to murder, breaking or entering, and armed robbery by finding that the aggravating factors outweighed the mitigating factor where the court found the statutory aggravating factor that defendant occupied a position of leadership or dominance, the nonstatutory aggravating factor that defendant failed to show remorse, and the statutory mitigating factor that defendant had a record of criminal convictions consisting solely of misdemeanors punishable by not more than sixty days imprisonment.

Am Jur 2d, Criminal Law §§ 598, 599.

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 Owens, J., at the 11 April 1994 Criminal Session of Superior Court, Rutherford County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to the additional judgment imposed for felonious breaking and entering and robbery with a dangerous weapon was allowed by this Court on 27 December 1994. Heard in the Supreme Court 9 May 1995.

Michael F. Easley, Attorney General, by Lorinzo L. Joyner, Special Deputy Attorney General, for the State.

Steven F. Bryant for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 18 February 1992 for the offenses of felonious breaking and entering, robbery with a dangerous weapon, and the first-degree murder of James Carroll Lawson. The defendant was tried noncapitally, and the jury found the defendant guilty as charged of felonious breaking and entering, robbery with a dangerous weapon, and first-degree murder on theories of both premeditation and deliberation and felony murder. By judgments and commitment dated 14 April 1994, Judge Owens sentenced the defendant to consecutive terms of life imprisonment for the murder and thirty-five years' imprisonment for the felonious breaking and entering and robbery with a dangerous weapon.

At trial, the State presented evidence tending to show that on 11 February 1992 James Lawson was stabbed to death in his home after surprising Daniel Pratt, an intruder. Pratt testified that he broke into the victim's home for the purpose of stealing a trunk full of money reputedly kept by the victim. The victim returned to find Pratt in his home, and the two men began to struggle. During the struggle, Pratt obtained possession of a knife belonging to the victim and stabbed the victim to death. The defendant stipulated that the victim's death was caused by a stab wound to the chest and that the victim received six additional stab wounds to his back. Pratt was arrested and pled guilty to first-degree murder, felonious breaking and entering, and robbery with a dangerous weapon.

Pratt further testified that the defendant also participated in the criminal enterprise that resulted in the victim's death. Pratt stated that the night before the murder, the defendant told him about an old man who kept a trunk of money in his house. The next day, the defendant told Pratt that the money was kept in an old, run-down house that would be easy to get into without being seen. The defendant described the interior of the house and told Pratt that the man lived there alone, might carry a gun, and was usually away from his home during the day.

Later that day, the defendant drove Pratt to the victim's home. According to Pratt, the defendant slowed down in front of the victim's

house and said, "That's it and he's not at home." At a railroad crossing two hundred yards past the victim's house, Pratt testified that he grabbed his duffel bag, jumped out of the defendant's car, and told the defendant to pick him up in twenty minutes. The defendant asked, "Where?" and Pratt answered, "Here." When the defendant returned to pick up Pratt, she asked Pratt if he "got anything." Pratt told the defendant that he had stabbed the victim but did not know if the victim was dead. The defendant then drove Pratt to a Hardee's to wash the blood from his hands and helped Pratt discard the knife and duffel bag.

Later that evening, the defendant told Pratt that her stepgrandmother, who lived in Georgia, kept large sums of money in a safe in her home. The defendant and Pratt made plans to go to Georgia to rob the defendant's grandmother. In preparation for their trip to Georgia, defendant and Pratt bought a map of Georgia and two pairs of gloves so that no fingerprints would be left in the grandmother's house.

The defendant and Pratt were arrested before they were able to leave North Carolina.

I.

[1] In her first assignment of error, the defendant contends that the trial court committed reversible error by denying her motions to dismiss. Specifically, the defendant argues that the State failed to present sufficient evidence that she was an accessory before the fact to the felonies committed by Daniel Pratt.

When a defendant moves for dismissal, the trial court must determine whether the State has presented substantial evidence of each essential element of the offense charged. *State v. Quick*, 323 N.C. 675, 682, 375 S.E.2d 156, 160 (1989). If substantial evidence of each essential element is presented, the dismissal is properly denied. *Id.* "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). In ruling on the motion to dismiss, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387-88 (1984).

The defendant was charged with and convicted of first-degree murder, felonious breaking and entering, and robbery with a danger-

ous weapon based on the theory that she was an accessory before the fact to each offense committed by Daniel Pratt. The essential elements of accessory before the fact are (1) the defendant must have counseled, procured, commanded, encouraged, or aided the principal in the commission of the offense; (2) the principal must have committed the offense; and (3) the defendant must not have been present when the offense was committed. *State v. Davis*, 319 N.C. 620, 624, 356 S.E.2d 340, 342 (1987). The defendant concedes the existence of the second and third elements and challenges the sufficiency of the State's evidence only with respect to the first element.

In the present case, the evidence, viewed in the light most favorable to the State, tends to show that the defendant counseled, encouraged and aided Pratt in the commission of the crimes against the victim. The day before the murder, Pratt stole approximately five hundred dollars from his aunt's purse. The defendant received a share of this money and knew that Pratt was looking for other "ways" to obtain money. The defendant knew that Pratt was willing to steal to get more money. That night, the defendant told Pratt about an old man who kept a trunk of money in his house. The next day, the defendant provided Pratt with specific details about the victim and drove Pratt to the victim's house. Less than twelve hours had elapsed between the time the defendant targeted the victim and the time of the victim's murder. Prior to the defendant's counseling, Pratt had no knowledge of the victim's identity, his reputation for keeping large sums of money in his house, the floor plan of the house, or that the victim carried a gun and was rarely home during the day. That the defendant aided Pratt in the commission of the crimes is further evident in that she drove Pratt to the victim's house, pointed out that the victim was not home, and agreed to return and pick Pratt up when it became clear that he was prepared to commit the robbery. Finally, after picking Pratt up outside the victim's house, the defendant asked Pratt, "Did [you] get anything?" It is reasonable to infer, if it is not in fact clear, from this statement and from the evidence overall that the defendant knew that Pratt was going to rob the victim's home.

Based on our review of this evidence, we conclude sufficient evidence clearly existed from which a jury could find that the defendant counseled, encouraged or aided Daniel Pratt in committing the crimes charged. Defendant's first assignment of error is, therefore, overruled.

II.

[2] In her second assignment of error, the defendant contends that the trial court erred by finding as an aggravating factor that she occupied a position of leadership or dominance over Daniel Pratt.

In the present case, the evidence tends to show that the defendant was twenty-nine years old at the time Daniel Pratt murdered the victim. Pratt, on the other hand, was still a teenager. One reasonable inference from this evidence is that the defendant assumed a position of influence over Pratt based on their relative ages. More importantly, however, is the fact that when the defendant and Pratt began to generally discuss robbery as a means of obtaining money, defendant was the only person with the knowledge necessary to bring about and influence the success of the criminal enterprise. The defendant not only informed Pratt that the victim kept a trunk of money in his house, she drove Pratt, who had no other apparent means of transportation, to the victim's house, pointed out the house and told Pratt that no one was home. We find that this evidence fully supports the trial court's finding that the defendant occupied a position of leadership which resulted in Pratt's involvement in the crimes.

III.

[3] We next consider whether the trial court erred in finding in aggravation that the defendant showed a lack of remorse for her crimes. The defendant contends that the trial court erred by focusing solely on the defendant's lack of remorse at the time of the offense, in violation of this Court's holding in *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985). In *Parker*, this Court held:

> For the [S]tate to prove lack of remorse as an aggravating circumstance, it is not enough to show merely that there was no remorse at the very time the crime was being committed. Rarely does a defendant have remorse for a crime he is presently committing. Almost always remorse occurs, if at all, sometime after the commission when defendant has had an opportunity to reflect on his criminal deed. *If after such time for reflection remorse does not come, and there is evidence of this fact, then lack of remorse properly may be found by the sentencing judge as an aggravating circumstance.*

Id. at 257, 337 S.E.2d at 502 (emphasis added). Contrary to the defendant's argument, a careful review of the record supports the trial court's finding.

In the case *sub judice*, the only evidence of remorse presented by the defendant was through the testimony of Teresa Greene, a pastor who visited the defendant in jail approximately twice a month. Reverend Greene testified that the defendant demonstrated remorse in that she often became tearful talking about her participation in the crimes and by often stating that she would never have gotten involved with Pratt had she known the resulting consequences. However, the fact that the defendant showed remorse while in jail carries little weight with this Court. It is relatively easy for one facing a life behind bars to be remorseful.

In contrast to her actions while in jail, the defendant not only exhibited a lack of remorse at the time the offense was committed, but she also exhibited no hint of remorse in the five days following the murder prior to her arrest. Instead, the defendant aided Daniel Pratt in attempting to cover up the murder by hiding the murder weapon and other incriminating evidence. Further, the defendant quickly began planning and acquiring the tools necessary to commit her next crime, specifically, the break-in and theft of money from her grandmother's home in Georgia. These actions, which are wholly inconsistent with feelings of remorse, were critical to the trial court's findings. We find that this evidence was enough to support the aggravating factor of lack of remorse found by the trial court. This assignment of error is therefore overruled.

IV.

[4] In her fourth assignment of error, the defendant contends that the trial court erred by failing to find the mitigating factor that she had been a person of good character. Glenn Bradley, the defendant's brother-in-law, testified that the defendant was a good, soft-hearted person and had a good reputation in the community. The defendant specifically argues that by failing to find in mitigation that she was a person of good character, in light of Bradley's testimony, the trial court ignored uncontradicted and substantial evidence of a mitigating factor in violation of the Fair Sentencing Act.

A defendant's sentence may be mitigated by evidence that he or she has been a person of good character. N.C.G.S. § 15A-1340.4(a)(2)m (1988). However, the defendant bears the burden of demonstrating that the evidence so clearly establishes the mitigating factor that no reasonable inferences to the contrary can be drawn and that the evidence is manifestly credible. *State v. Jones*, 309 N.C. 214, 219-20, 306 S.E.2d 451, 455 (1983). Accordingly, we will find the

sentencing judge in error only when evidence of a statutory mitigating factor is both uncontradicted and manifestly credible. *Id.* at 220, 306 S.E.2d at 456.

In this case, the defendant's only character witness, Glenn Bradley, was a relative. Bradley did not meet the defendant until shortly before her trial after she married his brother and moved into his home while released from jail on bond. Bradley's opinion about the defendant's character was based solely upon what friends and family members thought of defendant. During cross-examination by the district attorney, Bradley admitted he had never spoken with any persons, other than the defendant's friends and family, about the defendant's character or reputation. Nor had Bradley ever spoken with anyone who lived in the area of the county where the defendant and her family were from. The character evidence presented by the defendant was not the kind of evidence that is so manifestly credible that it required the trial court to find good character as a mitigating factor. Accordingly, we find no error in the trial court's failure to find defendant's good character as a mitigating factor.

V.

[5] In her final assignment of error, the defendant contends that the trial court erred by finding that the aggravating factors outweighed the mitigating factors. We disagree.

The balance struck by a sentencing court in weighing the aggravating and mitigating factors is a matter left to the sound discretion of the sentencing court and will not be disturbed on appeal absent a showing that the decision was manifestly unsupported by reason. *Parker*, 315 N.C. at 258, 337 S.E.2d at 502-03. The sentencing court need not justify the weight it attaches to any factor. *Id.* at 258, 337 S.E.2d at 502.

In the present case, the sentencing court properly found one statutory aggravating factor, that the defendant occupied a position of leadership or dominance, and one nonstatutory aggravating factor, that the defendant failed to show remorse. The sentencing court found only one statutory mitigating factor, that the defendant had a record of criminal convictions consisting solely of misdemeanors punishable by not more than sixty days' imprisonment. As already noted, the amount of weight to be given these factors is within the sentencing court's discretion. Under the circumstances of this case, we are not willing to conclude that the weighing of the aggravating

and mitigating factors was manifestly unsupported by reason. We are therefore compelled to conclude that the sentencing court did not abuse its discretion by finding that the two aggravating factors outweighed the mitigating factor.

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

NO ERROR.

STATE OF NORTH CAROLINA v. GARY DEAN NELSON

No. 199A94

(Filed 6 October 1995)

1. Rape and Allied Sexual Offenses § 200 (NCI4th)— second-degree rape—attempted rape not submitted—no error

The trial court did not err in a prosecution for second-degree rape and kidnapping by not submitting attempted second-degree rape where defendant denied that penetration occurred but also testified that the event was consensual. If the jury had believed the defendant's evidence, he would have been found not guilty.

Am Jur 2d, Rape § 110.

2. Appeal and Error § 157 (NCI4th)— second-degree rape—jury request to view evidence—communication between foreperson and judge—appealable

The issue of whether there was error in a second-degree rape prosecution in a meeting between the judge and the foreperson out of the presence of the other eleven jurors to discuss a request to view evidence was appealable. The State conceded that the failure to object did not prevent defendant from appealing, but contended that defendant consented by not objecting when the court said it would ask only the foreman to return to the courtroom, and also cited the court's statement after if had sent the items to the jury room that it "was done in accordance with the procedure suggested by" defense counsel. This is not sufficient to show the defendant consented to the procedure.

Am Jur 2d, Appellate Review § 222.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case. 43 ALR4th 410.

3. Criminal Law § 497 (NCI4th)— second-degree rape—deliberations—review of evidence—no prejudicial error

There was no prejudicial error in a prosecution for second-degree rape and kidnapping where the jury sent a note to the judge during deliberations asking to review certain items of evidence and the court asked only the foreperson to return to the courtroom to discuss the request before allowing the evidence to be taken to the jury room. Although it was error not to require all the jurors to return to the courtroom for the questions in regard to the exhibits, there was no prejudice because all of the exhibits which were given to the jury had been introduced into evidence; the court did not give any instructions to the foreman except not to alter or change the exhibits; the court did not give any instructions on the law which could have been misinterpreted by the foreman to the jury; the jury was given what they said they wanted; and the exhibits sent to the jury room were innocuous. N.C.G.S. § 15A-1233(a).

Am Jur 2d, Trial § 1665.

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. 341, 442 S.E.2d 333 (1994), ordering a new trial on the defendant's conviction of first-degree kidnapping, and on discretionary review of a unanimous decision ordering a new trial on a conviction of second-degree rape at the 21 September 1992 Criminal Session of Superior Court, Guilford County, Cashwell, J., presiding. Heard in the Supreme Court 10 May 1995.

The defendant was tried for second-degree rape and first-degree kidnapping. The State's evidence showed that on 9 January 1992, the victim was a topless dancer at a nightclub in Greensboro. The defendant was in the club and talked to the victim. After the club had closed at 2:00 a.m., the victim was walking to her automobile when the defendant appeared from behind the victim, forced her behind a truck, and raped her.

The defendant testified that he was in the club and talked to the victim. She told him she would drive him home. He said he was very drunk when he left the club, and when he met the victim at her automobile, he was overcome with nausea. He went behind a truck

because he did not want the victim to see him be sick. The defendant testified the victim came to check on him and began to rub his back and shoulders. He then felt her rubbing his private parts, after which she unzipped his pants and attempted to have vaginal intercourse with him. He testified she began rubbing his penis against her vagina. He said, however, that "she never got it inside her vagina."

The defendant was found guilty of both charges. The Court of Appeals unanimously ordered a new trial on the conviction for rape and by a divided panel ordered a new trial on the kidnapping conviction. The State appealed on the kidnapping conviction as a matter of right, and we granted discretionary review as to the conviction for rape.

Michael F. Easley, Attorney General, by William N. Farrell, Jr., Senior Deputy Attorney General, and Ellen B. Scouten, Assistant Attorney General, for the State-appellant.

Geoffrey C. Mangum for the defendant-appellee.

WEBB, Justice.

[1] The defendant contends and the Court of Appeals held it was error not to submit to the jury the lesser included offense of attempted second-degree rape. The Court of Appeals, relying on *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985), said the defendant's unequivocal denial that a penetration had occurred required the court to submit the lesser included offense to the jury.

We have held that a lesser offense should not be submitted to the jury if the evidence is sufficient to support a finding of all the elements of the greater offense, and there is no evidence to support a finding of the lesser offense. A denial by the defendant that he committed the crime is not sufficient to submit a lesser included offense. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983).

> Where there is conflicting evidence as to an essential element of the crime charged, the court should instruct the jury with regard to any lesser included offense *supported by any version of the evidence.* If the lesser included offense is not supported by the evidence, it should not be submitted, regardless of conflicting evidence.

State v. Jones, 304 N.C. 323, 331, 283 S.E.2d 483, 488 (1981).

When the rule is applied in this case, we believe it was error for the Court of Appeals to hold the lesser included offense should have been submitted. The State submitted positive evidence of every element of the crime. The defendant testified that the event was consensual. This is not evidence of attempted rape. If the jury had believed the defendant's evidence, he would have been found not guilty. The defendant did not present evidence of a lesser included offense. If the lesser included offense of attempted second-degree rape had been submitted to the jury, the defendant could have been convicted of a crime which neither party's evidence would support.

The rule that a jury can believe all, part, or none of a party's evidence, *State v. Faircloth*, 297 N.C. 388, 255 S.E.2d 366 (1979), does not help the defendant. It does not apply when to let it do so could result in the jury's finding of guilt of a crime which is not supported by the evidence of either party.

We can understand why the Court of Appeals reached the result which it did. In *Williams*, 314 N.C. at 353, 333 S.E.2d at 719, we noted that had "the defendant unequivocally denied the essential element of penetration," the court should have submitted to the jury the lesser included offense of attempted rape. That language was appropriate in the context of that case but it is not applicable here.

We reverse the Court of Appeals on this issue.

[2] In its next argument, the State asserts that the Court of Appeals erred by determining that the court's meeting with the jury foreman out of the presence of the other eleven jurors constituted reversible error. During jury deliberations, the court made the following statement:

> [B]efore we bring the jury in, Ms.—the bailiff[,] brought me a note just a few moments ago, counsel, from the jury in which they've listed four things. It's kind of a cryptic note. It reads as follows: "One, photos. Two, underwear. Three, medical reports. Four, rose." And if counsel wishes to see the note—-

After discussions with counsel for both parties, the court stated, "All right, in order to determine what underwear they're referring to, because they didn't tell me, I'm going to ask them to come out—I'll ask the foreperson only to come out." The foreman came to the jury box and engaged in the following colloquy:

THE COURT:—I want to just clarify one thing. . . . I have a note given me by the bailiff which lists four items that the jury wishes to see. One is photographs.

JUROR NO. 9:—Yes, sir.

THE COURT:—Two says underwear, three says medical reports, and four says rose.

JUROR NO. 9:—Yes.

THE COURT:—Do you—does the jury wish to see all of the photographs?

JUROR NO. 9:—I think they more meant the photographs that were laying [sic] out right in front of us just before we went in.

THE COURT:—Okay.

Mr. Cahoon and Mr. Panosh, I'm going to send back all of the photographs.

I don't know which ones were laying out there, but I'll let you have all of the photographs.

When you say "underwear," are you referring to a particular item?

JUROR NO. 9:—Ms. Shavers' underwear.

THE COURT:—The red —-

JUROR NO. 9:—The red T-bar.

THE COURT:—You will be allowed to get that.

Medical reports, you're referring to all of the medical reports, that is, both the defendant's exhibits—and I don't know if the State had any marked or not.

MR. PANOSH:—Yes, sir.

THE COURT:—All of the reports referring to medical reports, is that correct?

JUROR NO. 9:—Yes. I polled the room asking individuals —-

THE COURT:—Don't tell me that. Just tell me yes or no what you want. Just all the medical reports, too?

JUROR NO. 9:—Yes, sir.

THE COURT:—I'll give you that.

And the rose was the only other item?

JUROR NO. 9:—Yes, sir.

The court then asked counsel for both parties to go through the exhibits and collect those items requested by the jury, which they did. While counsel were selecting the exhibits, the court addressed the foreman, saying:

> I would ask you, of course, when these items are in the jury's possession back in the jury room, do not alter or change them in anyway. Don't make any marks on them. Don't do anything in that regard. You may examine them, but don't alter or change them in anyway, please.

After a brief discussion about how those items not enclosed in containers would be handled, the trial court made the following statement for the record:

> All right, let the record reflect that the items requested by the jury were given to the jury in open court by tendering them to the foreperson; that the defendant and his attorney and the State's attorney was [sic] present, and that this was done in accordance with the procedure suggested by Mr. Cahoon.

The defendant did not object to the action of the court. Although the State concedes that the failure to object does not prevent the defendant from appealing, *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985), it contends the defendant consented to this procedure and cannot now complain of it. It bases this argument on the fact that the defendant did not object when the court said it would ask only the foreman to return to the courtroom and the court's statement after it had sent the items to the jury room that it "was done in accordance with the procedure suggested by" defense counsel. This is not sufficient to show the defendant consented to the procedure. The matter is appealable.

[3] It was error not to require all the jurors to return to the courtroom for the questions in regard to the exhibits. N.C.G.S. § 15A-1233(a) (1988); *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652. The question is whether this was harmless error.

In *Ashe*, we held that the failure to require all jurors to return to the courtroom to ask a question of the court violates not only

N.C.G.S. § 15A-1233 but also the unanimous verdict requirement of Article I, Section 24 of the North Carolina Constitution. In *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *vacated and remanded*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990), we held that in order to hold harmless an error based on a violation of the North Carolina Constitution, the State must show that the error was harmless beyond a reasonable doubt. An error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction.

The State argues that *State v. McLaughlin*, 320 N.C. 564, 359 S.E.2d 768 (1987), governs and under that case the harmless error test is found in N.C.G.S. § 15A-1443(a), which is whether "there is a reasonable possibility that had the error in question not been committed, a different result would have been reached." In *McLaughlin*, we explained that there was only a statutory and not a constitutional violation. For that reason, we applied the test of N.C.G.S. § 15A-1443(a). In this case, there is constitutional error and we must apply the test delineated in *Huff*.

We believe the State has carried its burden of showing the error was harmless beyond a reasonable doubt. All the exhibits which were given to the jury had been introduced into evidence. The court did not give any instructions to the foreman except not to alter or change the exhibits. The court did not give any instructions on the law which could have been misinterpreted by the foreman to the jury. The court questioned the foreman as to what exhibits the jury wanted. The jury was given what the foreman said they wanted. We do not see how this could have been misintrepreted by the jury.

The exhibits sent to the jury room were innocuous. The photographs were of the club and the scene where the alleged crimes occurred. They added nothing to the credibility of any of the witnesses. The underwear requested by the jury was the victim's "red T-bar." This was the victim's costume, which she wore while dancing. She was not wearing it when the incident in question occurred. It should not have influenced the jury. All the medical reports sent to the jury, except one page, were introduced at trial by the defendant. We do not see how the defendant was prejudiced by allowing the jury to see evidence he had introduced. The rose was a flower the victim carried from the club and dropped when the incident occurred. It should not have affected the reasoning of the jury.

We do not see how the error in not requiring all the jurors to be in the courtroom to ask for the exhibits contributed to the conviction of the defendant. The error was harmless beyond a reasonable doubt.

For the reasons stated in this opinion, we reverse the Court of Appeals and remand to that court for further remand to the Superior Court, Guilford County, for the reinstatement of its judgments.

REVERSED AND REMANDED.

LAURA LEIGH BOONE (STOTT) BROMHAL v. E. GREGORY STOTT

No. 520A94

(Filed 6 October 1995)

Divorce and Separation § 520 (NCI4th)— separation agreement—attorney fee provision—public policy—validity

A provision in a separation agreement for the recovery of attorney fees incurred to enforce provisions of the agreement does not violate public policy and is valid and binding under N.C.G.S. § 52-10.1.

Am Jur 2d, Divorce and Separation §§ 829, 838, 839.

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 116 N.C. App. 250, 447 S.E.2d 481 (1994), affirming judgment for the plaintiff entered by Willis, J., on 3 November 1992 in District Court, Wake County. Heard in the Supreme Court 21 June 1995.

Brady, Schilawski, Earls and Ingram, by Michael F. Schilawski, for plaintiff-appellee.

Jack P. Gulley for defendant-appellant.

ORR, Justice.

This case arises out of a Separation Agreement (hereinafter "Agreement") executed by the parties, which provides for an award of attorney's fees should a party fail to comply with the terms of the Agreement. The sole question presented by this appeal is whether the trial court erred in its award of attorney's fees to the plaintiff pursuant to this provision of the Agreement.

The record reflects that the parties married on 23 April 1977 and separated on or about 17 August 1987. Two minor children were born to the parties during the marriage. The parties entered into a Separation Agreement and subsequently a Modification Agreement. Defendant failed to comply with the child support provision of the Modification Agreement, giving rise to plaintiff's suit.

The complaint was filed on 28 December 1988 and an amended complaint was filed on 13 June 1989. In her complaint, plaintiff requested an order requiring defendant to pay the deficient child support and also sought reimbursement of attorney's fees pursuant to paragraph 27 of the Agreement, which provides:

> Suit costs. If either party shall fail to keep and perform any agreement or provision hereof, the other party shall be entitled to recover reasonable attorney's fees and any and all other expenses incurred in any action instituted to enforce provisions of this agreement.

In a judgment entered 3 November 1992, plaintiff was awarded $22,550.49, plus interest, for unpaid child support and reimbursement for one additional marital debt, and defendant was ordered to compensate plaintiff for attorney's fees incurred at all stages of the case in the amount of $40,000.

Defendant appealed this judgment to the Court of Appeals, which affirmed the trial court's order by a divided panel. The dissent was based solely on the issue of attorney's fees, which is now before this Court. Defendant contends that the provision in the Agreement for recovery of attorney's fees is invalid because it lacks statutory authority. We disagree.

Although the Court of Appeals has addressed the issue before us in several cases, including *Edwards v. Edwards*, 102 N.C. App. 706, 403 S.E.2d 530, *disc. rev. denied*, 329 N.C. 787, 408 S.E.2d 518 (1991), this Court has not directly considered the contractual recovery of attorney's fees in the context of separation agreements. The majority at the Court of Appeals below, in reliance upon *Edwards*, based the statutory authority for approval of the recovery of attorney's fees on N.C.G.S. § 52-10.1, which controls separation agreements.

> Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects. . . .

N.C.G.S. § 52-10.1 (1991). There can be no question that this broad language in N.C.G.S. § 52-10.1 statutorily authorizes a married couple in executing a separation agreement to include any provision, including the one in question, unless that specific provision violates public policy. It is therefore necessary for us in addressing this issue to determine whether the inclusion of a provision for the recovery of attorney's fees in a separation agreement violates the public policy of the State of North Carolina.

In her article "*Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina*," 69 N.C. L. Rev. 319, 319-20 (1991) [hereinafter "Sharp"], Sally Burnette Sharp, professor of law at the University of North Carolina at Chapel Hill, states:

> Separation or marital settlement agreements are, quite correctly, said to minimize the psychological and economic costs of divorce, to create better prospects for post-divorce cooperation between the parties, to lessen the impact of divorce upon children, and to promote judicial economy. It is hardly surprising, therefore, to find that these agreements are the vehicle by which the distributional consequences of the overwhelming majority of divorces in this country are concluded.

As such, it is obvious that the General Assembly of North Carolina views the utilization of separation agreements as instruments of sound public policy in North Carolina in dealing with the growing number of divorces taking place in our society.

One of the assumptions in the Sharp article is that "settlement agreements are fundamentally different from other kinds of contracts. They deal with issues of custody, support, and distribution of wealth that have consequences of immense significance, not only to the parties involved, but to the state as well." *Id.* at 326.

> [T]he state has strong and legitimate policy interests in settlement agreements that differ markedly from its interests in most other private contracts. In general, the state has an interest in protecting all citizens from bargaining contexts which are peculiarly conducive to overreaching tactics. Specifically, the state has a very real interest in the creation of some procedures by which it can ensure that settlement agreements make adequate provision for children and dependent spouses.

Id. at 349. The enforcement of provisions for the recovery of attorney's fees in settlement agreements helps ensure that provisions for support of children and dependent spouses in those agreements will be enforced by allowing a party to the agreement to seek enforcement in a court of law and to recover the legal expenses associated with that enforcement. Thus, parties would not be disadvantaged by choosing to resolve these issues privately in a settlement agreement instead of pursuing a court action for child support or custody or for alimony in which attorney's fees may be granted under N.C.G.S. §§ 50-13.6 and 50-16.4. We conclude that the public policy of this State encourages settlement agreements and supports the inclusion of a provision for the recovery of attorney's fees in settlement agreements.

Turning our attention to the facts of the case *sub judice*, enforcement of the particular provision for the recovery of attorney's fees at issue is not inconsistent with public policy. The Agreement in question was drafted by the defendant, an attorney licensed in North Carolina, and on 27 September 1989, both parties stipulated that the Separation Agreement and modifications made to it were valid and enforceable. There is also uncontested evidence that the trial court made extensive findings of fact and conclusions of law in regard to the necessity of the plaintiff bringing a lawsuit to enforce the provisions of the Separation Agreement and incurring substantial attorney's fees and costs in her effort to enforce the provisions. There is no issue brought forward by the defendant questioning the amount of attorney's fees awarded by the trial court. The sole contention, as previously noted, is that the trial court was without authorization to impose the attorney's fees.

In arguing that the provision at issue should not be enforced, defendant relies on a line of North Carolina cases where the appellate courts have refused to enforce attorney's fees indemnification clauses in contracts in the context of business-oriented lawsuits. These cases do not mandate that the provision at issue is against public policy. The policy reasons given for denying enforcement in the cases cited do not apply to the facts before us.

This Court first addressed a contractual provision indemnifying a party for attorney's fees in *Tinsley v. Hoskins*, 111 N.C. 340, 16 S.E. 325 (1892), which concerned a promissory note. In invalidating the provision, this Court stated that it could result in an oppressive penalty, serve as a shield for usury and promote litigation; that it

"tends to the oppression of debtors to sanction their incorporation in *commercial instruments*"; and that "stipulations *like the one now sued upon*, when incorporated into obligations *of this particular character*, are against public policy and therefore invalid." *Id.* at 341-42, 16 S.E. at 325-28 (emphasis added). Thus, this Court's decision in *Tinsley* was limited strictly to commercial instruments.

Williams v. Rich, 117 N.C. 235, 23 S.E. 257 (1895), extended the rationale to invalidate an attorney's fees indemnity provision in a deed of trust because such stipulations are in the nature of forfeitures, they encourage litigation, they "can readily be used to cover usurious agreements, and excessive exactions may be had under the guise of an attorney's fee." *Id.* at 240, 23 S.E. at 259.

The rule was established to protect debtors from the "opportunity for oppression" by lending institutions in collecting on notes, mortgages and deeds of trust. *Turner v. Boger*, 126 N.C. 300, 302, 35 S.E. 592, 593 (1900).

In *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 266 S.E.2d 812 (1980), this Court applied these same justifications to the commercial lease of specific goods by requiring statutory authority for a contractual provision indemnifying a party for attorney's fees. We enunciated the law in North Carolina as " 'frown[ing] upon contractual obligations for attorney's fees as part of the costs of an action' " and reviewed cases that had adhered to this general rule based on public policy considerations. *Id. at* 289-90, 266 S.E.2d at 814-15 (quoting *Supply, Inc. v. Allen*, 30 N.C. App. 272, 276, 227 S.E.2d 120, 123 (1976)). All of the cases reviewed involved a promissory note, a deed of trust, a guaranty on a promissory note or a commercial construction contract.

However, the public policy justifications in debtor-creditor and commercial contract cases do not apply to a separation agreement. A separation agreement is different from a commercial, arms-length transaction. It cannot be analyzed in terms of the marketplace and bargaining power.

As Sharp notes in her article, separation agreements are in fact different from other types of contracts.

> Standard contract principles are designed to operate within the context of a rational, competitive market that assumes a relative parity of bargaining strength between the parties. To equate the "market" of settlement agreements, marriage dissolution—a situ-

> ation virtually always accompanied by extraordinary stress and rarely accompanied by mutual desires to achieve fair results—with the paradigmatic "marketplace" in which strangers bargain at arms' length, is simply to ignore the realities of human nature, the adversarial process, and the realities of most divorce bargaining.

Sharp, 69 N.C. L. Rev. at 350. The public policy rationale for frowning upon contractual provisions for the recovery of attorney's fees in the commercial and debtor-creditor context simply does not apply to separation agreements.

The provision for recovery of attorney's fees is therefore not inconsistent with public policy and is therefore legal, valid and binding under N.C.G.S. § 52-10.1.

Accordingly, we affirm the order of the Court of Appeals affirming the trial court's award of attorney's fees to plaintiff.

AFFIRMED.

STATE OF NORTH CAROLINA v. BRIAN DESMOND WORTHY

No. 618A94

(Filed 6 October 1995)

Criminal Law § 439 (NCI4th)— closing argument—interest of witness in testifying—no mischaracterization of evidence

The prosecutor's closing argument in a first-degree murder trial that an eleven-year-old State's witness had no interest in testifying except his concern for his future safety was not a mischaracterization of the evidence or a personal opinion and was supported by the evidence where the witness's answer that he was "not really" afraid referred to talking to the police rather than to testifying against defendant; a reasonable inference that the witness was afraid of facing defendant and testifying against him could be drawn from his testimony that he had intended to spend the night with defendant, but after witnessing defendant shoot the victim, he decided to go home to his mother; and the argument simply sought to restore the credibility of the witness after his credibility had been attacked during closing argument by defense counsel.

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.

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 Lamm, J., at the 4 August 1994 Criminal Session of Superior Court, Gaston County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 14 September 1995.

Michael F. Easley, Attorney General, by R. Kendrick Cleveland, Associate Attorney General, for the State.

James A. Jackson, Assistant Public Defender, for defendant-appellant.

LAKE, Justice.

At trial, the State's evidence tended to show that during the early morning hours of 5 August 1993, defendant shot and killed Robert Alan Burns. Two of defendant's friends, seventeen-year-old Brian Carroll and ten-year-old Darius Phillips, witnessed the murder. During the evening of 4 August 1993, defendant was selling crack cocaine from the yard of Brian Carroll's grandmother's house. According to Phillips, two white customers took cocaine from defendant and drove off without paying for it. After selling his drugs, defendant asked Carroll and Phillips if they wanted to ride around in defendant's Malibu. The two agreed. Defendant drove, and during the ride, defendant told Carroll and Phillips he was going to kill a white person. While driving on Franklin Boulevard, the group spotted two white males walking down the road. Defendant said he was going to "get them," but then realized a policeman was behind the car.

The trio continued to drive and eventually encountered the victim, Robert Burns, a young white male who was riding a bicycle. Defendant pulled his Chevrolet into a parking lot beside a launderette and asked the victim for directions to Camelot Apartments. The victim gave defendant the correct directions. Defendant drove down the road but then turned around and drove back up to Burns, stopped the car so the victim's bicycle was beside the driver's window, and according to witness Carroll, said, "That wasn't the right directions." Defendant pulled out a nine-millimeter handgun, and the victim said,

"Oh, no." Defendant pulled the trigger, shooting the victim once in the chest, and then drove away. According to Phillips, defendant said, "Guess what," to Burns before shooting him.

The victim dropped his bicycle in the road and ran to a nearby house where he collapsed and died on the porch.

The defendant presented evidence and elected to testify on his own behalf. According to defendant, it was Brian Carroll who urged defendant to shoot the victim. Defendant could not remember what he asked the victim concerning Camelot Apartments, but he did remember Brian Carroll saying, "Why didn't you shoot him?" as they drove away. When they returned to the victim, defendant pulled out the handgun, pointed it at the ground, told the victim to run, and shot the handgun. After he shot, he noticed the victim was leaning over. Defendant testified he panicked and drove away, not realizing the victim had been shot. Defendant admitted to selling crack cocaine, but he could not recall being cheated during a "sale."

In his sole assignment of error, defendant argues that the trial court committed prejudicial error in overruling defendant's objection to the State's closing argument that Darius Phillips had no interest in testifying except concern for his future safety. Defendant contends this argument was unsupported by the evidence and amounted to nothing more than the prosecutor's personal opinion. Accordingly, defendant argues his right to a fair trial was violated. We do not agree.

It is well settled that arguments of counsel rest within the control and discretion of the presiding trial judge. *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992); *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). In the argument of hotly contested cases, counsel is granted wide latitude. *Williams*, 317 N.C. at 481, 346 S.E.2d at 410. While it is not proper for counsel to "travel outside the record" and inject his or her personal beliefs or other facts not contained within the record into jury arguments, or place before the jury incompetent or prejudicial matters, counsel may properly argue all the facts in evidence as well as any reasonable inferences drawn therefrom. *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975).

> Additionally, as this Court has previously pointed out, "for an inappropriate prosecutorial comment to justify a new trial, it 'must be sufficiently grave that it is prejudicial error.' " In order to reach the level of "prejudicial error" in this regard, it now is well established that the prosecutor's comments must have "so

> infected the trial with unfairness as to make the resulting conviction a denial of due process."

State v. Green, 336 N.C. 142, 186, 443 S.E.2d 14, 40 (citations omitted), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994). Moreover, "prosecutorial statements are not placed in an isolated vacuum on appeal." *State v. Pinch*, 306 N.C. 1, 24, 292 S.E.2d 203, 221, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *and by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995).

Defendant contends that the prosecutor's closing argument was based upon a mischaracterization of the following portion of Darius Phillips' testimony on direct examination:

> Q. Why was it that you didn't tell the police officers earlier about what had happened?
>
> A. I was. My mama was going to take me, but we forgot.
>
> Q. Were you scared?
>
> A. Not really.

Viewed in context, we do not believe the prosecutor's argument was improper. The prosecutor argued, in part:

> But you've got to look and see what the interest of the person has in the outcome of the case . . . and whether or not that interest is such that [it] would [i]nfluence their testimony.
>
> And what interest do you think Darius Phillips has got in the outcome of this case other than his thoughts of his possible future safety there.
>
> [DEFENSE COUNSEL]: OBJECTION to that also, your Honor.
>
> THE COURT: Just a minute. Objection is overruled.
>
> [THE PROSECUTOR]: And what interest do you think Brian Carroll's got in the outcome of this case? I'll tell you the person that's got an interest [in] this case is Brian Worthy.

First, we do not subscribe to defendant's interpretation that the prosecutor mischaracterized Phillips' testimony when the prosecutor argued that Phillips' only interest in testifying was perhaps a concern

for his personal safety. Defendant would have us read the testimony to mean that Phillips was "not really" afraid of testifying at trial, and thus the prosecutor's closing argument, that Phillips' only interest in testifying was his concern for his future personal safety, twisted and mischaracterized the evidence of the case. We do not accept this interpretation and instead read Phillips' testimony in the context of the line of questioning which produced the response, i.e., whether Phillips was afraid of talking to the police. Thus, Phillips' answer "not really" meant he was "not really" afraid to talk with the police, rather than he was "not really" afraid of testifying against defendant.

Further, we cannot agree that, as contended by defendant, the record is devoid of any evidence from which it could be reasonably inferred that Darius Phillips had thoughts concerning his future safety. We note in this regard that Phillips testified that prior to the murder, he had intended to spend the night with defendant. However, after witnessing defendant shoot a man in the manner he described, Phillips decided to go home to his mother instead. Based upon this evidence, it is certainly a reasonable inference that Phillips, who at the time of trial was eleven years old, was afraid of the prospects of facing defendant and giving testimony against him. This would hardly be an uncommon emotion for any witness to such a sight, regardless of his or her age. Thus, there was no mischaracterization of testimony when the prosecutor argued that Phillips had no interest in testifying other than concerns for his future safety.

Additionally, during defendant's closing argument, he attacked the credibility of Phillips as a State's eyewitness. Defendant reminded the jury that when Phillips testified, he denied talking with the police even though he had. Defendant reminded the jury that Phillips claimed he told his mother about the shooting, but she did not believe him. Defendant rhetorically asked the jury why the State had not called Phillips' mother as a witness if Phillips really had told her about the shooting.

"[C]ounsel 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). The prosecutor's argument simply sought to shore-up Darius Phillips' credibility in the eyes of the jury after his credibility had been attacked. In context, the argument pointed out to the jury that in deciding a witness' credibility, it is important to consider why a witness might be motivated to testify in

a certain way. The prosecutor simply told the jury that Phillips had no ulterior motive or hidden agenda for testifying against defendant, thus inferring to the jury that it had no reason to disbelieve Phillips' testimony. The prosecutor then contrasted Phillips' lack of motivation to fabricate testimony with defendant's, who was faced with a first-degree murder charge and so had strong reason to fabricate testimony. Accordingly, as its full context reveals, the prosecutor's argument did not mischaracterize the testimony at trial. Rather, the argument was but a common and proper argument attempting to bolster a witness' attacked credibility.

Furthermore, even if the prosecutor's argument could, in some way, be construed as improper, defendant fails to demonstrate any prejudice. Two eyewitnesses testified defendant shot an innocent stranger and then left the scene. Only a short while earlier, defendant told both eyewitnesses he wanted to shoot a white person. His own testimony shows he was the shooter. We thus conclude that in view of the overwhelming evidence against defendant, any possible impropriety in the remark of the prosecutor was not sufficiently grave to amount to prejudicial error. This assignment of error is overruled.

For the reasons stated herein, we conclude defendant received a fair trial, free from prejudicial error.

NO ERROR.

LILLIAN E. MURRAY, WIDOW OF HUGH H. MURRAY, JR., DECEASED EMPLOYEE, AND WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF HUGH H. MURRAY, JR. v. ASSOCIATED INSURERS, INCORPORATED, EMPLOYER; VIRGINIA MUTUAL INSURANCE COMPANY, CARRIER

No. 279A94

(Filed 6 October 1995)

Workers' Compensation § 152 (NCI4th)— auto accident—death benefit—dual purpose rule

There was competent evidence to support the Industrial Commission's findings and the findings justify the conclusions and award denying plaintiffs' claim where plaintiffs sought an award of death benefits for a decedent who died from injuries received in an automobile accident while on his way from Raleigh to Hound Ears. Although there was evidence to support plain-

tiffs' position, there was also competent evident to support the finding that there was no employment-related purpose which created the necessity for the trip and the findings justify the conclusion that the dual purpose rule does not apply.

Am Jur 2d, Workers' Compensation § 294.

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

Justice WHICHARD dissenting.

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. 506, 442 S.E.2d 370 (1994), vacating and remanding the Industrial Commission's opinion and award denying plaintiffs' claims for death benefits filed 11 August 1992. Heard in the Supreme Court 12 September 1995.

Teague, Campbell, Dennis & Gorham, by C. Woodrow Teague and George W. Dennis III, for plaintiff-appellees.

Young Moore Henderson & Alvis P.A., by B.T. Henderson II and J. Aldean Webster III, for defendant-appellants.

MITCHELL, Chief Justice.

This appeal is the result of a workers' compensation claim in which the plaintiffs seek an award of death benefits under N.C.G.S. § 97-38. Decedent Hugh H. Murray, Jr., was the founder of Associated Insurers, Inc. He sold the company in 1982 to five co-workers but continued to work as an employee of the company for a salary plus an automobile allowance and operating expenses. On 27 June 1986, decedent was severely injured in a car accident on his way from Raleigh to the Hound Ears community near Boone, North Carolina. Decedent died on 5 September 1987 as a result of his injuries.

After a hearing, a deputy commissioner entered an opinion and award denying plaintiffs' claims for death benefits. The deputy commissioner determined that the injuries sustained by and the subsequent death of the decedent did not arise in the course of the decedent's employment and denied plaintiffs' claim. The Industrial Commission adopted the opinion and award as filed, noting that the decedent was on his way to a "purely non-business related party" and

that he was off duty when the collision occurred; thus, he "was not in the course of his employment, even if he would have been at some time the following day." Plaintiffs appealed to the Court of Appeals. The Court of Appeals held that the Commission erred in concluding that whether decedent had business appointments during the weekend was irrelevant because he was on his way to a dinner party at the time of the accident. The Court of Appeals stated that decedent's injuries and resulting death are compensable under the dual purpose rule if decedent had a concurrent business purpose for traveling to Hound Ears. The Court of Appeals vacated and remanded this case to the Industrial Commission in order for it to make specific findings of fact on that issue. Judge Cozort dissented, stating that the factual issue presented under the dual purpose rule had been resolved by the Commission. Defendants appeal to this Court as a matter of right by virtue of Judge Cozort's dissent.

The issue on appeal is whether the findings of fact made by the Industrial Commission support its conclusion that there was no dual purpose involved in decedent's trip. The Industrial Commission's findings of fact are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding. *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981). Therefore, our review is limited to two questions: (1) whether the Commission's findings of fact are supported by any competent evidence, and (2) whether those findings of fact justify the Commission's legal conclusions and award. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981).

In *Humphrey v. Quality Cleaners & Laundry*, 251 N.C. 47, 110 S.E.2d 467 (1959), this Court set out the test for determining whether a trip that has both personal and business purposes is compensable under the Workers' Compensation Act:

> If the work of the employee creates the necessity for travel, [he] is in the course of his employment, though he is serving at the same time some purpose of his own. * * * If however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel was then personal, and personal the risk.

Id. at 51, 110 S.E.2d at 470 (quoting *Marks' Dependents v. Gray*, 251 N.Y. 90, 93, 167 N.E. 181, 183 (1929) (alteration in original)).

In finding of fact eighteen, the deputy commissioner found:

> 18. There was no employment-related purpose which created the necessity for Mr. Murray's trip on 27 June 1986. Mr. Murray was traveling to Hound Ears for a social and relaxing weekend with his wife. Mr. Murray's work did not create the necessity for travel.

This finding of fact was adopted by the Commission.

In his conclusion of law, the deputy commissioner concluded:

> 5. Assuming arguendo that the "dual purpose rule" is applicable to the present case, inasmuch as Mr. Murray's trip would have been made despite the failure of any business purpose for the weekend in question and would have been dropped in the event of the failure of the private purpose, Mr. Murray's trip was a personal trip and, therefore, Mr. Murray's death as a result of the collision on 27 June 1986 is not compensable under the North Carolina Workers' Compensation Act. [*Humphrey*, 251 N.C. 47, 110 S.E.2d 467]; N.C.G.S. § 97-2(6).

This conclusion was adopted by the Commission.

After careful review of the briefs, transcripts and record, we conclude that although there was evidence to support plaintiffs' position, there was also competent evidence to support the Commission's findings and its findings justify its conclusions and award. Further, we agree with Judge Cozort that the factual issue arising under the dual purpose rule in this case was resolved by the Commission in its opinion and award. Accordingly, the decision of the Court of Appeals to vacate and remand to the Commission is reversed.

REVERSED.

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

Justice WHICHARD dissenting.

The dissenting opinion in the Court of Appeals and the majority opinion here are correct in concluding that the Commission made a finding, supported by evidence in the record, which in turn supports the conclusion that the dual purpose doctrine does not apply to the

facts presented. They are incorrect, however, in holding that the inquiry ends there.

The Commission made its finding after excluding evidence which was admissible under N.C.G.S. § 8C-1, Rule 803(3); was relevant to the question at issue; and was directly supportive of a finding that at the time of the accident, plaintiff's decedent had concurrent business and personal purposes. Indeed, Lillian Murray's proffered testimony that a business appointment was "the reason for going" would have supported a finding that business was the sole, or at least the primary, purpose for the trip. In treating this proffered evidence as irrelevant to its decision, the Commission was operating under a misapprehension of the applicable law. "It is still the rule that '[f]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal right.' " *Helms v. Rea*, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973) (quoting *McGill v. Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939)). The Court of Appeals majority thus properly vacated the Commission's opinion and award and remanded the case for reconsideration of the evidence in its true legal light.

I find the reasoning and result of the majority opinion for the Court of Appeals entirely correct, and I therefore dissent.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. WILLIAM H. PEACE

No. 481PA94

(Filed 6 October 1995)

Costs § 25 (NCI4th)— unemployment insurance—ESC as employer—attorney fees

N.C.G.S. § 96-17(b1) prohibited a Superior Court award of attorney fees where the Employment Security Commission discharged one of its employees; that employee subsequently filed a claim for unemployment benefits with ESC as an agency; the initial administrative determination was to deny benefits; that decision was appealed and the ESC as an agency retained an independent hearing officer as a designated Deputy Commissioner to hear the appeal; the independent hearing officer awarded benefits; ESC appealed to Superior Court, which affirmed the award of benefits and ordered ESC to pay the claimant's attorney fees; ESC

then appealed to the Court of Appeals; and the Court of Appeals treated the ESC as an agency appealing its own decision, held that ESC had no authority to appeal to Superior Court and that N.C.G.S. § 96-17(b1) did not apply, and remanded for findings that would allow an award of attorney fees under N.C.G.S. § 6-19.1. However, ESC appealed to Superior Court not as an agency decision maker, but as an aggrieved employer liable for UI benefits and with the same rights of appeal as any other employer. The appeal to Superior Court under Chapter 96 was a proper proceeding and N.C.G.S. § 96-17(b1) applies and prohibits the Superior Court award of attorney fees.

Am Jur 2d, Costs §§ 72-76.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 115 N.C. App. 486, 445 S.E.2d 84 (1994), reversing and remanding the judgment entered by Weeks, J., on 18 February 1993 in Superior Court, Wake County. Heard in the Supreme Court 14 September 1995.

Fred R. Gamin, Staff Attorney, for petitioner-appellant.

Thomas Hilliard, III for respondent-appellee.

Kenneth L. Schorr on behalf of Legal Services of Southern Piedmont, amicus curiae.

ORR, Justice.

The Employment Security Commission (hereinafter "ESC") plays two roles in this case. First, ESC is the employer ("ESC-employer"), as defined by N.C.G.S. § 96-8(5)(p), that discharged respondent William H. Peace. Second, ESC is the agency ("ESC-agency") that determined whether Peace was eligible for unemployment insurance ("UI") benefits.

On 7 June 1991, ESC-employer discharged one of its employees, Peace, an equal opportunity officer. Peace subsequently filed a claim for UI benefits with ESC-agency. In the initial administrative determination rendered pursuant to N.C.G.S. § 96-15(b)(2), Peace's claim for UI benefits was denied by a decision of the designated adjudicator, John Lynch, pursuant to N.C.G.S. § 96-14(2) (misconduct in connection with work).

Peace appealed the adjudicator's decision pursuant to N.C.G.S. § 96-15(b)(2) ("The conclusion of the adjudicator shall be deemed the

final decision of the Commission unless within 10 working days after the date of notification or mailing of the conclusion, whichever is earlier, a written appeal is filed pursuant to such regulations as the Commission may adopt"). Thereafter, the matter was set for an evidentiary appeals hearing pursuant to N.C.G.S. § 96-15(c) (Appeals), and ESC Regulations 14 (Appeals Procedures) and 21.18 (Adjudication and Appeals for Former Commission Employees). ESC-agency retained an independent hearing officer designated as a Deputy Commissioner to hear the appeal pursuant to ESC Regulation 21.18(C). The independent hearing officer, Jo Ann Weaver Hull, awarded Peace benefits. ESC-employer then appealed to Superior Court pursuant to ESC Regulation 21.18(D).

N.C.G.S. § 96-15 outlines the standard procedure for claims for UI benefits, appeals within ESC-agency, and appeals from the ESC-agency final decision to Superior Court. N.C.G.S. § 96-15(f) (Procedure) requires that hearings and appeals be conducted in accordance with regulations prescribed by the Commission. ESC Regulation 21.18 outlines a special procedure for adjudication and appeals for former ESC employees.

N.C.G.S. § 96-15 provides that (1) a decision will be made by an adjudicator, N.C.G.S. § 96-15(b)(2) (1993); (2) the adjudicator's decision may be appealed to an appeals referee, N.C.G.S. § 96-15(c); (3) on ESC-agency's own motion, the Commission or a Deputy Commissioner may affirm, modify, or set aside the decision of the appeals referee, N.C.G.S. § 96-15(e); and (4) an appeal to the Superior Court is available after exhaustion of the remedies set out above, N.C.G.S. § 96-15(h).

To protect against the appearance of impropriety, ESC Regulation 21.18 limits review by ESC-agency where ESC-agency has a vested interest in the outcome as the employer in the case. The regulation in effect at the time of Peace's discharge provided that (1) a decision will be made by an adjudicator, ESC Reg. 21.18(A); (2) the adjudicator's decision may be appealed to a Deputy Commissioner, ESC Reg. 21.18(C); (3) a direct appeal to the Superior Court from the Deputy Commissioner's decision is available, ESC Reg. 21.18(D).

Thus, N.C.G.S. § 96-15 allows one appeal within the agency, an optional review by the agency, and an appeal from the agency decision to Superior Court; whereas ESC Regulation 21.18 allows one appeal within the agency, followed directly by an appeal from the

agency decision to Superior Court. The procedure prescribed by ESC Regulation 21.18 bypasses the optional review by the agency in those situations where the agency is the employer.

As previously noted, ESC-employer appealed the adverse decision of the Deputy Commissioner to Superior Court pursuant to Regulation 21.18(D). On 18 February 1993, Judge Gregory A. Weeks, pursuant to chapter 96 of the N.C. General Statutes, affirmed the decision of the Deputy Commissioner awarding UI benefits to Peace and also ordered ESC to pay Peace's attorney's fees. Judge Weeks' order gives no indication of the authority for the award of attorney's fees to Peace.

ESC-employer then appealed Judge Weeks' order awarding attorney's fees to the Court of Appeals, the sole assignment of error being that the award of attorney's fees was improper under N.C.G.S. § 96-17(b1). N.C.G.S. § 96-17(b1) states that each party shall bear its own costs and attorney's fees in any court proceeding under chapter 96 (Employment Security).

The Court of Appeals held that ESC had no authority to appeal, and thus the action was not a chapter 96 action. The Court of Appeals further held that N.C.G.S. § 96-17(b1) did not apply but that N.C.G.S. § 6-19.1 did apply. The Court of Appeals then remanded for findings that would allow an award of attorney's fees pursuant to N.C.G.S. § 6-19.1 ("that the agency acted without substantial justification in pressing its claim against the party").

We conclude that the Court of Appeals erred in holding that the appeal to Superior Court by ESC-employer was not a court proceeding under chapter 96. The Court of Appeals apparently based its reasoning on ESC Regulation 21.18(D), which stated at the time of Peace's discharge that

> [t]he decision of the Deputy Commissioner shall be considered the decision of the Commission. Any decision of the Commission shall become final in the absence of a timely appeal therefrom by an aggrieved party to Superior Court within thirty (30) days from the date of mailing of the decision to the parties.

The Court of Appeals reasoned that "[s]ince the Commission itself considers a decision of one of its deputy commissioners to be a decision of the Commission, . . . it defies logic to allow the Commission to

appeal its own decision." *Employment Security Comm. v. Peace*, 115 N.C. App. 486, 488, 445 S.E.2d 84, 85 (1994).

The reasoning of the Court of Appeals erroneously treats ESC as an agency appealing its own agency decision rather than as an "aggrieved party." In this case, ESC appealed to Superior Court not as an agency decision-maker, but as an employer aggrieved by the agency action. ESC-employer is liable to pay for UI benefits the same as any other employer and has the same rights of appeal as any other employer. Thus ESC-employer had the status of "aggrieved party" under ESC Regulation 21.18(D) and had appeal rights as such.

Therefore, the appeal to Superior Court by ESC-employer was a proper proceeding under chapter 96, and N.C.G.S. § 96-17(b1) applies. Therefore, N.C.G.S. § 96-17(b1) prohibits the Superior Court award of attorney's fees in this case.

For the foregoing reasons, we reverse the order of the Court of Appeals and remand to that court for further remand to the Superior Court, Wake County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

BRIDGESTONE/FIRESTONE v. WILMINGTON MALL REALTY CORP.

[341 N.C. 721 (1995)]

BRIDGESTONE/FIRESTONE v. WILMINGTON MALL REALTY CORP.

No. 25A95

(Filed 6 October 1995)

Appeal of right by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 117 N.C. App. 535, 451 S.E.2d 365 (1995), affirming a judgment for plaintiff entered on 27 August 1993 by Fullwood (Ernest B.), J., in Superior Court, New Hanover County. Heard in the Supreme Court 13 September 1995.

Marshall, Williams & Gorham, L.L.P., by John D. Martin, for plaintiff-appellee.

Murchison, Taylor, Kendrick, Gibson & Davenport, L.L.P., by Michael Murchison, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. HENRY LOUIS WALLACE

No. 70PA95

(Filed 6 October 1995)

On writs of certiorari, issued pursuant to the State's petition and defendant's petition, to review an order denying defendant DNA samples but allowing defendant to observe the State's DNA testing procedures, entered by Johnston, J., on 30 January 1995 in Superior Court, Mecklenburg County. Heard in the Supreme Court 15 September 1995.

Michael F. Easley, Attorney General, by John H. Watters, Special Deputy Attorney General, and Valerie Spalding, Assistant Attorney General, for the State.

James P. Cooney III and Isabel S. Day, Mecklenburg County Public Defender, for defendant-appellant.

PER CURIAM.

WRIT OF CERTIORARI ISSUED ON THE STATE'S PETITION IMPROVIDENTLY ALLOWED; WRIT OF CERTIORARI ISSUED ON DEFENDANT'S PETITION IMPROVIDENTLY ALLOWED.

APPENDIXES

PRESENTATION OF
JUSTICE DAVID MAXWELL BRITT PORTRAIT

ORDER ADOPTING RULES FOR
DESIGNATION OF COMPLEX BUSINESS CASES

ORDER ADOPTING AMENDMENTS TO
THE RULES IMPLEMENTING MEDIATED
SETTLEMENT CONFERENCES IN
SUPERIOR COURT CIVIL ACTIONS

AMENDMENT TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING ORGANIZATION OF
THE JUDICIAL DISTRICT BARS

AMENDMENT TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONERNING THE PALS COMMITTEE

AMENDMENT TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING DISCIPLINE AND DISABILITY

AMENDMENTTO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING MEMBERSHIP

AMENDMENT TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING THE OPERATION OF
THE SPECIALIZATION PROGRAM

AMENDMENT TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING FOREIGN LEGAL CONSULTANTS

AMENDMENT TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING THE ORGANIZATION OF
THE IOLTA PROGRAM

PRESENTATION OF THE PORTRAIT

OF

DAVID MAXWELL BRITT

Associate Justice
Supreme Court of North Carolina
1978 - 1982

April 22, 1996

RECOGNITION OF JUDGE HENRY McKINNON

BY

CHIEF JUSTICE BURLEY B. MITCHELL, JR.

Chief Justice Burley B. Mitchell, Jr. welcomed official and personal guests of the Court. The invocation was pronounced by Dr. T. L. Cashwell, Jr., Pastor Emeritus, Hayes Barton Baptist Church. The Chief Justice then recognized the Britt family and Judge Henry McKinnon, who would make the presentation address to the Court:

> On behalf of the members of the Court, I would like to welcome each of you to this ceremony to which we have all looked forward. We honor a man today who not only made an impact on the Supreme Court, but, through his years as a lawyer-legislator and as speaker of the State House of Representatives, made a tremendous impact in restructuring our judicial branch of government. His stature and contributions are evident in the supportive and impressive crowd that has come to honor him.
>
> When I heard who Justice Britt had asked to present remarks to the Court today, I knew we were in for a treat. Judge Henry McKinnon has been a remarkable influence on the judiciary in North Carolina in his own right. A graduate of Duke University's undergraduate and law school programs, Judge McKinnon was appointed to the Superior Court in April of 1958. He served as a Resident Superior Court Judge from Robeson County until the end of October 1980 when he agreed to remain on our list of emergency judges while he spent more time improving his quail hunting skills.

PRESENTATION ADDRESS
BY
HENRY A. MCKINNON, JR.
RETIRED JUDGE,
SUPERIOR COURT OF NORTH CAROLINA

May It Please The Court:

It has been almost forty years since I appeared before this Court, and I had no expectation of ever doing so again, so it is a special privilege for me to be asked to participate in the presentation of the portrait of Justice David M. Britt. The portrait is being presented by a number of the former law clerks of Justice Britt and members of his family, and I am honored to speak in their behalf.

David Maxwell Britt was born on January 3, 1917, in the Town of McDonald in Robeson County, the second of eight children of Dudley H. Britt and Martha Mae Hall Britt. His paternal great-great grandfather came to Robeson County from Johnston County in about 1790 and settled in what later was appropriately named Britts Township. His paternal grandparents moved westward about ten miles to the area that was to become McDonald in about 1886, and at about the same time his maternal grandparents, the Halls, moved there from Cumberland County. His parents grew up and were married in this community.

May it please the court, in preparing for this presentation it has been difficult not to make this a bragging session on Robeson County, and particularly the unique community of McDonald, but those who have known David Britt know of his love for his home place and for his family, and I think it and they deserve some recognition at this time.

The Town of McDonald came into being in about 1900, when a new railroad crossed this rich farming section of Robeson County. A major landowner laid off and sold lots on his land near the store of P. K. McDonald, and the town was created. It was soon incorporated as the Town of McDonald, and for the next twenty years it blossomed. People from the surrounding community built homes there, and in its heyday it boasted of a bank, a drug store, a doctor, two churches, and several mercantile establishments, including one operated by David Britt's father. At its peak it may have had as many as two hundred inhabitants.

The first child of Dudley and Martha Mae Hall Britt, Clifford Bowman, died in infancy, and after David came Neill LaSane, Miriam Hall, now Mrs. Garran Purvis, Arthur Victor, Dudley H., Carl Truett and William

Earl, and they were raised as a close and loving family in McDonald. Grandparents on both sides lived in the community and were a strong influence on David Britt's early life. His parents lived long enough to know of some of his successes in life. Two of his brothers, N. L. and Carl Truett have died, but the others of his siblings are present today.

One thing that makes McDonald unique is that within a period of fifteen years, beginning with David Britt's birth, the town produced six boys who were to become lawyers (four in the Britt family), and four of them became distinguished members of the judiciary. In addition to Justice Britt, these are his brother Earl, Senior United States Judge for the Eastern District, the late Judge James B. McMillan of the United States District Court for the Western District, and Judge Charles G. McLean, retired Chief District Judge of the 16th Judicial District of North Carolina.

In claiming some firsts for Robeson County, McDonald and the Britt family, we can say with pride that David Britt was Robeson County's first native son to become Speaker of the House of Representatives, judge of the Court of Appeals and a justice of the Supreme Court, and that his brother, Earl, was the first native son to be a United States District Judge. In making these claims, it is necessary to explain that while Judge James McMillan's roots and raising were in Robeson County, he happened to be born in Goldsboro, while his mother was visiting at her family's home, and that Justice L. R. Varser, who came to this Court from Robeson, was a native of Gates County.

On a personal note, I might say that I have tried to claim some of this judicial luster of McDonald by marriage, because my wife, Martha, was also born in McDonald, and her father, Dr. E. L. Bowman, the town's first doctor, delivered all of the Britt children, as well as Judge McLean.

On a slightly broader scale, it should be noted that from three early Britt settlers in Robeson County, probably related, have sprung a remarkable number of lawyers. Within this century at least twenty-three have come to the bar from Robeson County bearing the Britt name, along with half a dozen more who are of that blood, and most of them have practiced in the county. Within my memory there have been seven "Lawyer Britts" active there at one time.

The coming of the automobile and good roads, followed by the Great Depression, brought an end to McDonald's days of prosperity,

but it remained as a good place to grow up, and it remains as a community to be claimed with pride as a native home.

David Britt's early years were influenced strongly by his surrounding community, his family, and the economic conditions of his time. He knew the days of the pitcher pump, the privy, and the wood stove. He experienced the hard work of a farm and a family store. He began school in a two-room school where two teachers attempted to teach seven grades, and eventually moved to a new community school with four classrooms and an auditorium. When he began high school in 1929, it involved a twelve-mile ride on a model-T bus to Lumberton. As tough as those times may seem today, they were the norm for rural North Carolina then, and they molded character and a willingness to work hard that have been hallmarks of the career of David Britt.

He entered Wake Forest College in the fall of 1933, at the age of 16, and found another community and relationships that have strongly influenced his life. During college he worked at jobs that were a part of many Wake Forest students' experience then, including such things as working in the kitchen and then the dining room of his boarding house, and being janitor of his fraternity, Alpha Phi Omega. He entered into interfraternity politics and was elected business manager of the year book, with his classmate and good friend James W. Mason, as editor. Later the two served respectively as business manager of the student newspaper and of the student magazine, better paying positions which helped with their college expenses. In 1936 he also made his first entry into "real" politics, when at the request of schoolmate A. Pilston Godwin, he solicited votes at home for Thad Eure in his first run for Secretary of State.

Under the rules of the college and of the State Bar at that time, one could enter law school after two years of college, and David Britt began law school in the fall of 1935, along with his friend, the late beloved Chief Justice Joseph Branch. By attending two summer sessions and monitoring courses in addition to their regular schedule, they completed two years of law study and took the bar examination in the summer of 1937. It is worthy of note that the list of those passing that 1937 bar examination included not only future Justices Branch and Britt, but also United States District Judge Woodrow W. Jones, Court of Appeals Judge James C. Farthing, and Superior Court Judges A. Pilston Godwin and John D. McConnell.

Although David Britt had passed the bar exam, he was still only twenty years old and not eligible for admission to the bar. He needed

only ten semester hours to receive his law degree, but because his brother, N. L., was already at Wake Forest and his sister Miriam was ready for college, and the family's resources were strained, he elected to work that fall in a grocery store in Fairmont and to prepare to open a law office there in January.

In January 1938 David Britt was admitted to the bar and began a solo practice in Fairmont, which then had five lawyers. Like others of that time, his early practice was modest, with his first fee for a court appearance in a local court being $15.00. In the spring of that year he was encouraged to run for solicitor of the Fairmont District Recorder's Court against an entrenched incumbent, and he engaged in his first personal political campaign. He contacted personally about 75% of the voters in the four townships surrounding Fairmont, and although he lost the race, he made many friends who thereafter became his supporters and clients. In 1940 he was successful in winning this office, and held it for four years, prosecuting the criminal docket of the court, while still being permitted to engage in civil practice.

1941 was a memorable and what must have been a whirlwind year in the life of David Britt. In March he began dating Louise Teague, the daughter of Talmadge S. Teague, former school superintendent and then postmaster of Fairmont, and his wife, Mae Thomas Teague, and by July 16 they were married, beginning a happy marriage now in its fifty-fifth year. By the end of the year they had built and moved into a small home in Fairmont.

To this marriage were born four children: Nancy and Martha Neil, during the war years, and later Mary Louise and David Maxwell Britt, Jr. Young David, Jr. died in 1972 in a tragic car accident, a few days short of his eighteenth birthday. The daughters are present today, with their families, which include six grandchildren and three great-grandchildren of David and Louise Britt.

David Britt's law practice grew rapidly, and by the time I came to the bar in 1947, while only five years separated us in age, I looked on him as a senior member of the Robeson County bar. Although located in Fairmont, his practice was county-wide, and his influence in South Robeson was such that Mr. Horace E. Stacy, Sr., and other older lawyers sometimes jokingly referred to him as "King David". He was recognized as being honest, straightforward and a prodigious worker in whatever he undertook. I have appeared with him in cases, and on the other side, always with pleasure. In fact, my last appearance in this Court, in the spring of 1957, was to seek correction of

grievous errors which he, a Baptist, had persuaded a Baptist judge, Judge Raymond B. Mallard, to commit in a case involving a branch of my Methodist denomination.

He was active in all phases of community life. A lifelong member of the Baptist Church, he served as deacon and Sunday School teacher in Fairmont and later in Raleigh, and as chairman of the Robeson Baptist Association executive committee. He served as chairman of the Fairmont Board of Education, was a District Governor of Rotary International, and he served as Robeson County Democratic Chairman and as a member of the State Democratic Executive Committee.

In 1958 David Britt was elected as one of Robeson's members of the North Carolina House of Representatives, beginning the second phase of his remarkable public career. His interest in the legislature was spurred by his support for efforts of the North Carolina Bar Association toward improvements in the court system, and during the next five sessions of the General Assembly he was a leader in this movement and a principal architect of the dramatic changes brought about in legal and judicial reform.

At the end of the 1959 Session he was named to the General Statutes Commission and the Commission to Reorganize State Government, and in the 1961 Session he was floor manager for the bills sponsored by those Commissions, and a leader in the adoption of the constitutional amendments to restructure the court system. In 1963 he was chairman of the House Appropriations Committee and a member of the Advisory Budget Commission, and was appointed to the Courts Commission, which was to recommend the legislation to implement the court improvements.

In the period between the 1963 and 1965 Sessions David Britt found himself almost in the position of a full-time public servant. His positions on the Advisory Budget Commission and on the Courts Commission meant that there were almost weekly meetings of one or the other to attend, usually on weekends. Fortunately, his brother, now Judge Earl Britt, had joined him in law practice in 1959, and together they were able to maintain a busy practice during this time, with offices in both Fairmont and Lumberton.

The 1965 Session of the General Assembly must have been a most pleasant one for David Britt. It brought him into a new relationship with Governor Dan K. Moore, who was to become his close friend, and into a renewal of an old relationship with Joe Branch, his friend

from Wake Forest days, who was Governor Moore's legislative counsel. During that session David Britt was Chairman of the House Committee on Courts, and with his Senate counterpart, Senator Lindsey Warren, Jr., guided the adoption of legislation proposed by the Courts Commission to create a unified lower court system.

A less pleasant assignment resulting from the 1965 Session was his acceptance of the chairmanship of the study commission to review the controversial "Speaker Ban Law" which had been enacted in 1963. Under Britt's leadership, that Commission was able to recommend a bill vesting in the trustees of state schools the responsibility for appropriate speaker policies, which was passed at a 1965 Special Session, ending the controversy.

During 1966 the Courts Commission again worked regularly on legislation to establish the Court of Appeals, and in June of that year Lindsey Warren and David Britt jointly received the John J. Parker Award, the highest honor given by the North Carolina Bar Association, "in recognition of conspicuous service to the cause of jurisprudence," for their services on the Courts Commission and in the legislature.

Almost from the beginning of the 1965 Session David Britt had been pledged the support of every Democratic member of the House for the speakership in 1967, and at the opening of that Session he was easily elected speaker. The 1967 Session was a smooth one, with Governor Moore having substantial support for most of the programs he advanced. The legislation creating the Court of Appeals was adopted and Speaker Britt was credited with outstanding leadership during the session.

Looking back, the eight and one-half years and five sessions during which David Britt served in the General Assembly may have been the most productive years in legislative history, certainly in this century. They spanned the administrations of Governors Luther H. Hodges, Terry Sanford and Dan K. Moore. In addition to the total restructuring of the courts to create a unified system of justice, there was a major reorganization of state government, and a rewriting of numerous substantive laws, such as the Intestate Succession Act and the Durable Power of Attorney Act. Also, many parts of the programs of each governor's administration, in the areas of public and higher education, roads and economic development were considered and adopted.

Many of the dramatic changes that occurred during this period were the result of long and serious study, involving many groups, and the necessity of resolving differing interests, and David Britt's recognized abilities as a willing and hard worker, as one able to see all sides of a situation and to seek consensus, and as one devoted to law and justice, made him a natural leader in bringing these changes about.

I recall that during that period, while Justice Branch was legislative counsel to Governor Moore, he once told me that one of David Britt's chief assets as a legislative leader was the confidence that lay members of the legislature placed in his knowledge, his objectivity and his fairness in explaining to them the technicalities and the purposes of complicated legal measures, sometimes referred to as "lawyer's bills", that were continually before the legislature.

On the last day of the 1967 Session of the General Assembly Governor Moore announced the appointment of David Britt as one of the six original judges of the newly-created North Carolina Court of Appeals, thus signalling the ending of a distinguished career in one branch of government and the beginning of another.

His judicial career began on August 9, 1967, when he took the oath of office in a ceremonial session of the Superior Court of Robeson County, at which I had the privilege of presiding. The ceremony was attended by Governor Moore, Chief Justice R. Hunt Parker, Lt. Governor Robert W. Scott, newly named Chief Judge of the Court of Appeals Raymond Mallard and a filled courtroom of Judge Britt's friends and relatives. Appropriately, the oath was administered by his close friend of many years, Associate Justice Joseph Branch.

My special memory of that occasion will be appreciated by those who knew Chief Justice Hunt Parker. He was to share the bench with me, and as we were putting on our robes in the judge's chamber I asked him whether it would be appropriate in recognizing special guests to name him or Governor Moore first. His answer was, "Why, of course, the Governor is the chief executive officer of the state." I did name Governor Moore first, and then the Chief Justice, but afterward it occurred to me that, in a judicial setting, his reply had left me with a choice, and I always wondered if that was intentional on his part.

That fall Judge Britt joined with the other five original members of the Court of Appeals in the task of drafting the rules of the new court and preparing to hear the first appeals. At the death of Judge

James C. Farthing in December 1967 Judge Frank M. Parker was named to replace him. In January 1968 the Court heard its first appeals, and the six judges quickly became known as a close-knit, hardworking group of friends who made this new court a real success in the expanded judicial system. In July 1969 three additional judges were appointed to the court, and in 1975 three more were added. Judge Britt was elected without opposition to a new term in 1974. Judge Britt's many opinions written during his service on that court appear in Volumes 1 through 37 of its Reports.

In January 1978 Judge Britt filed for election to a seat on the Supreme Court to fill the vacancy to be created by the approaching retirement of Justice I. Beverly Lake and, with his usual diligent hard work and his many friends across the state, won handily in the primary. In August of that year Justice Lake announced his early retirement, and Governor Hunt appointed the new nominee to succeed him. On August 31, 1978, he was administered the oath of office in this courtroom by Chief Justice Susie Sharp, and began his service as an Associate Justice of this Court. By this early start on his term he had the pleasure of serving for a few months with his good friend, Associate Justice Dan K. Moore, who was also retiring.

Justice Britt's service on this Court spanned a period of exactly four years. In that time he served with two Chief Justices and with ten members of the Court. Of those, only Chief Justice Mitchell is a member of the present Court, and it is most fitting that this presentation is made to the Court over which he presides, and with the honoree present to enjoy the proceedings.

His many opinions, in Volumes 295 through Volume 307, reflect his lifetime dedication to hard work, his broad legal and governmental experience, and his devotion to the law. Not surprisingly, among those he found most interesting were two involving the separation of powers between the executive and legislative branches of government mandated by our Constitution. In State ex rel. Wallace vs. Bone, 304 N.C. 1, and in the Advisory Opinion In Re Separation of Powers, 305 N.C. 767, he authored the unanimous opinions of this Court that the involvement of members of the legislature or its committees in matters reserved to the executive branch of government was unconstitutional as a violation of the separation of powers doctrine.

Justice Britt retired on August 31, 1982, the fourth anniversary of his coming to the Supreme Court. He had reached the age or sixty-five, and had completed in that month fifteen years as a member of the judiciary. Although he might well have had many more distin-

guished years as a member of the Court, he chose this time because of those circumstances and some health problems he was then experiencing, and decided to enter into another phase of life.

After brief service as an Emergency Justice he joined the law firm of Bailey and Dixon in Raleigh in that privileged status as "Counsel", where he was able to pace his labors while still participating actively in various phases of the firm's practice, and he continues that association. He has continued to be active in many things related to the legal and judicial systems.

Throughout his career Justice Britt has found time to give distinguished services to two of the great loves of his life, beyond his family, the Baptist denomination and Wake Forest University. In addition to positions of leadership in his local church, both in Fairmont and Raleigh, he has served as vice-president and a trustee of the Baptist State Convention, as a trustee of Wake Forest University, as a trustee of Southeastern Baptist Seminary, and as a trustee of Meredith College for sixteen years. Anyone will recognize these offices as working jobs, and most of them were held during the busiest times of his legislative and judicial careers. In 1969 Wake Forest University honored him with the degree of Doctor of Laws.

In seeking one word which best describes the life of David M. Britt I would choose "Devotion". Devotion to his family, his community, and his faith—devotion to his state, to his government and to the rule of law—have been exemplified throughout his career. I would add to that one other characteristic, which has been the means by which he expressed that devotion—Hard Work.

In memoirs which Justice Britt wrote for his family he concluded with those familiar words of the prophet Micah: "What doth the Lord require of thee, but to do justly, to love mercy, and to walk humbly with thy God?" Characteristically, he expressed it this way: "I admonish you not only to work hard, but 'to do justly, to love mercy, and to walk humbly with thy God' ".

David Maxwell Britt has lived by those commandments.

The portrait of Justice Britt was painted by Charles Gilbert Kapsner of Little Falls, Minnesota. Mr. Kapsner has studied extensively in Italy, at the International University of Art in Florence and under seasoned artists. He is well known in North Carolina for his work with North Carolina artist Ben Long on frescos in churches in western North Carolina and in the NationsBank building and St. Peter's Catholic Church in Charlotte. The portrait is given by a

group of Justice Britt's former law clerks and by members of his family. It will be unveiled by his youngest granddaughter, Louise Hayes.

ACCEPTANCE OF JUSTICE BRITT'S PORTRAIT BY CHIEF JUSTICE MITCHELL

Thank you Judge McKinnon for sharing memories of Justice Britt and reminding us of the remarkable contributions Justice Britt has made to the Judiciary in North Carolina.

At this point, I would like to call upon Ms. Louise Hayes, the youngest granddaughter of Justice Britt, to come forward and unveil her grandfather's portrait.

It is with pleasure that I, on behalf of the Court, accept this wonderful portrait of Justice David Britt. I instruct the Clerk to, as quickly as possible, have the portrait hung upon the hallways of the Supreme Court. I would also instruct Ralph White, our Reporter, to have the entire contents of this proceeding, including the full presentation of Judge McKinnon, reprinted in the next published volume of the North Carolina Reports.

ORDER ADOPTING RULES FOR DESIGNATION OF COMPLEX BUSINESS CASES

Pursuant to the authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are amended by the adoption of an amendment to Rule 2.1 and by the adoption of new Rules 2.2 and 23.1.

Rule 2.1 shall be retitled and shall be amended to read as follows:

Designation of Exceptional Civil Cases and Complex Business Cases

(a) The Chief Justice may designate any case or group of cases as (a) exceptional or (b) "complex business." A senior resident superior court judge, chief district court judge, or presiding superior court judge may ex mero motu, or on motion of any party, recommend to the Chief Justice that a case or cases be designated as exceptional or complex business.

(b) Such recommendation for exceptional cases may include special areas of expertise needed by the judge to be assigned and may include a list of recommended judges. Every complex business case shall be assigned to a special superior court judge for complex business cases, designated by the Chief Justice under Rule 2.2, who shall issue a written opinion upon final disposition of the case.

(c) Such recommendation shall be communicated to the Chief Justice through the Administrative Office of the Courts.

(d) Factors which may be considered in determining whether to make such designations include: the number and diverse interests of the parties; the amount and nature of anticipated pretrial discovery and motions; whether the parties voluntarily agree to waive venue for hearing pretrial motions; the complexity of the evidentiary matters and legal issues involved; whether it will promote the efficient administration of justice; and such other matters as the Chief Justice shall deem appropriate.

(e) The Chief Justice may enter such orders as are appropriate for the pretrial, trial, and other disposition of such designated case or cases.

New Rule 2.2 shall be titled and read as follows:

Designation of Special Superior Court Judge for Complex Business Cases

The Chief Justice shall designate one or more superior court judges as special judges to hear and decide complex business cases as provided in Rule 2.1. Any judge so designated shall be

known as a Special Superior Court Judge for Complex Business Cases.

Comment

The portion of this rule providing for the designation of a case as "exceptional" has been in effect in North Carolina since January 5, 1988, and has been utilized numerous times in various situations. The portion of this rule providing for the designation of a "complex business case" was adopted by the North Carolina Supreme Court on August 28, 1995, as a result of a recommendation in the January 1995 ANNUAL REPORT OF THE NORTH CAROLINA COMMISSION ON BUSINESS LAWS AND THE ECONOMY chaired by the North Carolina Attorney General.

The North Carolina Commission on Business Laws and the Economy was established by an executive order of the Governor on April 19, 1994, to recommend "any needed changes in existing statutes and regulations which affect the operation of businesses in North Carolina, particularly Chapter 55 of the North Carolina General Statutes . . . and to recommend any needed new statutes, rules and regulations designed to assure that North Carolina offers a legal environment which provides the flexibility and support to allow businesses to operate successfully in this state and which will attract them to locate and incorporate here."

The Commission's report noted that many national corporations incorporate in the state of Delaware because of that state's Chancery Court which provides a high level of judicial expertise on corporate law issues. It also observed the desirability of a state having a substantial body of corporate law that provides predictability for business decision making. Also, it is essential that corporations litigating complex business issues receive timely and well reasoned written decisions from an expert judge.

Accordingly, the Commission recommended that the North Carolina Supreme Court amend Rule 2.1 to allow the Chief Justice to designate certain cases as complex business cases. The Commission also recommended that the Governor appoint at least one expert in corporate law matters as a Special Judge to hear cases designated by the Chief Justice pursuant to Rule 2.2.

The term "complex business case" is purposely not defined in order to give litigants the flexibility to seek a designation as such with respect to any business issue that they believe requires special judicial expertise. It is anticipated that any case involving significant issues arising under Chapters 55, 55B, 57C, 59, 78A,

78B and 78C of the General Statutes of North Carolina would be designated a complex business case.

New Rule 23.1 shall be entitled and read as follows:

Summary Procedure for Significant Commercial Disputes

(a) The senior resident superior court judge of any superior court district, or a presiding judge unless prohibited by local rule may, upon joint motion or consent of all parties, order Summary Procedures For A Significant Commercial Dispute ("Summary Procedures") in any case within the subject matter jurisdiction of the superior court that does not include a claim for personal, physical or mental injury where 1) the amount in controversy exceeds $500,000; 2) at least one party is a North Carolina citizen, corporation or business entity (or a subsidiary of such corporation or business entity) or has its principal place of business in North Carolina; and 3) all parties agree to forego any claim of punitive damages and waive the right to a jury trial. The joint motion or consent for summary procedures must be filed with the court on or before the time the answer or other responsive pleading is due.

(b) To the extent they are not inconsistent with these Rules, the North Carolina Rules of Civil Procedure shall apply to Summary Procedures.

(c) Summary Procedures are commenced by filing with the court and serving a complaint.

(d) The complaint and any accompanying documents shall be sent, via next-day delivery, to either a person identified in the agreement between the parties to receive notice of Summary Procedures or, absent such specification, to each defendant's principal place of business or residence.

(e) The complaint must state prominently on the first page that Summary Procedures are requested. The complaint also must contain a statement of the amount in controversy exclusive of interest and costs, a statement that one of the parties is a North Carolina citizen, corporation or other business entity, or a subsidiary of such corporation or business entity, or that such citizen, corporation or business entity has its principal place of business in North Carolina, and a statement that the defendant has agreed to submit to the court's jurisdiction for Summary Procedures.

(f) Any action pending in any other jurisdiction which could have been brought initially as a Summary Procedure in this state may, subject to the procedures of the court of the other jurisdiction, be transferred to the superior courts of this state and converted to a Summary Procedure. Any pending action in this state may be converted to a Summary Procedure subject to the provisions of this Rule 23.1. Within 15 days of transfer or conversion, the court shall hold a conference at which time a schedule for the remainder of the action shall be established that will conform as closely as feasible to these Rules. Unless cause not to do so is shown, the record from any prior proceedings shall be incorporated into the record of the Summary Procedure.

(g) A defendant shall serve an answer together with any compulsory counterclaims within thirty days after service of the complaint.

(h) A plaintiff shall serve a reply to any counterclaim within twenty days after service of the counterclaim. Any answer or reply to a counterclaim shall be accompanied by a list of persons consulted, or relied upon, in connection with preparation of the answer or reply. Crossclaims, permissive counterclaims and third-party claims are not permitted absent agreement of all parties. Crossclaims, counterclaims and third-party claims, if any, are subject to the provisions of this Rule 23.1.

(i) A party may, in lieu of an answer, respond to a complaint or counterclaim by moving to dismiss. A motion to dismiss and accompanying brief must be served within thirty days after service of the complaint upon the defendant. A motion to dismiss a counterclaim and accompanying brief must be served within twenty days after service of the counterclaim. An answering brief in opposition to a motion to dismiss is due within fifteen days after service of the motion and accompanying brief. A reply brief in support of the motion to dismiss is due within ten days after service of the answering brief. The opening and answering briefs shall be limited to twenty-five pages, and the reply brief shall be limited to ten pages. Within thirty days after the filing of the final reply brief on all motions to dismiss, if no oral argument occurs, or within thirty days of oral argument if oral argument occurs, the court will either render to the parties its decision on such motions or will provide to the parties an estimate of when such decision will be rendered. Such additional time shall not normally exceed an additional thirty days. If a motion to dismiss a claim is denied, an answer to that claim shall be filed within ten days of such denial.

(j) Within seven days of filing of the answer, a plaintiff shall serve upon the answering defendant a copy of each document in the possession of plaintiff that plaintiff intends to rely upon at trial, a list of witnesses that plaintiff intends to call at trial and a list of all persons consulted or relied upon in connection with preparation of the complaint. Within thirty days of the filing of the answer, the answering defendant shall provide to all other parties a list of witnesses it intends to call at trial and all documents in its possession that it intends to rely upon at trial. A plaintiff against whom a counterclaim has been asserted shall serve upon the defendant asserting the counterclaim, within thirty days after such plaintiff receives from the defendant asserting the counterclaim the materials referred to in the preceding sentence, a list of witnesses it intends to call at trial in opposition to the counterclaim, all documents in its possession that it intends to rely upon at trial in opposition to the counterclaim and all persons consulted or relied upon in connection with preparation of the reply to the counterclaim.

(k) Any party may serve upon any other party up to ten written interrogatories (with any sub-part to be counted as a separate interrogatory) within thirty days after the filing of the last answer. Responses are due within twenty days after service of the interrogatories.

(l) Any party may serve on any other party a request to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents, said request to be served within thirty days after filing of the last answer. The response to a document request is due within thirty days after service of the document request and must include production of the documents at that time for inspection and copying.

(m) Any party may serve on any other party a notice of up to four depositions to begin no sooner than seven days from service of the deposition notice and subsequent to the filing of all answers. A party may also take the deposition of any person on the other party's witness list, as well as the deposition of all affiants designated under Section (s) of this Rule. The first deposition notice by a party shall be served not later than sixty days after the filing of the last answer. All depositions to be taken by a party are to be scheduled and completed within 120 days of the filing of the last answer.

(n) Any party may serve upon any other party up to ten requests for admission (with any sub-part to be counted as a sep-

arate request for admission) within thirty days of the filing of the last answer. Responses are due within twenty days after service.

(o) Parties are obligated to supplement promptly their witness list, the documents they intend to rely upon at trial and their discovery responses under this Rule.

(p) Discovery disputes, at the court's option, may be addressed by a referee at the expense of the parties or by the court.

(q) Unless otherwise ordered by the court, all discovery, except for discovery contemplated by Section (s) of this Rule, shall be completed within 180 days after the filing of the last answer.

(r) There shall be no motions for summary judgment in Summary Proceedings.

(s) If the parties notify the court within seven days after the close of discovery that the parties have agreed to forego witnesses at the trial of the case, the parties may submit briefs and appendices in support of their cause as follows:

(1) Plaintiff's Brief—thirty days following close of discovery;

(2) Defendant's Answering Brief—within thirty days after service of plaintiff's brief; and

(3) Plaintiff's Reply Brief—within fifteen days of service after Defendant's Answering Brief.

(t) The briefs must cite to the applicable portions of the record. Affidavits may be used but all affiants must be identified prior to the close of discovery and must, at the option of any other party, be produced for deposition within two weeks from the date discovery would otherwise close. The court shall make factual findings based upon the record presented by the parties.

(u) If the parties elect to forego witnesses at trial and submit briefs pursuant to Section (s) of this Rule, trial shall consist of oral argument, or submission on briefs if oral argument is waived by the parties with the consent of the court, to be scheduled and held by the court within one week of the close of briefing pursuant to Section (s).

(v) If the parties elect to present live witnesses at trial, the trial shall be scheduled to begin between thirty and sixty days after the close of discovery. Within thirty days after the close of discovery, the parties shall provide the court with an agreed upon pre-trial order. The pre-trial order shall include a summary of the claims or defenses of each party, a list of the witnesses each party expects to introduce at trial, a description of any evidentiary disputes, a statement of facts not in dispute and a statement of disputed issues of fact. Absent contrary court order, the trial shall be limited to five days, which shall be allocated equitably between the parties. Within ten days of the close of trial, each party shall file a post-trial brief including proposed findings of fact and conclusions of law. Each brief shall not exceed fifty pages.

(w) Within thirty days after the filing of the final brief, if no oral argument occurs, or within thirty days of argument if oral argument occurs, the court will either render to the parties its decision after trial or will provide the parties an estimate of when the decision will be rendered. Such additional time shall not normally exceed an additional thirty days.

(x) The schedule for trial or decision after trial or on motion to dismiss shall not be extended unless the assigned judge certifies that:

(1) the demands of the case and its complexity make the schedule under this Rule incompatible with serving the ends of justice; or

(2) the trial cannot reasonably be held or the decision rendered within such time because of the complexity of the case or the number or complexity of pending criminal cases.

The following comment to the new Rule 23.1 of the General Rules of Practice shall accompany the Rule:

This rule was adopted by the North Carolina Supreme Court on August 28, 1995 as a result of a recommendation in the January 1995 ANNUAL REPORT of THE NORTH CAROLINA COMMISSION ON BUSINESS LAWS AND THE ECONOMY chaired by the North Carolina Attorney General.

In its report, the Commission observed that, historically, North Carolina has enjoyed a high quality, efficient civil justice system. In recent years, however, civil litigation (and in particular, complex commercial litigation) has become protracted and costly. This is the result of many factors, including more complex laws and regulations, legal tactics and increased caseload.

The North Carolina court system has responded by instituting a number of innovative programs designed to resolve civil disputes more efficiently. These include court-ordered arbitration and a pilot mediation program. Despite the success of these programs, resolution of complex business and commercial disputes in North Carolina can be slow and costly.

The Commission noted that a state court system that offers alternatives to the normal litigation process which can expedite the resolution of significant commercial and business disputes is an important element of a progressive, efficient business environment. States that can offer alternatives are more likely to attract new business organizations and incorporations as well as business expansions.

Accordingly, the Commission recommended that the State establish a summary procedure through which North Carolina citizens and business entities and their subsidiaries, and businesses which are headquartered in the State can more efficiently resolve significant commercial civil disputes. The Commission recommended that the availability of such a summary procedure be limited to civil actions in superior court where 1) at least $500,000 is in controversy, 2) at least one party is a North Carolina citizen or corporation, and 3) all parties consent to the summary proceeding. As part of that agreement, the parties to the summary proceeding must agree to waive punitive damages and a jury trial.

The summary procedure provided for in this Rule can be utilized only with consent of all parties. It does not restrict any parties' rights and is supplementary to, and not inconsistent with, the General Statutes. (See G.S. 7A-34.) Its purpose is to provide an alternative procedure for significant commercial disputes and thereby improve the overall efficiency of the court system.

Adopted by the Court in Conference this 28 day of August, 1995. This amendment, along with the commentary thereto, shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals and shall be effective upon adoption.

Orr, J.
For the Court

Witness my hand an the Seal of the Supreme Court of North Carolina, this the 28 day of August, 1995.

Christie Speir Cameron
Clerk of the Supreme Court

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

WHEREAS, section 7A-38.1 of the North Carolina General Statutes establishes a statewide system of court-ordered mediated settlement conferences to facilitate the settlement of superior court civil actions and

WHEREAS, N.C.G.S. Sect. 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. Sect. 7A-38.1(c) the Rules Governing Mediated Settlement Conferences are hereby amended to read as in the following pages. The amended Rules shall be effective the 1st day of October, 1995.

Adopted by the Court in conference the 7th day of September, 1995. The Appellate Court Reporter shall publish the Rules Governing Mediated Settlement in Superior Court Civil Actions in their entirety, as amended through this action, at the earliest practicable time.

Orr, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

RULE 1. ORDER FOR MEDIATED SETTLEMENT CONFERENCE

A. BY ORDER IN EACH ACTION

(1) Order by Senior Resident Superior Court Judge. The Senior Resident Superior Court Judge of any district, or part thereof, authorized to participate in the mediated settlement conference program may, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) Timing of the Order. The Senior Resident Superior Court Judge shall issue the order as soon as practicable after the time for the filing of answers has expired. Rules 1.A.(3) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(3) Content of Order. The court's order shall (1) require the mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on a form prepared and distributed by the Administrative Office of the Courts.

(4) Motion for Court Ordered Mediated Settlement Conference. In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter,

the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(5) Motion to Dispense With Mediated Settlement Conference. A party may move the Senior Resident Superior Court Judge, within 10 days after the Court's order, to dispense with the conference. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

(6) Motion to Authorize the Use of Other Settlement Procedures. A party may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure in lieu of a mediated settlement conference. Such motion shall state the reasons the authorization is requested and that all parties consent to the motion. The Court may order the use of any agreed upon settlement procedure authorized by Supreme Court or local rules. The deadline for completion of the authorized settlement procedure shall be as provided by rules authorizing said procedure or, if none, the same as ordered for the mediated settlement conference.

(7) Exemption from Mediated Settlement Conferences. The Senior Resident Superior Court Judge may be required by the Administrative Office of the Courts to exempt from such conferences a random sample of cases so as to create a control group to be used for comparative analysis.

B. BY LOCAL RULE (Reserved for future adoption.)

C. MOTION TO AUTHORIZE OTHER SETTLEMENT PROCEDURES (Reserved for future adoption.)

RULE 2. SELECTION OF MEDIATOR

A. Selection of Certified Mediator by Agreement of Parties. The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state

that the mediator is certified pursuant to these Rules. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts.

B. **Nomination and Court Approval of a Non-Certified Mediator.** The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate all or some of the issues in the action and who agrees to mediate indigent cases without pay.

If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and opposing counsel have agreed upon the selection and rate of compensation.

The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's decision. The nomination and approval or disapproval of the court shall be on a form prepared and distributed by the Administrative Office of the Courts.

C. **Appointment of Mediator by the Court.** If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts. The motion shall state whether any party prefers a certified attorney mediator, and if so, the Senior Resident Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non-attorney mediator, and if so, the Senior Resident Judge shall appoint a certified non-attorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is

expressed, the Senior Resident Judge may appoint a certified attorney mediator or a certified non-attorney mediator.

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator certified pursuant to these Rules, under a procedure established by said Judge and set out in Local Rules or other written document. Only mediators who agree to mediate indigent cases without pay shall be appointed. The Dispute Resolution Commission shall furnish for the consideration of the Senior Resident Superior Court Judge of any district where mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who want to be appointed in said district.

D. **Mediator Information Directory.** To assist the parties in the selection of a mediator by agreement, the Senior Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county.

E. **Disqualification of Mediator.** Any party may move a Resident or Presiding Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. **Where Conference is to be Held.** Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrange-

ments for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. When Conference Is to be Held. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.A.(1) shall state a date of completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order.

C. Request to Extend Date of Completion. A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by entering a written order setting a new date for the completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. Recesses. The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

E. The Mediated Settlement Conference Is Not To Delay Other Proceedings. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS

A. Attendance.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(i) All individual parties.

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) Insurance Company Representatives. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) Attorneys. At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

B. Notifying Lien Holders. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. Finalizing Agreement. If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

D. Payment of Mediator's Fee. The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND

If a party or other person required to attend a mediated settlement conference fails to attend without good cause, a Resident or Presiding Judge may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. Authority of Mediator.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed.

(2) Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. Duties of Mediator.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) The fact that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator timely to determine that an impasse exists and that the conference should end.

(4) Reporting Results of Conference. The mediator shall report to the court in writing whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. The mediator's report shall inform the court of the absence of any party, attorney, or insurance representative known to the mediator to have been absent without permission from the mediated settlement conference. The Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program on forms provided by it.

(5) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

RULE 7. COMPENSATION OF THE MEDIATOR

A. **By Agreement.** When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. **By Court Order.** When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $100.00 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $100.00.

C. **Indigent Cases.** No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. The Judge may take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. **Payment of Compensation by Parties.** Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person must:

A. Have completed a minimum of 40 hours in a Trial Court Mediation Training Program certified by the Dispute Resolution Commission;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is a member in good standing of the North Carolina State Bar, and

(b) has at least five years of experience as a judge, practicing attorney, law professor or mediator, or equivalent experience. Any current or former attorney who is disqualified by the attorney licensing authority of

any state shall be ineligible to be certified under this Rule 8.B. (1) or Rule 8.B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission;

(b) after completing the 20 hour training required by Rule 8.B.(2)(a), five years of experience as a mediator, having mediated: (a) at least 12 cases in each year, and (b) for at least 20 hours in each year;

(c) a six hour training on North Carolina legal terminology and civil court procedure, mediator ethics and confidentiality, provided by a trainer certified by the Dispute Resolution Commission;

(d) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's mediation experience;

(e) a four year degree from an accredited college or university.

C. Observe two court ordered Superior Court mediated settlement conferences conducted by a certified Superior Court mediator;

D. Demonstrate familiarity with the statutes, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any ethical standards hereafter adopted by this Court;

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Courts; and

H. Agree to mediate indigent cases without pay.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faith-

fully observed these rules or those of any district in which he or she has served as a mediator.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators of Superior Court civil actions shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Standards of conduct for mediators;

(4) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(5) Demonstrations of mediated settlement conferences;

(6) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(7) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. Payment of all administrative fees must be made prior to certification.

RULE 10. LOCAL RULE MAKING

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these rules is authorized to publish local rules implementing mediated settlement conferences not inconsistent with these rules and G.S. 7A-38.1.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATION OF THE JUDICIAL DISTRICT BARS

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 12, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the organization of the North Carolina State Bar and, particularly, the organization of the judicial district bars, as set forth in 27 N.C.A.C. 1A, be amended by adding a new section .0900 as follows:

TITLE 27, CHAPTER 1
SUBCHAPTER A

Section .0900 Organization of the Judicial District Bars

.0901 Bylaws

(a) Each judicial district bar shall adopt bylaws for its governance subject to the approval of the council;

(b) Each judicial district bar shall submit its current bylaws to the secretary of the North Carolina State Bar for review by the council on or before June 1, 1996;

(c) Pending review by the council, any bylaws submitted to the secretary on behalf of a judicial district bar or which already exist in the files of the secretary shall be deemed official and authoritative.

(d) All amendments to the bylaws of any judicial district bar must be filed with the secretary within 30 days of adoption and shall have no force and effect until approved by the council.

(e) The secretary shall maintain an official record for each judicial district bar containing bylaws which have been approved by the council or for which approval is pending.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly

adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 12, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of January, 1996.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 1996.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 7th day of March, 1996

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ORGANIZATION OF THE JUDICIAL DISTRICT BARS

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TITLE 27, CHAPTER 1
SUBCHAPTER A

Section .1000 MODEL BYLAWS FOR USE BY JUDICIAL DISTRICT BARS

.1001 Name

The name of this District Bar shall be THE DISTRICT BAR OF THE _____ JUDICIAL DISTRICT, and shall be hereinafter referred to as the "District Bar".

.1002 Authority and Purpose

The District Bar is formed pursuant to the provisions of Chapter 84 of the North Carolina General Statutes to promote the purposes therein set forth and to comply with the duties and obligations therein or thereunder imposed upon the Bar of this judicial district.

.1003 Membership

The members of the District Bar shall consist of two classes: active and inactive.

(a) Active members: The active members shall be all persons who, at the time of the adoption of these bylaws or any time thereafter

(1) are active members in good standing with the North Carolina State Bar and

(2) reside in the judicial district or

(3) practice in the judicial district and elect to belong to the District Bar as provided in G.S. 84-16.

(b) Inactive members: The inactive members shall be all persons, who, at the time of the adoption of these bylaws or at any time thereafter

(1) have been granted voluntary inactive status by the North Carolina State Bar and

(2) reside in the judicial district and

(3) elect to participate, but not vote or hold office, in the District Bar by giving written notice to the Secretary of the District Bar.

.1004 Officers

The officers of the District Bar shall be a President, a Vice President, and Secretary and/or Treasurer who shall be selected and shall serve for the terms set out herein.

(a) President: The President serving at the time these bylaws are effective shall continue to serve for a term ending at the next annual meeting following the adoption or effective date of these bylaws. The President for the following term shall be the then current Vice President. Thereafter, the duly elected Vice President shall automatically succeed to the office of the President for a term of one, two, or three years.

(b) Vice President: The Vice President serving at the time these bylaws are effective shall continue to serve for a term ending at the next annual meeting following the adoption or effective date of these bylaws, at which time said Vice President shall succeed to the office of the President. Thereafter, the Vice President shall be elected at the annual meeting as hereinafter provided for a term of one, two, or three years.

(c) Secretary and/or Treasurer: The Secretary and/or the Treasurer serving at the time these bylaws are effective shall each continue to serve in their respective offices until the expiration of the term of that office or until successors are appointed by the President (or be elected by the active members of the District Bar), whichever occurs later. In all other years, the Secretary and/or Treasurer shall be appointed by the President (or be elected by the active members of the District Bar) to serve for a term of one, two, or three years.

(d) Election: Before (or at) the annual meeting at which officers are to be elected, the Nominating Committee shall submit the names of its nominees for the office of Vice President to the Secretary. Nominations from the floor shall be permitted. If no candidate receives a majority of the votes cast, the candidate with the lowest number of votes shall be eliminated and a run-off election shall immediately be held among the remaining candidates. This procedure shall be repeated until a candidate receives a majority of the votes.[1]

(e) Duties: The duties of the officers shall be those usual and customary for such officers, including such duties as may be from time to time designated by resolution of the District Bar, the North Carolina State Bar Council or the laws of the State of North Carolina.

(f) Vacancies: If a vacancy in the office of the Vice President, Secretary-Treasurer occurs, the vacancy will be filled by the Board of Directors, if any, and if there is no Board of Directors, then by the vote of the active members at a special meeting of such members. The successor shall serve until the next annual meeting of the District Bar. If the office of the President becomes vacant, the Vice President shall succeed to the office of the President and the Board of Directors, if any, and if there is no Board of Directors, then by the vote of the active members at a special meeting of such members, will select a new Vice President, who shall serve until the next annual meeting.

(g) Notification: Within 10 days following the annual meeting, or the filling of a vacancy in any office, the President shall notify the Executive Director of the North Carolina State Bar of the names, addresses and telephone numbers of all officers of the District Bar.

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1. The procedure for voting for, and election of, councilors is set by statute and rules of the N.C. State Bar. District Bar voting procedure with regard to matters relating to District Bar dues is now statutorily prescribed in North Carolina General Statutes Section 84-18.1. The procedure, but not the manner or method of conducting the vote, to submit nominations to the Governor to fill vacancies on the District Court bench is set forth in North Carolina General Statutes Section 7A-142. It is suggested that, for voting upon, and elections for, other District Bar matters and issues, the District Bars be permitted to adopt bylaws providing for procedures as may seem appropriate for each District Bar. Such rules might address notice provisions, including how much notice is given and permissible methods of giving notice, what shall constitute a quorum (see footnote 2), and how any such election shall be conducted (including whether or not members must be present to vote, whether proxies will be permitted, whether or not absentee or some other form of mail ballot will be allowed and whether or not cumulative voting should be permitted when elections for multiple candidates or positions are being conducted).

(h) Record of Bylaws: The President shall ensure that a current copy of these bylaws is filed with the office of the Senior Resident Superior Court Judge with the _____ Judicial District and with the Executive Director of the North Carolina State Bar.

(i) Removal from Office: The District Bar, by a two-thirds vote of its active members present at a duly called meeting, may, after due notice and an opportunity to be heard, remove from office any officer who has engaged in conduct which renders the officer unfit to serve, or who has become disabled, or for other good cause. The office of any officer who, during his or her term of office, ceases to be an active member of the North Carolina State Bar shall immediately be deemed vacant and shall be filled as provided in Rule .1004(f) above.

.1005 Councilor

The District Bar shall be represented in the State Bar Council by one or more duly elected councilors, the number of councilors being determined pursuant to G.S. 84-17. Any councilor serving at the time of the adoption of these bylaws shall complete the term of office to which he or she was previously elected. Thereafter, elections shall be held as necessary at the annual (or a Special) meeting of the District Bar immediately preceding the expiration of a councilor's term. Nominations shall be made by the Nominating Committee and the election held as provided in North Carolina General Statutes Section 84-18 and in Section .0800 et seq. of this subchapter (27 N.C.A.C. 1A .0800 et seq.). If more than one council seat is to be filled, separate elections shall be held for each vacant seat. A vacancy in the office of councilor shall be filled as provided by Rule .0804 of this subchapter (27 N.C.A.C. 1A .0804).

.1006 Annual Membership Fee

(a) Each active member of the District Bar shall:

(1) Pay such annual membership fee, if any, as is prescribed by a majority vote of the active members of the District Bar present and voting at a duly called meeting of the District Bar, provided, however, that such fee may never exceed the amount of the annual membership fee currently imposed by the North Carolina State Bar. Each member shall pay the annual District Bar membership fee at the time and place set forth in the notice thereof mailed to the member by the Secretary-Treasurer; and

(2) Keep the Secretary-Treasurer notified of the member's current mailing address and telephone number.

(b) The annual membership fee shall be used to promote and maintain the administration, activities and programs of the District Bar.

.1007 Meetings

(a) Annual meetings: The District Bar shall meet each _____ _____ at a time and place designated by the President. The President, Secretary or other Officer shall mail or deliver written notice of the annual meeting to each active member of the District Bar at the member's last known mailing address on file with the District Bar at least ten days before the date of the annual meeting and shall so certify in the official minutes of the meeting. Notice of the meeting mailed by the Executive Director of the North Carolina State Bar shall also satisfy the notice requirement. Failure to mail or deliver the notice as herein provided shall invalidate any action at the annual meeting.

(b) Special meetings: Special meetings, if any, may be called at any time by the President or the Vice President. The President, Secretary or other Officer shall mail or deliver written notice of the special meeting to each active member of the District Bar at the member's last known mailing address on file with the District Bar at least ten days before the date of any special meeting. Such notice shall set forth the time and place for the special meeting and the purpose(s) thereof. Failure to mail or deliver the notice shall invalidate any action taken at a special meeting.

(c) Quorum: Twenty percent of the active members of the District Bar shall constitute a quorum, and a quorum shall be required to take official action on behalf of the District Bar.[2]

.1008 District Bar Finances

(a) Fiscal Year: The District Bar's fiscal year shall begin on _____ _____ and shall end on _____.

2. Consistent with the comment contained in Footnote 1, each District Bar should be permitted to adopt bylaws providing for what shall constitute a quorum based upon each District Bar's particular situation and circumstances. The above provision regarding quorum should be considered only as a suggestion and individual District Bars may wish to provide that a different percentage of the membership shall constitute a quorum. Other methods of defining a quorum should also be permitted. For example, in certain of the larger District Bars, any quorum based on a percentage of the membership, except for a very nominal percentage, may be difficult to attain. One alternate quorum provision might read as follows: A quorum shall be those present at any membership meeting for which proper notice was given.

(b) Duties of Treasurer: The Treasurer shall maintain the funds of the District Bar on deposit, initiate any necessary disbursements and keep appropriate financial records.

(c) Annual Financial Report: Each _____ before the annual meeting, the Treasurer shall prepare the District Bar's annual financial report for review by the Board of Directors, if any, and submission to the District Bar's annual meeting and the North Carolina State Bar.

(d) District Bar Checks: All checks written on District Bar accounts (arising from the collection of mandatory dues) that exceed $500 (or such larger amount as may be approved, in writing, by the Staff Auditor of the North Carolina State Bar) must be signed by two (2) of the following: (1) the Treasurer, (2) any other officer, (3) another member of the Board of Directors, or (4) the Executive Secretary/Director, if any.

(e) Fidelity Bond: If it is anticipated that receipts from membership fees will exceed $20,000 for any fiscal year, the District Bar shall purchase a fidelity bond at least equal in amount to the anticipated annual receipts to indemnify the District Bar for losses attributable to the malfeasance of the Treasurer or any other member having access to District Bar funds.

(f) Taxpayer Identification Number: The Treasurer shall be responsible for obtaining a federal taxpayer identification number for the District Bar.

.1009 Prohibited Activities

(a) Prohibited Expenditures: Mandatory District Bar dues, if any, shall not be used for the purchase of alcoholic beverages, gifts to public officials, including judges, charitable contributions, recreational activities or expenses of spouses of District Bar members or officers. However, such expenditures may be made from funds derived entirely from the voluntary contributions of District Bar members.

(b) Political Expenditures: The District Bar shall not make any expenditures to fund political and ideological activities.

(c) Political Activities: The District Bar shall not engage in any political or ideological conduct or activity, including the endorsement of candidates and the taking or advocation of positions on political issues, referendums, bond elections, and the like, however, the District Bar, and persons speaking on its behalf, may

take positions on, or comment upon, issues relating to the regulation of the legal profession and issues or matters relating to the improvement of the quality and availability of legal services to the general public.

.1010 Committees

(a) Standing Committee(s): The standing committees shall be the Nominating Committee, Pro Bono Committee, Fee Dispute Arbitration Committee and Grievance Committee, provided that, with respect to the Fee Dispute Arbitration Committee and the Grievance Committee, the District meets the State Bar guidelines relating thereto.

(b) Fee Arbitration Committee:

(1) The Fee Arbitration Committee shall consist of at least six but not more than eighteen persons appointed by the President to staggered three-year terms as provided in the District Bar's Fee Arbitration Plan.

(2) The Fee Arbitration Committee shall be responsible for implementing a Fee Arbitration Plan approved by the Council of the North Carolina State Bar to resolve fee disputes efficiently, economically, and expeditiously without litigation.

(c) Grievance Committee:

(1) The Grievance Committee shall consist of at least five but not more than thirteen persons appointed by the President to staggered three year terms as provided by the Rules and Regulations of the North Carolina State Bar governing Judicial District Grievance Committees.

(2) The Grievance Committee shall assist the Grievance Committee of the North Carolina State Bar by receiving grievances, investigating grievances, evaluating grievances, informally mediating disputes, facilitating communication between lawyers and clients and referring members of the public to other appropriate committees or agencies for assistance.

(3) The Grievance Committee shall operate in strict accordance with the rules and policies of the North Carolina State Bar with respect to District Bar Grievance Committees.

(d) Special Committees: Special committees may be created and appointed by the President.

(e) Nominating Committee:

(1) The Nominating Committee shall be appointed by the officers (or the Board of Directors) of the District Bar and shall consist of at least three active members of the District Bar who are not officers or directors of the District Bar.[3]

(2) The Nominating Committee shall meet as necessary for the purpose of nominating active members of the District Bar as candidates for officers and councilor(s) and the Board of Directors, if any.

(3) The Nominating Committee members shall serve one-year terms beginning on _____ and ending on _____.

(4) Any active member whose name is submitted for consideration for nomination to any office or as a councilor must have indicated his or her willingness to serve if selected.

(f) Pro Bono Committee:

(1) The Pro Bono Committee shall consist of at least five active members of the District Bar appointed by the President.

(2) The Pro Bono Committee shall meet at least once each quarter and shall have the duty of encouraging members of the District Bar to provide pro bono legal services. The Committee shall also develop programs whereby attorneys not involved in other volunteer legal service programs may provide pro bono legal service in their areas of concentration and practice.

(3) The members of the Pro Bono Committee shall serve one-year terms commencing on _____.

3. The composition of the Nominating Committee set forth above is a suggestion only. The District Bars may choose to constitute their nominating committees in a different manner, as for example, letting the committee consist of the three most immediate past presidents of the District Bar who are still active members of the District Bar as defined herein. Smaller District Bars may choose to have no Nominating Committee and nominate and elect officers from the floor at the annual meeting of the District Bar.

.1011 Board of Directors or Executive Committee

(a) Membership of Board: A Board of Directors consisting of at least _____ active members of the District Bar shall be elected. At all times, the Board of Directors shall include at least one director from each county in the Judicial District. The Board of Directors serving when these bylaws become effective shall continue to serve until the following annual meeting. Beginning on _____ immediately after the effective date of these bylaws, the President shall appoint an initial Board of Directors who shall serve three-year terms commencing on _____, except that the terms of the initial members of the Board shall be staggered at one-year intervals to ensure continuity and experience. To effect the staggered initial terms, the President will determine which of the initial members shall serve terms of less than three years.

The State Bar Councilor (or Councilors) from the judicial district shall be an ex officio member (or members) of the District Bar Board of Directors or Executive Committee.

(b) Terms of Directors: After the initial staggered terms of the Board of Directors expire, successors shall be elected by the active members at the annual District Bar meeting, as set out in Rule .1004 (d) above, and Rule .1011 (c) and (d) below. Following the completion of the initial staggered terms, the directors shall serve three-year terms beginning on _____ following their election.

(c) Designated and At-Large Seats in Multi-County Districts: In multi-county districts, one seat on the Board of Directors shall be set aside and designated for each county in the district. Only active members of the District Bar who reside or work in the designated county may be elected to a designated county seat. All other seats on the Board of Directors shall be at-large seats which may be filled by any active member of the District Bar.

(d) Elections: When one or more seats on the Board of Directors become vacant, an election shall be held at the annual meeting of the District Bar. Except as otherwise provided herein, the election shall be conducted as provided for in Rule .1004 (d) above. The candidates receiving the highest number of votes cast will be elected, regardless of whether any of the candidates received a majority of the votes cast, provided that designated seats will be filled by the candidates receiving the highest number of votes who live or work in the designated county, regardless of whether any of the candidates received a majority of the votes cast.

(e) Vacancies: If a vacancy occurs on the Board of Directors, the President (or the Board of Directors) shall appoint a successor who shall serve until the next annual meeting of the District Bar. If the vacancy occurs in a designated seat for a particular county within the district, the successor will be selected from among the active members of the District Bar who live or work in the designated county.

(f) Duties of Board of Directors: The Board of Directors shall have the responsibilities described in Rules .1004 (f) and .1007 (c) above. The Board of Directors shall also consult with the officers regarding any matters of District Bar business or policy arising between meetings and may act for the District Bar on an emergency basis if necessary, provided that any such action shall be provisional pending its consideration by the District Bar at its next duly called meeting. The Board of Directors may not impose on its own authority any sort of fee upon the membership.

.1012 Amendment of the Bylaws

The membership of the District Bar, by a _____ (majority, two-thirds, etc.) vote of the active members present at any duly called meeting at which there is a quorum present and voting throughout, may amend these bylaws in ways not inconsistent with the constitution of the United States, the policies and rules of the North Carolina State Bar and the laws of the United States and North Carolina.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 12, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of January, 1996.

s/L. Thomas Lunsford
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 1996.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 7th day of March, 1996

s/Orr, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PROCEDURES OF THE PALS COMMITTEE

The following amendment to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 12, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the operations of the Positive Action for Lawyers (PALS) Committee, as particularly set forth in 27 N.C.A.C. 1D .0600, et.seq., be amended by adding a new Rule .0610 as follows:

TITLE 27, CHAPTER 1
SUBCHAPTER D

Section .0600 Procedures for the Positive Action for Lawyers (PALS) Committee

.0610 Rehabilitation Contracts

The committee shall have the authority to enter into rehabilitation contracts with lawyers suffering from chemical dependency including contracts that provide for alcohol and/or drug testing. Such contracts may include any provisions necessary to further the purposes of this section including, but without limitation: a) a provision that upon PALS receiving a report of a positive alcohol or drug test for a substance prohibited under the contract, the contract may be amended to include additional provisions considered by PALS to be in the best rehabilitative interest of the lawyer and the public interest; and b) a provision that the lawyer being contracted with stipulates to the admission of any alcohol and/or drug testing results into evidence in any *in camera* proceeding brought under this section without the necessity of further authentication.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 12, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of January, 1996.

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 March, 1996.

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 March, 1996

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING 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 January 12, 1996.

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 .0116 and .0121, be amended as follows (additions in bold type and deletions underlined):

TITLE 27, CHAPTER 1
SUBCHAPTER B

Section .0100 Discipline and Disability of Attorneys

.0116 Reciprocal Discipline

. . .

(b) Except as provided in subsection (c) below, reciprocal discipline will be administered as follows:

(1) Upon receipt of a certified copy of an order demonstrating that a member has been disciplined in another jurisdiction, state or federal, the Grievance Committee will forthwith issue a notice directed to the member . . .

. . .

(3) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0116(b)(1) above, the chairperson of the Grievance Committee will impose the identical discipline unless the **Grievance Committee concludes** member demonstrates

(A) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(B) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Grievance Committee could not, consistent with its duty, accept as final the conclusion on that subject;

(C) that the imposition of the same discipline would result in grave injustice. ;**or**

(D) that the misconduct established warrants substantially different discipline in this state.

.0121 Notice to Complainant

. . .

(c) If final action on a grievance is taken by the Grievance Committee in the form of a letter of caution or letter of warning or is dismissed, **the Grievance Committee finds that there is no probable cause to believe that misconduct occurred and votes to dismiss a grievance,** the chairperson of the Grievance Committee will advise the complainant that following its deliberations, the committee did not find probable cause to justify imposing discipline and dismissed the grievance.

(d) If final action on a grievance is taken by the Grievance Committee in the form of a letter of caution or a letter of warning, the chairperson of the Grievance Committee will so advise the complainant. The communication to the complainant will explain that the letter of caution or letter of warning is not a form of discipline.

(e)(d) If a grievance is referred to the Board of Continuing Legal Education . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 12, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 30th day of January, 1996.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 1996.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 7th day of March, 1996

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

The following amendments to the Rules and Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 12, 1996.

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. 1A .0203 and 27 N.C.A.C. 1D .0900 et.seq., .1001, .1002, .1523, .1524, and .1609, be amended as follows (additions in bold type and deletions underlined):

TITLE 27, CHAPTER 1
SUBCHAPTER A

Section .0200 Membership-Annual Membership Fees

. . .

.0203 Annual Membership Fees; When Due

. . .

(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 North Carolina Supreme Court on or before July 1 of each year shall also pay a late fee of $75.00 **$30.00.**

TITLE 27, CHAPTER 1
SUBCHAPTER D

Section .0900 Procedures for the Membership and Fees Committee

.0901 Transfer to Inactive Status

(a) Petition for Transfer to Inactive Status

Any member who desires to be transferred to inactive status shall file a duly verified petition with the secretary addressed to the council setting forth fully

(1) the member's name and current address;

(2) the date of the member's admission to the North Carolina State Bar;

(3) the reasons why the member desires transfer to inactive status;

(4) that the member is at the time of filing the petition a **the** member **is** in good standing having paid all **membership** fees required, **Client Security Fund assessments, late fees and costs assessed by the North Carolina State Bar, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education** and without any grievances or disciplinary complaints undisposed of **pending** against him or her;

(5) any other matters pertinent to the petition.

(b) Conditions Upon Transfer

No member may be voluntarily transferred to disability-inactive status or retired/nonpracticing inactive status until:

(1) the member has paid all membership fees, **Client Security Fund assessments,** late fees, and other costs assessed against the member by the North Carolina State Bar, **as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education, and**

(2) all grievances and disciplinary matters pending against the member have been finally resolved.

(c) Order Transferring Member to Inactive Status

Upon receipt of a petition which satisfies the provisions of Rule .0901(a) above, the council may, in its discretion, enter an order transferring the member to inactive status. The order shall become effective immediately upon entry by the council. A copy of the order shall be **mailed** to served on the member. pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

.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 **unless** the member was exempt from such requirements pursuant to Rule .1517 of this subchapter;

(3) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest;

(4) [this provision shall be effective for all members who are transferred to inactive status on or after January 1, 1996] if 2 or more years have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed with the secretary of the State Bar, that during the period of inactive status, the member has completed 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519 of this subchapter. Of the required 15 CLE hours, 12 hours must be earned attending practical skills courses and 3 hours must be earned by attending a 3 hour block course of instruction devoted exclusively to the area of professional responsibility; and

(5) (4) that the member has paid **all of the following:**

(A) a $125.00 reinstatement fee.**;**

(B) the membership fees **and Client Security Fund assessment** for the current year in which the application is filed.**;**

(C) all past due **attendee** fees, fines and penalties owed the Board of Continuing Legal Education **for CLE**

courses taken to satisfy the requirements of Rule .0902(b)(2) and (4) above; and

(D) all past due costs assessed against the member by the Disciplinary Hearing Commission; and

(E) all costs incurred by the North Carolina State Bar in investigating and processing the application **for reinstatement**.

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.

(c) Service of Reinstatement Petition

The petitioner shall contemporaneously serve a copy of the petition on the secretary and upon each member of the Membership and Fees Committee. The secretary shall transmit a copy of the petition **to each member of the Membership and Fees Committee and** to the counsel.

(d) Response **Investigation** by Counsel

The counsel will conduct any necessary investigation regarding the petition **and shall advise the members of the Membership and Fees Committee of any findings from such investigation.** The counsel may file a response to the petition with the secretary within 15 days after service of the petition. The response must set out specific objections sufficient to put the petitioner on notice of the facts or events at issue. The counsel will serve a copy of any response upon the petitioner and the members of the Membership & Fees Committee.

(e) Response by Membership and Fees Committee

Any member of the Membership and Fees Committee may file:

(1) an objection to the petition with the secretary within 15 days after receipt of the petition. The response must set out specific objections sufficient to put the petitioner on notice of the facts or events at issue. The objecting member will serve a copy of any response filed upon the petitioner and upon the counsel. The objecting member shall not participate in any vote on the petition.

(2) a request for additional investigation of the petition within 15 days after the member receives the petition.

(f) Uncontested Petitions

If no timely objection to the petition is filed within the time set out herein by the counsel or a member of the Membership and Fees Committee, **After the investigation of the petition by the counsel is complete,** the Membership and Fees Committee will consider the petition at its next meeting and shall make a recommendation to the council regarding whether the petition should be granted.

(f) (g) Contested **Hearing Upon Denial** of Petitions for Reinstatement

(1) Notice of Council Action and Request for Hearing If the council denies a petition for reinstatement from inactive status, the member shall be notified in writing within 14 days after such action by the council. The notice shall be served upon the member pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

(2) The member shall have 30 days from the date of service of the notice to file a written request for hearing upon the secretary. The request shall be served upon the secretary pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

(3) Hearing Procedure

The procedure for the hearing shall be as provided in Section .1000 of this subchapter.

(1) Hearing Procedure

If a timely objection to the petition is filed by the counsel or a member of the Membership and Fees Committee, the secretary will refer the matter to the chairperson of the Membership and Fees Committee of the North Carolina State Bar for hearing. Within 14 days after the objection is filed, the chairperson will appoint three members of the Membership and Fees Committee to serve as a hearing panel. The chairperson may appoint him or herself as a member of a hearing

panel. The chairperson will schedule a time and place for a hearing before the hearing panel and will notify the counsel and the petitioner of the time and place of the hearing. The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as practicable and the Rules of Evidence applicable in superior court, unless the parties agree otherwise.

(2) Hearing Panel Recommendation

Following the hearing on a contested reinstatement petition, the hearing panel will make a written recommendation to the full Membership and Fees Committee regarding whether the petitioner's license should be reinstated. The recommendation shall include appropriate findings of fact and conclusions of law in support of its recommendation.

(3) Record to Membership and Fees Committee

(A) The petitioner will compile a record of the proceedings before the hearing panel to the Membership and Fees Committee, including a legible copy of the complete transcript, all exhibits introduced into evidence and all pleadings, motions and orders, unless the petitioner and counsel agree in writing to shorten the record. Any agreements regarding the record shall be included in the record transmitted to the Membership and Fees Committee.

(B) The petitioner shall provide a copy of the record to the counsel not later than 90 days after the hearing unless an extension is granted by the chairperson of the committee for good cause shown.

(C) The petitioner will transmit a copy of the record to each committee member who did not sit on the hearing panel no later than 30 days before the meeting at which the petition is to be considered.

(D) The petitioner shall bear all of the costs of transcribing, copying and transmitting the record to the Membership and Fees Committee.

(E) If the petitioner fails to comply fully with any of the provisions of Rule .0902(g)(3)(A)-(D) above, the counsel may file a motion to the secretary to dismiss the petition.

(4) Committee Recommendation

(A) In his or her discretion, the chairperson of the Committee may permit counsel for the State Bar and the petitioner to present oral or written argument, but the committee will not consider additional evidence not in the record transmitte from the hearing panel, absent a showing that the ends of justice so require or that undue hardship will result if the additional evidence is not presented.

(B) After considering the record and the arguments of counsel, if any, the Membership and Fees Committee will make a written recommendation regarding whether the petition should be granted. The chairperson of the committee shall sign the recommendation for the committee members.

(5) Record to Council

(A) Following entry of the written recommendation of the Membership and Fees Committee, the petitioner will transmit a copy of the record of the proceedings before the hearing panel and the Membership and Fees Committee to each council member no later than 30 days before the council meeting at which the petition is to be considered.

(B) The petitioner shall bear all of the costs of transcribing, copying and transmitting the record to the council.

(6) Order by Council

The council will review the record and the recommendations of the hearing panel and the Membership and Fees Committee and will determine whether and upon what conditions the petitioner will be reinstated. The council may tax the costs attributable to the proceeding against the petitioner.

.0903 *Suspension for Nonpayment 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, **late fee** and/or who has failed to pay the required Client Security Fund assessment approved by the North Carolina

Supreme Court in a timely fashion, the secretary shall prepare a written notice

(1) directing the member to show cause, **in writing**, within 30 days of the date **of service** 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 **Upon Failure to Respond to Notice to Show Cause**

Whenever **a member fails to respond in writing within 30 days of the service of the notice to show cause upon the member** and it appears that a the 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) of subchapter A **and/or the Client Security Fund assessment,** and that more than 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) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

(1) Consideration by Membership and Fees Committee

If a member submits a written response to a notice to show cause within 30 days of the service of the notice upon the member, the Membership and Fees Committee shall consider the matter at its next

regularly scheduled meeting. The member may personally appear at the meeting and be heard, may be represented by counsel, and may offer witnesses and documents. The counsel may appear at the meeting on behalf of the State Bar and be heard, and may offer witnesses and documents. The burden of proof shall be upon the member to show cause by clear, cogent and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules regarding payment of the annual membership fee, late fee and/or Client Security Fund assessment.

(2) Recommendation of Membership and Fees Committee

The Membership and Fees Committee shall determine whether the member has shown cause why the member should not be suspended. If the committee determines that the member has failed to show cause, the committee shall make a written recommendation to the council that the member be suspended.

(3) Order of Suspension

Upon the recommendation of the Membership and Fees Committee, 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.

(e) (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 North Carolina State Bar on or 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 Service of Suspension Order

A member who has been suspended for nonpayment of the annual membership fee, **any late 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 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 written request and satisfactory showing by the member of payment of all the membership fees, Client Security Fund assessment, **any** late fees and costs. Such 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 of Suspension Order

At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for nonpayment of dues **the membership fee**, Client Security Fund assessment and/or **any** 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, **and for any calendar year which has elapsed since the date of the entry of the order of suspension unless** or the member was exempt from such requirements pursuant to Rule .1517 of this subchapter.;

(3) 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.; **and**

(4) that the member has paid **all of the following:**

(A) a $125.00 reinstatement fee, a $30 late fee,;

(B) all past and current membership fees **and late fees**,;

(C) including all annual Client Security Fund assessments,;

(D) all past due **attendee** fees, fines and penalties owed the Board of Continuing Legal Education, **including attendee fees for CLE courses taken to satisfy the requirements of Rule .0904(c)(2) above;**

(E) all past due costs assessed against the member by the Disciplinary Hearing Commission; and

(F) all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

(d) Procedure **for Review of Reinstatement Petition**

The procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(f) above.

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.

Section .1000 Rules Governing Continuing Legal Education Reinstatement Hearings Before the Membership and Fees Committee

DELETE ENTIRE SECTION AND INSERT THE FOLLOWING:

.1001 Reinstatement Hearings Before Panel of Membership and Fees Committee

(a) Notice; Time and Place of Hearing

(1) Time and Place of Hearing

The chairperson of the Membership and Fees Committee shall fix the time and place of the hearing within 30 days after the member's request for hearing is filed with the secretary. The hearing shall be held as soon as practicable after the request for hearing is filed but in no event more than 90 days after such request is filed unless otherwise agreed by the member and the chairperson of the Membership and Fees Committee.

(2) Notice to Member

The notice of the hearing shall include the date, time and place of the hearing and shall be served upon the member at least 10 days before the hearing date.

(b) Hearing Panel

(1) Appointment

The chairperson of the Membership and Fees Committee shall appoint a hearing panel consisting of three members of the committee to consider the petition and make a recommendation to the council.

(2) Presiding Panel Member

The chairperson shall appoint one of the three members of the panel to serve as the presiding member. The presiding member shall rule on any question of procedure that may arise in the hearing; preside at the deliberations of the panel; sign the written determination of the panel; and report the panel's determination to the council.

(3) Quorum

A majority of the panel members is necessary to decide the matter.

(4) Panel Recommendation

Following the hearing on a contested reinstatement petition, the panel will make a written recommendation to the council on behalf of the Membership and Fees Committee regarding whether the member's license should be reinstated. The recommendation shall include appropriate findings of fact and conclusions of law.

(c) Burden of Proof

(1) Reinstatement from Inactive Status

The burden of proof shall be upon the member to show by clear, cogent and convincing evidence that he or she has satisfied the requirements for reinstatement as set forth in Rule .0902(b) of this subchapter.

(2) Reinstatement from Suspension for Nonpayment of Membership Fees, Late Fee, or Client Security Fund Assessment

The burden of proof shall be upon the member to show by clear, cogent and convincing evidence that he or she has satisfied the requirements for reinstatement as set forth in Rule .0904(c) of this subchapter.

(3) Reinstatement from Suspension for Failure to Comply with the Rules Governing the Administration of the Continuing Legal Education Program

The burden of proof shall be upon the member to show by clear, cogent and convincing evidence that he or she has

(A) satisfied the requirements for reinstatement as set forth in Rule .0904(c) of this subchapter,

(B) cured any continuing legal education deficiency for which the member was suspended, and

(C) paid the reinstatement fee required by Rule .1512 and Rule .1609(a) of this subchapter.

(d) Conduct of Hearing

(1) Member's Rights

The member shall have these rights at the hearing:

(A) to appear personally and be heard;

(B) to be represented by counsel;

(C) to call and examine witnesses;

(D) to offer exhibits; and

(E) to cross-examine witnesses.

(2) State Bar Appears Through Counsel

The counsel shall appear at the hearing on behalf of the State Bar and shall have the right

(A) to be heard;

(B) to call and examine witnesses;

(C) to offer exhibits; and

(D) to cross-examine witnesses.

(3) Rules of Procedure and Evidence

The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as practicable and the Rules of Evidence applicable in superior court, unless otherwise provided by this subchapter or the parties agree to other rules.

(4) Report of Hearing; Costs

The hearing shall be reported by a certified court reporter. The member shall pay the costs associated with obtaining the court reporter's services for the hearing. The member shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The member shall be taxed with all other costs of the hearing, but such costs shall not include any compensation to the members of the hearing panel.

(e) Hearing Panel Recommendation

The written recommendation of the hearing panel shall be served upon the member within seven days of the date of the hearing.

.1002 Review and Order of Council

(a) Review by Council of Recommendation of Hearing Panel

(1) Record to Council

(A) Compilation of Record

The member will compile a record of the proceedings before the hearing panel, including a legible copy of the complete transcript, all exhibits introduced into evidence and all pleadings, motions and orders, unless the member and counsel agree in writing to shorten the record. Any agreements regarding the record shall be included in the record transmitted to the council.

(B) Transmission of Record to Council

The member shall provide a copy of the record to the counsel not later than 90 days after the hearing unless an extension is granted by the president of the State Bar for good cause shown. The member will transmit a copy of the record to each member of the council no later than 30 days before the council meeting at which the petition is to be considered.

(C) Costs

The member shall bear all of the costs of transcribing, copying, and transmitting the record to the members of the council.

(D) Dismissal for Failure to Comply

If the member fails to comply fully with any of the provisions of this rule, the counsel may file a motion with the secretary to dismiss the petition

(2) Oral or Written argument

In his or her discretion, the president of the State Bar may permit counsel for the state bar and the member to present oral or written argument, but the council will not consider additional evidence not in the record

transmitted from the hearing panel, absent a showing that the ends of justice so require or that undue hardship will result if the additional evidence is not presented.

(b) Order by Council

The council will review the recommendation of the hearing panel and the record and will determine whether and upon what conditions the member will be reinstated.

(c) Costs

The council may tax the costs attributable to the proceeding against the member.

Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

. . .

.1523 Noncompliance

(a) Failure to Comply with Rules May Result in Suspension

An **member** attorney who is required to file a report of CLE credits and does not do so or who fails to meet the minimum requirements of these rules, including the payment of duly assessed penalties and attendee fees, may be suspended from the practice of law in the state of North Carolina.

(b) **Notice of Failure to Comply**

The board shall notify an **member** attorney who appears to have failed to meet the requirements of these rules that the **member** attorney will be suspended from the practice of law in this state, unless the **member** attorney shows good cause **in writing** why the suspension should not be made or the **member** attorney shows **in writing** that he or she has complied with the requirements within a 90-day period after receiving the notice. Notice shall be forwarded to **served on** the **member** attorney's address, as shown in the records of the North Carolina State Bar, by certified mail. **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 thereunder to serve process.**

(c) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause

Ninety-three days after mailing such notice, if no **written response** affidavit is filed with the board by the **member** attorney attempting to show good cause or attempting to show that the **member** attorney has complied with the requirements of these rules, **upon the recommendation of the board, the council may enter an order suspending the member** attorney's **from the practice of law** license shall be suspended by order of the North Carolina State Bar. The order shall be entered and served as set forth in the Procedures of the Membership and Fees Committee, Rule .0903(c) of this subchapter.

(d) (c) **Procedure Upon Submission of a Timely Response to a Notice to Show Cause**

(1) Consideration by the Board

If the **member** attorney responds **files a timely written response** to the notice, the board shall **consider the matter at its next regularly scheduled meeting. The member may personally appear at the meeting and be heard, may be represented by counsel, and may offer witnesses and documents, including affidavits. The State Bar may also appear through counsel, may be heard, and may offer witnesses and documents, including affidavits. The burden shall be upon the member to show cause by clear, cogent and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules governing the continuing legal education program. The board** shall review all **evidence presented** affidavits and other documents filed by the **member** attorney to determine whether good cause has been shown or to determine whether the **member** attorney has complied with the requirements of these rules within the 90-day period **after receiving the notice to show cause.**

(2) Recommendation of the Board

The board shall determine whether the member has shown good cause why the member should not be suspended. If the board determines that good cause has

been shown or that the attorney is in compliance with these rules, it shall enter an appropriate order. If the board determines that good cause has not been shown and that the **member** attorney has not shown compliance with these rules within the 90-day period **after receipt of the notice to show cause,** then the board shall **make a written recommendation** refer the matter to the council **that the member be suspended** for determination after hearing by the Membership and Fees Committee.

(3) Order of Suspension

Upon the recommendation of the board, If the council, after hearing by the Membership and Fees Committee, shall **may** determine that the **member** attorney has not complied with these rules and that good cause therefore has not been shown, it shall **may enter an order suspending** suspend the **member** attorney's license to **from the** practice **of** law in North Carolina until compliance is shown. The procedures to be followed by the council and the Membership and Fees Committee shall be the same as those followed when the council and the Membership and Fees Committee consider whether to suspend an attorney's license for the nonpayment of dues. **The order shall be entered and served as set forth in the Procedures of the Membership and Fees Committee, Rule .0903(d)(3) of this subchapter.**

(e) Late Compliance Fee

Any member who complies with the requirements of the rules during the 90-day period after receiving the notice to show cause shall pay a late compliance fee as set forth in Rule .1608(b) of this subchapter.

.1524 Reinstatement

(a) Procedure for Reinstatement

Except as noted below, the procedure for reinstatement shall be as set forth in the Procedures for the Membership and Fees Committee, Rule .0904 (c) and (d) of this subchapter, and shall be administered by the Membership and Fees Committee.

(b) Reinstatement Petition

Any member who has been suspended for noncompliance with **the rules governing the continuing legal education program** may be **seek reinstatement by** reinstated upon recommendation of the board upon a showing that the member's continuing legal education deficiency has been cured. The member shall file **filing a reinstatement** petition seeking reinstatement **with the secretary. The secretary shall transmit a copy of the petition to each member of the board. The reinstatement petition shall contain the information and be in the form required by Rule .0904(c) of this subchapter. If not otherwise set forth in the petition, the member shall attach a statement to the petition** seeking reinstatement in which the member shall state with particularity the accredited legal education courses which the member has attended and the number of credit hours obtained **in order to cure any continuing legal education deficiency for which the member was suspended** since the last reporting period prior to the member's suspension.

(c) Reinstatement Fee

In lieu of the $125.00 reinstatement fee required by Rule .0904(c)(4)(A), Tthe petition shall be accompanied by a reinstatement fee **payable to the board**, in the amount of **$250.00 as required by Rule .1609(a) of this subchapter** which shall be determined by the board upon approval of the council.

(d) Determination of Board; Transmission to Membership and Fees Committee

Within 30 days of the filing of the petition for reinstatement with the secretary, the board shall determine whether the deficiency has been cured. **The board's written determination and the reinstatement petition shall be transmitted to the secretary within five days of the determination by the board. The secretary shall transmit a copy of the petition and the board's recommendation to each member of the Membership and Fees Committee.**

(e) Consideration by Membership and Fees Committee

The Membership and Fees Committee shall consider the reinstatement petition, together with the board's determination, pursuant to the requirements of Rule

.0902(c)-(f). If the board shall finds that the deficiency has been cured and the reinstatement fee paid, the board shall advise the secretary of the North Carolina State Bar who shall issue an order of reinstatement. If the board determines that the deficiency has not been cured or that the reinstatement fee has not been paid, the board shall refer the matter to the Membership and Fees Committee for hearing. Any member who complies with the requirements of the rules during the 90-day probationary period under Rule .1523(b) of this subchapter shall pay a late compliance fee, the amount of which shall be determined by the board upon approval of the council.

(f) Hearing Upon Denial of Petition for Reinstatement

The procedure for hearing upon the denial by the Membership and Fees Committee of a petition for reinstatement shall be as provided in Section .1000 of this subchapter.

. . .

Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

. . .

.1609 Noncompliance Procedures

(a) Reinstatement Fee

The uniform reinstatement fee is $250 and must accompany the reinstatement petition.

(b) Policy

Reinstatement will be granted only upon a showing that the member has attended sufficient approved CLE activity to make up his or her previous deficiency.

(c) Petition

The attachment to the petition for reinstatement required by Rule .1524(b) of this subchapter shall list the CLE activities according to a form provided by the board.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 12, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 30th day of January, 1996.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 1996.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 7th day of March, 1996

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE OPERATION OF THE SPECIALIZATION PROGRAM

The following amendment to the Rules and Regulations, and Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 12, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning specialization, as particularly set forth in 27 N.C.A.C. 1D .1905(a), be amended as follows (additions in bold type, deletions underlined):

TITLE 27, CHAPTER 1
SUBCHAPTER D

Section .1900 Rules Concerning the Accreditation of Continuing Legal Education for the Purposes of the Board of Legal Specialization.

.1905 Alternatives to Lecture-Type CLE Course Instruction

(a) Teaching—Preparation and presentation of written materials at an accredited CLE course will qualify for CLE credit at the rate of three **six** hours of credit for each hour of presentation as computed under Rule .1904 of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 12, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 30th day of January, 1996.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of

the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 1996.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 7th day of March, 1996

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING FOREIGN LEGAL CONSULTANTS

The following amendments to the Rules, Regulations and Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 12, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar be amended to include new provisions governing the licensure of foreign legal consultants by adding a new subchapter "F", concerning foreign legal consultants under Title 27, Chapter 1 of the North Carolina Administrative Code as follows:

TITLE 27, CHAPTER 1
SUBCHAPTER F

.0100 Foreign Legal Consultants

.0101 Applications

All applications for certification as a foreign legal consultant must be made on forms supplied by the North Carolina State Bar and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by writing or by telephoning the Bar's offices.

.0102 Application Form

(a) The application for certification as a foreign legal consultant form requires an applicant to supply full and complete information under oath relating to the applicant's background, including family history, past and current residences, education, military service, past and present employment, citizenship, credit status, involvement in disciplinary, civil, or criminal proceedings, substance abuse, mental treatment and bar admission and discipline history.

(b) Every applicant must submit as part of the application:

(1) A certificate from the authority that has final jurisdiction regarding matters of professional discipline in the foreign country or jurisdiction in which the applicant is admitted to practice law, or the equivalent thereof. This certificate must be signed by a responsible official or one of the members of the executive

body of the authority, imprinted with the official seal of the authority, if any, and must certify:

(A) The authority's jurisdiction in such matters;

(B) The applicant's admission to practice law, or the equivalent thereof, in the foreign country, the date of admission and the applicant's standing as an attorney or the equivalent thereof; and

(C) Whether any charge or complaint has ever been filed with the authority against the applicant and if so, the substance of and adjudication or resolution of each charge or complaint.

(2) A letter of recommendation from one of the members of the executive body of this authority or from one of the judges of the highest law court or court of general original jurisdiction of the foreign country, certifying the applicant's professional qualifications, and a certificate from the clerk of this authority or the clerk of the highest law court or court of general original jurisdiction, attesting to the genuineness of the applicant's signature;

(3) A letter of recommendation from at least two attorneys, or the equivalent thereof, admitted in and practicing law in the foreign country, stating the length of time, when, and under what circumstances they have known the applicant and their appraisal of the applicant's moral character;

(4) Two sets of clear fingerprints;

(5) Two executed informational Authorization and Release forms;

(6) A birth certificate;

(7) Copies of all applications to take a bar examination or an attorney's examination or for admission to the practice of law that the applicant has filed in any state or territory of the U.S., or the District of Columbia or in any foreign country;

(8) Certified copies of any legal proceedings in which the applicant has been a party;

(9) Two recent 2-inch by 3-inch photographs of the applicant showing a front view of the applicant's head and shoulders; and

(10) Any other relevant documents or information as may be required by the North Carolina State Bar.

(c) The application must be filed in duplicate. The duplicate may be a photocopy of the original.

(d) The application and all required attachments shall be in English or accompanied by duly authenticated English translations.

.0103 Requirements for Applicants

As a prerequisite to being certified as a foreign legal consultant, an applicant shall:

(a) Possess the qualifications of character and general fitness requisite for an attorney and counselor at law and be of good moral character and entitled to the high regard and confidence of the public and have satisfied the requirements of Section .0104 of this Chapter at the time the certificate is issued;

(b) Have been admitted to practice as an attorney, or the equivalent thereof, in a foreign country for at least five years as of the date of application for a certificate of registration;

(c) Certify in writing that he or she intends to practice in the State as a foreign legal consultant and intends to maintain an office in the State for this practice;

(d) Be at least 21 years of age;

(e) Have been actively and substantially engaged in the practice of law or a profession or occupation that requires admission to the practice of law, or the equivalent thereof, in the foreign country in which the applicant holds a license for at least five of the seven years immediately preceding the date of application for a certificate of registration and is in good standing as an attorney, or the equivalent thereof, in that country;

(f) Have filed an application as prescribed in section .0102 above;

(g) Be at all times in good professional standing and entitled to practice in every state or territory of the U.S. or in the District of Columbia, in which the applicant has been licensed to practice law, and in every foreign country in which the applicant is admitted to the practice of law or the equivalent thereof and is not under any pending charges of misconduct. The applicant may be inactive and in good standing in any foreign country or in any state or territory of the U.S. or in the District of Columbia; and

(h) Satisfy the Bar that the foreign country in which the applicant is licensed will admit North Carolina attorneys to practice as foreign legal consultants or the equivalent thereof.

.0104 Burden of Proving Moral Character and General Fitness

Every applicant shall have the burden of proving that the applicant possesses the qualifications of character and general fitness requisite for an attorney and counselor-at-law and is possessed of good moral character and is entitled to the high regard and confidence of the public.

.0105 Failure to Disclose

No one shall be issued a certificate of registration as a foreign legal consultant in this state:

(a) Who fails to disclose fully to the Bar, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to the applicant's professional conduct, whether the same have been terminated or not, in this or any other state, or any federal court or other jurisdiction or foreign country, or

(b) Who fails to disclose fully to the Bar, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state, or any federal court or other jurisdiction or foreign country.

.0106 Investigation by Counsel

The counsel will conduct any necessary investigation regarding the application and will advise the Membership & Fees Committee of the North Carolina State Bar of the findings of any such investigation.

.0107 Recommendation of Membership & Fees Committee

(a) Upon receipt of all completed application forms, attachments, filing fees and information required by the Bar, and completion of the Bar's investigation, the Membership & Fees Committee shall make a written recommendation to the council respecting whether an applicant for certification as a foreign legal consultant has met the requirements of N.C. Gen. Stat. Section 84A-1 and these rules. Prior to making a written recommendation, the Committee may request further information from the applicant or other sources and may require the applicant to appear before it upon reasonable notice. The Committee's written recommendation shall include a statement of the reason(s) for the Committee's decision.

(b) A copy of the Committee's recommendation shall be served upon the applicant by pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

.0108 Appeal from Committee Decision

(a) The applicant will have 30 days from the date of service of the Committee's recommendation in which to serve a written request for a hearing upon the secretary pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

(b) If the applicant does not request a hearing in a timely fashion, the Membership & Fees Committee will forward its recommendation to the council. The council will consider the application and the recommendation of the Membership & Fees Committee and will make a final written recommendation to the N.C. Supreme Court, as set out in section .0110(6) below.

.0109 Hearing Procedure

(a) Notice, Time & Place of Hearing

(1) The chair of the Membership & Fees Committee shall fix the time and place of hearing within 30 days after the applicant's request for a hearing is served upon the Secretary. The hearing shall be held as soon as practicable after the request is filed.

(2) The notice of the hearing shall include the date, time and place of the hearing and shall be served upon the applicant at least 10 days before the hearing date.

(b) Hearing Panel

(1) The chair of the Membership & Fees Committee shall appoint a hearing panel composed of three members of the committee to consider the application and make a written recommendation to the council.

(2) The chair shall appoint one of the three members of the panel to serve as the presiding member. The presiding member shall rule on any question of procedure which arises during the hearing; preside at the deliberations of the panel, sign the written determinations of the panel and report the panel's determination to the council.

(c) Proceedings Before the Hearing Panel

(1) A majority of the panel members is necessary to decide the application.

(2) Following the hearing on the contested application, the panel will make a written recommendation to the council on

behalf of the Membership & Fees Committee regarding whether the application should be granted. The recommendation shall include appropriate findings of fact and conclusions of law.

(3) The applicant will have the burden of proving that he or she has met all the requirements of sections .0102 - .0104 above.

(4) At the hearing, the applicant and State Bar counsel will have the right

(A) to appear personally and be heard

(B) to call and examine witnesses

(C) to offer exhibits

(D) to cross-examine witnesses

(5) In addition the applicant will have the right to be represented by counsel.

(6) The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as practicable and by the Rules of Evidence applicable in superior court, unless otherwise provided by this subchapter or the parties agree otherwise.

(7) The hearing shall be reported by a certified court reporter. The applicant will pay the costs associated with obtaining the court reporter's services for the hearing. The applicant shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The applicant may also be taxed with all other costs of the hearing, but the costs shall not include any compensation to the members of the hearing panel.

(8) The written recommendation of the hearing panel shall be served upon the member and the counsel within 14 days of the date of the hearing.

.0110 Review and Order of Council

(a) Review by Council

The applicant shall compile a record of the proceedings before the hearing panel, including a legible copy of the complete transcript, all exhibits introduced into evidence at the hearing, all pleadings and

all motions and orders, unless the applicant and counsel agree in writing to shorten the record. Any agreement regarding the record shall be included in the record transmitted to the council.

(b) Transmission of Record to Council

The applicant shall provide a copy of the record to the counsel not later than 90 days after the hearing unless an extension is granted by the president of the N.C. State Bar for good cause shown. The applicant shall transmit a copy of the record to each member of the council, at the applicant's expense, no later than 30 days before the council meeting at which the application is to be considered.

(c) Costs

The applicant shall bear all of the costs of transcribing, copying, and transmitting the record to the members of the council.

(d) Dismissal for Failure to Comply

If the applicant fails to comply fully with any provisions of this rule, the counsel may file a motion with the secretary to dismiss the application.

(e) Appearance before the Council

In his or her discretion, the president of the State Bar may permit the counsel for the State Bar and the applicant to present oral or written argument but the council will not consider additional evidence not in the record transmitted from the hearing panel absent a showing that the ends of justice so require or that undue hardship will result if the additional evidence is not presented.

(f) Order by Council

The council will review the recommendation of the hearing panel and the record and will determine whether the applicant has met all of the requirements of sections .0102 - .0104 above. The council will make a written recommendation to the N.C. Supreme Court regarding whether the application should be granted. The council's recommendation will contain a statement of the reasons for the recommendation and shall attach to it the application.

(g) Costs

The council may tax the costs attributable to the proceeding against the applicant.

.0111 Application Fees; Refunds; Returned Checks

(a) Every application and every reapplication for certification as a foreign legal consultant shall be accompanied by a fee of $200 paid in U.S. currency.

(b) No part of the fee will be refunded.

(c) Failure to pay the application fees required by these rules shall cause the application to be deemed not filed. If the check payable for the application fee is not honored upon presentment for any reason other than error of the bank, the application will be deemed not filed. All checks presented to the Bar for any fees which are not honored upon presentment will be returned to the applicant, who shall pay the Bar in cash, cashier's check, certified check or money order any fees payable to the Bar, along with a $20 additional fee for processing the dishonored check.

.0112 Permanent Record

All information furnished to the Bar by an applicant shall be deemed material, and all such information shall be and become a permanent record of the Bar. Records, papers and other documents containing information collected or compiled by the North Carolina State Bar and its members or employees as a result of any investigation, application, inquiry or interview conducted in connection with an application for certificate of registration are not public records within the meaning of Chapter 132 of the General Statutes.

.0113 Denial; Re-Application

No new application or petition for reconsideration of a previous application from an applicant who has been denied a certificate of registration as a foreign legal consultant shall be considered by the Bar within a period of three years (3) next after the date of such denial unless, for good cause shown, permission for reapplication or petition for a reconsideration is granted by the Bar.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 12, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 30th day of January, 1996.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 1996.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 7th day of March, 1996

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ORGANIZATION OF THE IOLTA PROGRAM

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 12, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the administration of the plan for Interest on Lawyers Trust Accounts (IOLTA), as particularly set forth in 27 N.C.A.C. 1D .1301, be amended by deleting subsections (2) and (4) and by renumbering the remaining subsections consecutively so that the rule, as amended, reads as follows:

.1301 Purpose

The programs for which the funds may be utilized shall consist of

(1) providing civil legal services for indigents;

(2) enhancement and improvement of grievance and disciplinary procedures to protect the public more fully from incompetent or unethical attorneys;

(3) development and maintenance of a fund for student loans to enable meritorious persons to obtain legal education when otherwise they would not have adequate funds for this purpose;

(4) such other programs designed to improve the administration of justice as may from time to time be proposed by the board and approved by the Supreme Court of North Carolina.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 12, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the first day of April, 1996.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3rd day of April, 1996.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 3rd day of April, 1996

s/Orr, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW AND PROCEDURE

§ 63 (NCI4th). Contents of petition seeking review

Petitioners were not entitled to a contested case hearing by the Office of Administrative Hearings of a decision of the Division of Environmental Management granting a modification of respondent town's permit to discharge wastewater into a river to allow the relocation of its wastewater treatment plant because petitioners failed to satisfy the requirement of G.S. 150B-46 that the petition explicitly state what exceptions are taken to the decision. **Save Our Rivers, Inc. v. Town of Highlands,** 635.

APPEAL AND ERROR

§ 155 (NCI4th). Preserving question for appeal; effect of failure to make motion, objection, or request; criminal actions

A first-degree murder defendant's contentions as to instructions on aiding and abetting and acting in concert were reviewed under the plain error standard where defendant did not appeal on the ground upon which he objected at trial. **State v. Francis,** 156.

Where defendant objected to evidence on only one ground, he failed to preserve for review the additional grounds presented on appeal; he also waived appellate review of those additional arguments by failing specifically to argue plain error. **State v. Frye,** 470.

Defendant did not preserve for appeal the question of whether the trial court erred by allowing the prosecutor's cross-examination of defendant regarding a prior conviction where the transcript does not clearly reflect that defendant objected and no specific grounds for an objection were apparent from the context. **State v. Richardson,** 658.

§ 157 (NCI4th). Appeal permitted without prior motion, objection, or request generally

The issue of whether there was error in a second-degree rape prosecution in a meeting between the judge and the foreperson out of the presence of the other eleven jurors to discuss a request to view evidence was appealable where the record was not sufficient to show that defendant consented to the procedure. **State v. Nelson,** 695.

§ 164 (NCI4th). Appeal permitted without prior motion, objection, or request; insufficient evidence as matter of law

There was no plain error in submitting charges of first and second-degree murder to the jury where defendant had moved to dismiss all charges at the close of the State's case but did not renew the motion at the close of all of the evidence. Rule 10(b)(3) of the Rules of Appellate Procedure provides that a defendant who fails to make a motion to dismiss at the close of all of the evidence may not attack on appeal the sufficiency of the evidence at trial and, to the extent that G.S. 15A-1446(d)(5) is inconsistent, the statute must fail. **State v. Richardson,** 658.

ASSAULT AND BATTERY

§ 80 (NCI4th). Discharging barreled weapon or firearm into occupied property; indictment and warrant

The conviction and sentencing of defendant for three counts of discharging a firearm into occupied property did not violate double jeopardy principles although the three indictments were identical and did not describe in detail the specific events or evidence that would be used to prove each count. **State v. Rambert,** 173.

ATTORNEYS AT LAW

AUTOMOBILES AND OTHER VEHICLES

BURGLARY AND UNLAWFUL BREAKINGS

CONSTITUTIONAL LAW

CONSTITUTIONAL LAW—Continued

§ 131 (NCI4th). What constitutes exclusive emoluments, privileges, gratuities, and monopolies; county powers and grants

An amount equal to six weeks pay authorized by a board of county commissioners to be paid to the county manager upon his voluntary resignation after nine years of service as county manager was a special emolument not in consideration of public service which violated Article I, Section 32 of the N. C. Constitution. **Leete v. County of Warren,** 116.

§ 164 (NCI4th). State's use of false testimony to obtain conviction

Assuming the State knew a witness's testimony that he was outside a deli when shots were fired was false, defendant's constitutional rights were not violated by the State's use of this testimony since defendant failed to show that the testimony was material and that the State knowingly used this testimony to obtain his conviction for murder. **State v. Williams,** 1.

§ 177 (NCI4th). Former jeopardy; multiple assault charges

The conviction of defendant for three counts of discharging a firearm into occupied property did not violate double jeopardy principles where defendant fired three shots from one pistol into the victim's occupied automobile within a short period of time. **State v. Rambert,** 173.

§ 252 (NCI4th). Discovery; particular information or materials sought; miscellaneous

Defendant's motion for an order requiring that all medical and psychological records of an infant murder victim's mother be made available to defendant by five entities and any other persons providing medical and psychological services to the mother amounted to a fishing expedition and was properly denied by the trial court. **State v. Burr,** 263.

§ 266 (NCI4th). Particular acts or circumstances as infringing on right to counsel

The trial court's ruling that only one attorney from each side could make objections during voir dire of prospective jurors in a capital trial did not violate defendant's constitutional right to the assistance of counsel. **State v. Frye,** 470.

§ 284 (NCI4th). Right to appear pro se; defendant's dismissal of counsel

The trial court's denial of defendant's motion to dismiss an attorney privately retained by his family did not violate his constitutional right to counsel, including the right to waive legal representation and appear pro se, where defendant did not express dissatisfaction with his court-appointed attorney and at no time requested that he also be removed from defendant's case. **State v. Johnson,** 104.

§ 309 (NCI4th). Effectiveness of assistance of counsel; counsel's abandonment of client's interest

Defendant's counsel did not concede defendant's guilt of murder and thus render ineffective assistance when he stated during closing argument that defendant's driver "was the engine that made everything possible. He is the tool without which [defendant] could not have even gotten out of his yard." **State v. Hinson,** 66.

§ 313 (NCI4th). What constitutes denial of effective assistance of counsel; miscellaneous

The record in this capital trial does not show "an absolute impasse" between defendant and his defense team concerning trial tactics and that the trial court allowed

CRIMINAL LAW

CRIMINAL LAW—Continued

ical expert to aid the defense where defense counsel had access to medical evidence regarding the need for an expert two months prior to the trial. **State v. Burr,** 263.

§ 266 (NCI4th). Grounds for continuance; surprise witness or evidence generally

The trial court did not err in denying defendant's motion to continue made when the State provided defendant with a list of six possible witnesses on the Friday afternoon before the trial was to begin on Monday in order for defendant to investigate these witnesses. **State v. McCullers,** 19.

§ 395 (NCI4th). Expression of opinion on evidence during trial; statements made during jury selection

The trial court's question to each prospective juror in a capital trial, "If chosen to sit as a juror will you require the state to satisfy you of the defendant's guilt beyond a reasonable doubt before you find him guilty?" did not constitute an expression of opinion that each juror would vote to convict. **State v. Frye,** 470.

§ 396 (NCI4th). Expression of opinion on evidence during trial; actions or remarks regarding jurors or prospective jurors; opening remarks

The trial court did not express an opinion by stating to all prospective jurors, "You will become in effect officers of the Court and collaborators in judgment with me." **State v. Frye,** 470.

The trial court's instruction that, if defendant is found guilty of first-degree murder, the court will conduct a sentencing hearing at which "the same jury will hear the evidence from the state of aggravating factors . . . and then the defense may present evidence of mitigating factors" did not improperly imply that the existence of aggravating circumstances was predetermined but that there might be no mitigating circumstances and was not improper. **Ibid.**

§ 416 (NCI4th). Argument of counsel; matters beyond permissible scope

Assuming the prosecutor improperly encouraged the jury to find the especially heinous, atrocious, or cruel aggravating circumstance by comparing the facts in this case with the facts in published N.C. Supreme Court opinions which upheld findings of this circumstance, defendant failed to show he was prejudiced by the trial court's failure to intervene ex mero motu in light of the overwhelming evidence that the killing was especially heinous, atrocious, or cruel. **State v. Burr,** 263.

§ 427 (NCI4th). Argument of counsel; defendant's failure to testify; comment by prosecution

Statements made by the prosecutor during his closing argument were directed solely toward defendant's failure to offer evidence to rebut the State's case and not toward defendant's failure to testify. **State v. Williams,** 1.

There was no error in a first-degree murder prosecution where defendant contended that the prosecutor's argument that the State's evidence was uncontradicted was an improper comment on his exercise of his right not to testify. **State v. Alston,** 198.

There was no abuse of discretion in the trial court's failure to intervene in the sentencing phase of a first-degree murder prosecution where defendant contended that the prosecutor commented in his closing argument on his failure to testify but the argument appears to refer to a State trooper not testifying rather than defendant. **Ibid.**

CRIMINAL LAW—Continued

§ 433 (NCI4th). Argument of counsel; defendant as professional criminal, outlaw, or bad person

Comments by the prosecutor in his closing argument that a witness was afraid to testify out of fear of defendant or because defendant had a propensity for violence were not grossly improper and did not require a new trial. **State v. Hinson,** 66.

The prosecutor's argument that defendant was a Type H inmate, "the most dangerous there are," was a reasonable extrapolation from a psychologist's testimony. **State v. Frye,** 470.

§ 436 (NCI4th). Argument of counsel; defendant's callousness, lack of remorse or potential for future crime

There was no error in a first-degree murder prosecution where defendant contended that the prosecutor improperly encouraged the jury to convict defendant on the basis of community sentiment. **State v. Alston,** 198.

§ 439 (NCI4th). Argument of counsel; comment on character and credibility of witnesses generally

The prosecutor's closing argument in a first-degree murder trial that an eleven-year-old State's witness had no interest in testifying except his concern for his future safety was not a mischaracterization of the evidence or a personal opinion and was supported by the evidence. **State v. Worthy,** 707.

§ 442 (NCI4th). Argument of counsel; comment on jury's duty

The prosecutor could properly argue in a capital sentencing proceeding that the jury was the conscience of Alamance County. **State v. Burr,** 263.

There was no error requiring intervention ex mero motu in a first-degree murder prosecution where defendant contended that the prosecutor improperly opened his closing argument with a biblical reference which indicated that the jury was ordained by God to condemn defendant but the argument in context was that the evidence cried out that defendant perpetrated the crime even though it was committed in secret and without any witnesses. **State v. Alston,** 198.

There was no error in a first-degree murder sentencing hearing where defendant argued that the prosecutor's argument diminished the jury's sense of responsibility for determining the appropriateness of death. **Ibid.**

There was no error in a first-degree murder resentencing hearing where the prosecutor repeatedly emphasized during his closing argument that defendant started the chain of events that resulted in the jury being called to hear the case. **State v. McLaughlin,** 426.

§ 446 (NCI4th). Argument of counsel; inflammatory comments generally

The prosecutor's argument asking the jurors to imagine the sixteen-year-old victim as their own child was not so grossly improper as to deny defendant a fair trial in a prosecution of defendant for murder by shooting the victim with a crossbow. **State v. Hinson,** 66.

§ 447 (NCI4th). Argument of counsel; comment on rights of victim, victim's family

There was no error requiring intervention ex mero motu in a first-degree murder prosecution where defendant argued that the prosecutor improperly commented on the personal characteristics of the victim. **State v. Alston,** 198.

CRIMINAL LAW—Continued

There was no error in a first-degree murder prosecution where defendant contended that the prosecutor in his argument asked jurors to imagine themselves in the role of the victim. **State v. Goodson,** 619.

There was no error in a first-degree murder resentencing hearing where the prosecutor made comparisons between defendant's life and life that his victims would never have. **State v. McLaughlin,** 426.

§ 450 (NCI4th). Argument of counsel; inflammatory comments; violent, dangerous, or depraved nature of offense or conduct

The trial court did not err by failing to intervene when the prosecutor stated in his closing argument that "he who runs with the pack is responsible for the kill" where this statement was used to illustrate acting in concert. **State v. Goode,** 513.

The trial court did not err by failing to intervene when the prosecutor referred to two murders as a "feeding frenzy." **Ibid.**

The prosecutor's references to the victim's wounds as "slashes" and "stabs" when some were only minor lacerations were neither inflammatory nor grossly improper. **State v. Frye,** 470.

§ 452 (NCI4th). Argument of counsel; comment on aggravating or mitigating circumstances

The prosecutor's argument in a capital sentencing proceeding that there is no limit to the number of nonstatutory mitigating circumstances that may be submitted was not grossly improper. **State v. Burr,** 263.

The prosecutor's statements that aggravating circumstances made a crime deserving of the death penalty and that mitigating circumstances "moved it down from death to life," and his statements informing certain panels of prospective jurors that they had to decide in the fourth issue whether the aggravating circumstances were sufficiently substantial to call for a death sentence were essentially correct and did not require the trial court to intervene. **State v. Frye,** 470.

Assuming that the prosecutor's closing argument regarding Issue Three in a capital sentencing proceeding placed a burden of proof upon defendant which the law does not require, the trial court did not err by failing to intervene immediately to correct the prosecutor where the court notified the jury prior to closing arguments that it would give instructions on the applicable law, and the court properly instructed on Issue Three after the closing arguments. **Ibid.**

The prosecutor did not improperly criticize the capital sentencing statute or disparage defendant's right to present evidence in mitigation by arguing that the State is restricted in the presentation of aggravating circumstances while the defense can "play a numbers game" and "come up with as many [mitigating circumstances] as [it] want[s]" where the comment was intended to attack the weight of mitigating circumstances. **Ibid.**

There was no error in a first-degree murder resentencing hearing where defendant contended that the prosecutor misstated the manner in which the jury should evaluate the mitigating and aggravating evidence. **State v. McLaughlin,** 426.

There was no error in a first-degree murder resentencing hearing where the prosecutor told the jurors that mitigating circumstances are "things which defendant says make his crime less deserving of the death penalty" and that "you don't have to find a mitigating circumstance if you don't want to." **Ibid.**

§ 462 (NCI4th). Argument of counsel; comment on matters not in evidence requiring court action ex mero motu

There was no error requiring an intervention ex mero motu in the sentencing phase of a first-degree murder prosecution where defendant contended that the prosecutor improperly argued facts outside the record and expressed his own personal and prejudicial opinions. **State v. Alston,** 198.

§ 463 (NCI4th). Argument of counsel; comments supported by evidence

There was no error in a first-degree murder prosecution where defendant contended that the trial court erred in allowing the prosecutor to use inadmissible evidence during closing arguments but all of the evidence was properly admitted. **State v. Alston,** 198.

There was no plain error in a first-degree murder prosecution where defendant contended that the trial court should have intervened ex mero motu where the prosecutor referred in closing arguments to the victim's statements of fear, her belief that defendant was going to kill her and her statements relating to the defendant's threats and prior assault. **Ibid.**

There was no error requiring intervention ex mero motu in a first-degree murder resentencing hearing where defendant contended that the prosecutor argued without adequate evidentiary support that defendant was a contract killer, referred to defendant's legal rights, and referred to defendant as a mass murderer. **State v. McLaughlin,** 426.

The prosecutors' closing arguments in this murder trial suggesting that defendant stabbed the victim several times to force him to reveal the location of his money but not to kill him was supported by the evidence. **State v. Frye,** 470.

§ 465 (NCI4th). Argument of counsel; explanation of applicable law

The prosecutor's jury argument was not an improper misstatement of law that jurors could infer defendant's identity as the perpetrator of a child's murder from his malicious character but was a proper reference to the fact the jury could consider evidence of defendant's prior acts toward the mother on the issue of identity. **State v. Burr,** 263.

The prosecutor's statement in his jury argument in a trial for the first-degree murder of a child that defendant needed to show "adequate provocation" in order to negate deliberation was not an incorrect statement of the law since it referred to the kind of provocation which is insufficient to negate malice and reduce the murder to manslaughter but is sufficient to incite defendant to act suddenly and without deliberation. **Ibid.**

There was no error in a first-degree murder prosecution where defendant contended that the prosecutor improperly used excerpts from decisions of the appellate courts to confuse and mislead the jury. **State v. Alston,** 198.

There was no reversible error in a first-degree murder sentencing hearing where defendant contended that the prosecutor inaccurately stated the law as to the statutory aggravating circumstances submitted by the court and as to defendant's burden of proof regarding mitigating circumstances. **Ibid.**

In a homicide prosecution in which defense counsel argued that the State's failure to introduce at trial defendant's pretrial statement to the police strongly suggested it would show defendant did not have the requisite intent for first-degree murder, the prosecutor's closing argument asking why the defense "didn't have this officer come up here and read the statement" constituted a misstatement of the law because

defendant's statement was a self-serving declaration that was inadmissible when offered by defendant, but the trial court's failure to sustain defendant's objection and instruct the jury to disregard the statement was harmless error. **State v. Ratliff,** 610.

§ 466 (NCI4th). Argument of counsel; comments regarding defense attorney

The prosecutor's jury argument concerning the necessity of talking to witnesses before taking a case to court and having the witnesses in the courtroom was not an attack on the competence and professionalism of defense counsel but was an attempt to minimize the effect of evidence contained in a social worker's report which defense counsel read into evidence because the social worker, due to a miscommunication, was out of town the day she was to testify. **State v. Burr,** 263.

§ 467 (NCI4th). Argument of counsel; use of or reference to physical evidence

There was no error in a first-degree murder prosecution where photographs were introduced to illustrate the medical examiner's testimony and defendant argued that the prosecutor used those photographs to inflame the jury during closing arguments. **State v. Goodson,** 619.

§ 468 (NCI4th). Argument of counsel; miscellaneous

There was no error so grossly improper as to require the trial court's intervention ex mero motu in a first-degree murder prosecution where defendant argued that the prosecutor argued facts outside the evidence and expressed his own personal and highly prejudicial opinions. **State v. Alston,** 198.

Portions of a prosecutor's closing argument in a first-degree murder case did not constitute a comment on defendant's exercise of his right to remain silent, a shifting of the burden of proof, or the deprivation of defendant's presumption of innocence. **Ibid.**

There was no error in the sentencing phase of a first-degree murder prosecution in the court's decision not to intervene ex mero moto in the prosecutor's closing argument where defendant contended that the prosecutor improperly used hearsay testimony introduced to show the victim's state of mind to argue that defendant planned the crime, did not act under emotional disturbance, had a significant history of criminal activity, and committed the murder in retaliation for the victim's testimony against him in an earlier trial. **Ibid.**

The trial court did not abuse its discretion by not intervening ex mero motu in a first-degree murder sentencing hearing where defendant contended that the prosecutor acted improperly by requesting that the jury not consider sympathy for defendant's family in its consideration of mitigating circumstances. **Ibid.**

§ 479 (NCI4th). Court's failure to admonish jury

Defendant was not prejudiced by the trial court's failure to instruct the jurors regarding their conduct and duties at every recess in accordance with G.S. 15A-1236. **State v. Thibodeaux,** 53.

§ 480 (NCI4th). Conduct affecting jury; communications between jurors and outsiders

The trial court did not err by failing to conduct an inquiry of the jury panel about an alleged communication between a seated juror and a pastoral counselor during the penalty phase of defendant's capital trial where a local attorney informed the court during an in camera hearing that he had received an anonymous call during the penal-

CRIMINAL LAW—Continued

ty phase from a purported pastoral counselor who asked him a hypothetical question as to whether a juror who has assented to a verdict and is still a juror in the case may thereafter change his verdict. **State v. Burr,** 263.

§ 497 (NCI4th). Deliberations; use of evidence by the jury

Defendant was not prejudiced by the trial court's error in permitting the jury, over defendant's objection, to take State's exhibits into the jury room, including photographs of the crime scene and autopsy, defendant's confession, a witness's statement, and a diagram of the crime scene. **State v. Cannon,** 79.

The trial court did not abuse its discretion when it denied the jury's request to review the trial testimony of two witnesses which was favorable to defendant while allowing review of testimony favorable to the State where evidence and exhibits reviewed by the jury were not inconsistent with the testimony not reviewed by the jury. **Ibid.**

There was no prejudicial error in a prosecution for second-degree rape and kidnapping where the jury sent a note to the judge during deliberations asking to review certain items of evidence and the court asked only the foreperson to return to the courtroom to discuss the request before allowing the evidence to be taken to the jury room. **State v. Nelson,** 695.

§ 535 (NCI4th). Mistrial; handcuffed defendants

The trial court did not err in denying defendant's motion for a mistrial after the jurors observed him being brought through the courtroom in handcuffs and leg restraints. **State v. Johnson,** 104.

§ 680 (NCI4th). Peremptory instructions; instructions involving mitigating circumstances in capital cases generally

The trial court did not err by refusing to give the peremptory instruction set forth in N.C.P.I. — Crim. 150.11 for nonstatutory mitigating circumstances for which the factual predicate was uncontroverted since this pattern instruction is inappropriate for nonstatutory mitigating circumstances. **State v. McCarver,** 364.

The trial court did not err in a sentencing hearing for first-degree murder by not giving a peremptory instruction on the mitigating circumstance of the age of defendant. **State v. Simpson,** 316.

The trial court did not err in a sentencing hearing for first-degree murder by refusing to peremptorily instruct the jury upon nonstatutory mitigating circumstances. **Ibid.**

The trial court did not err in a first-degree murder resentencing hearing by failing to peremptorily instruct the jury with respect to a nonstatutory mitigating circumstance concerning defendant's employment record and that he was a productive member of society. **State v. McLaughlin,** 426.

The trial court did not err in a first-degree murder resentencing hearing by failing to peremptorily instruct the jury with respect to a nonstatutory mitigating circumstance concerning defendant's self-improvement while incarcerated. **Ibid.**

The trial court did not err in a first-degree murder resentencing hearing by not giving a peremptory instruction on the nonstatutory mitigating circumstance that defendant made significant efforts to be of assistance to other inmates in prison to help them adjust to prison life. **Ibid.**

There was no prejudicial error in a first-degree murder resentencing hearing where the trial court failed to give a peremptory instruction regarding the mitigating

CRIMINAL LAW—Continued

§ 787 (NCI4th). Instructions on accident generally

The trial court did not err in a first-degree murder prosecution in its instruction on accident. **State v. Goodson,** 619.

§ 792 (NCI4th). Instruction on acting in concert and aiding and abetting; distinction between, and relationship of, instructions

Although the trial court in a first-degree murder prosecution involving aiding and abetting and acting in concert could have been more precise in denominating the instructions and more explicit in informing the jurors when it was moving from one to the other in its instructions, the instructions closely track the pattern instructions and the evidence supporting defendant's guilt on either theory was overwhelming. **State v. Francis,** 156.

§ 793 (NCI4th). Instruction as to acting in concert generally

The trial court's instructions in a first-degree murder case did not allow the jury to apply the principle of acting in concert to convict defendant of specific intent crimes, including the underlying felony supporting felony murder, if it found that another perpetrator had the requisite mens rea to commit them. **State v. McCarver,** 364.

§ 1079 (NCI4th). Consideration of aggravating and mitigating factors generally; discretion of trial court

The trial court did not abuse its discretion in a prosecution for being an accessory before the fact to murder, breaking or entering, and armed robbery by finding that the aggravating factors outweighed the mitigating factor. **State v. Butler,** 686.

§ 1114 (NCI4th). Aggravating factors under Fair Sentencing Act; lack of acknowledgement of wrongdoing; lack of remorse

The trial court did not err when sentencing defendant for being an accessory before the fact to murder, breaking or entering, and armed robbery by finding lack of remorse as an aggravating factor. **State v. Butler,** 686.

§ 1133 (NCI4th). Aggravating factors under Fair Sentencing Act; position of leadership or inducement of others to participate generally; facts indicative of defendant's role

The trial court did not err in sentencing defendant as an accessory before the fact to first-degree murder, felonious breaking or entering, and armed robbery by finding as an aggravating factor that she occupied a position of leadership or dominance over the principal. **State v. Butler,** 686.

§ 1216 (NCI4th). Mitigating factors under Fair Sentencing Act; duress, coercion, threat, or compulsion generally

The trial court did not err when sentencing defendant for assault with a deadly weapon with intent to kill by not finding the mitigating factor of a threat insufficient to constitute a defense but which significantly reduced culpability. **State v. Richardson,** 658.

§ 1240 (NCI4th). Mitigating factors under Fair Sentencing Act; strong provocation; threat or challenge

The trial court did not err when sentencing defendant for assault with a deadly weapon with intent to kill by not finding the mitigating factor of strong provocation. **State v. Richardson,** 658.

with a dangerous weapon as an aggravating circumstance but defendant was not allowed to show in rebuttal that he received a forty-year sentence. **State v. Simpson,** 316.

§ 1321 (NCI4th). Capital sentencing; instructions; failure to unanimously agree on sentence

Questions by the jury after it had begun deliberations in a capital sentencing proceeding did not constitute an inquiry as to what the result would be if the jury failed to reach a unanimous decision but merely sought guidance as to the procedure for giving an answer to Issue Three, and the trial court was thus not required to instruct the jurors that their inability to reach a unanimous verdict should not be their concern but should simply be reported to the court. **State v. McCarver,** 364.

There was no error in a first-degree murder sentencing hearing where the trial court refused to instruct the jury that the court would impose a life sentence if the jury failed to agree on a sentencing recommendation. **State v. Simpson,** 316.

The trial court did not err in a first-degree murder resentencing hearing where, upon determining that the jury was divided eleven to one, the court gave an instruction which included the statement that the answer to Issue Number Four must be unanimous. **State v. McLaughlin,** 426.

§ 1322 (NCI4th). Capital sentencing; instructions; parole eligibility

The trial court did not err by failing to instruct the jury panel on the meaning of a life sentence when defense counsel asked a prospective juror if he would be able to consider life imprisonment as a penalty for first-degree murder, and the juror replied, "is that without privilege of parole?" **State v. Burr,** 263.

§ 1323 (NCI4th). Capital sentencing; instructions; aggravating and mitigating circumstances generally

The trial court did not err by instructing the jury to find and consider only the nonstatutory mitigating circumstances one or more jurors found to exist and to have mitigating value. **State v. McCarver,** 364.

The trial court did not err by instructing the jury that it could refuse to consider the nonstatutory mitigating circumstance pertaining to defendant's good conduct in jail if it deemed the evidence to have no mitigating value. **State v. Burr,** 263.

The trial court did not err in a first-degree murder sentencing hearing in its instructions on nonstatutory mitigating circumstances. **State v. Simpson,** 316.

The trial court did not err in a first-degree murder sentencing hearing by declining to instruct the jury that the statutory mitigating circumstances proven by a preponderance of the evidence must be given some mitigating weight. **Ibid.**

The trial court's instruction that, if defendant is found guilty of first-degree murder, the court will conduct a sentencing hearing at which "the same jury will hear the evidence from the state of aggravating factors . . . and then the defense may present evidence of mitigating factors" did not improperly imply that the existence of aggravating circumstances was predetermined but that there might be no mitigating circumstances and was not improper. **State v. Frye,** 470.

Any error in the trial court's failure to give an individual instruction for each of the fifty-four nonstatutory mitigating circumstances submitted on the mechanics by which the jury might answer "yes" to such a circumstance was harmless where the jury heard and was instructed to consider all the evidence defendant proffered in mitigation. **Ibid.**

CRIMINAL LAW—Continued

§ 1325 (NCI4th). Capital sentencing; instructions; unanimous decision as to mitigating circumstances

The trial court did not err by failing to instruct the jury in a capital sentencing proceeding that the entire jury must consider and weigh any mitigating circumstances found by any juror in reaching its answers to Issue Three and Issue Four. **State v. McCarver,** 364.

§ 1326 (NCI4th). Capital sentencing; instructions; aggravating and mitigating circumstances; burden of proof

The court's instruction that jurors could find a mitigating circumstance if the evidence "satisfies any one of you" of its existence was not plain error. **State v. McCarver,** 364.

The trial court's instruction on the burden of proof for finding mitigating circumstances did not constitute plain error. **State v. Burr,** 263.

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury in accord with the pattern jury instructions with respect to aggravating circumstances, the statutory questions required for the death sentence, and on preponderance of the evidence with respect to mitigating circumstances. **State v. Simpson,** 316.

There was no error in the use of pattern jury instructions defining mitigating circumstances in a first-degree murder sentencing proceeding. **Ibid.**

§ 1327 (NCI4th). Capital sentencing; instructions; aggravating and mitigating circumstances; duty to recommend the death sentence

The trial court did not err in a first-degree murder prosecution by instructing the jury that it had a duty to recommend a sentence of death if it determined that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to warrant the imposition of the death penalty. **State v. Alston,** 198.

§ 1329 (NCI4th). Capital sentencing; instructions; sentence recommendation by jury; requirement of unanimity

Any issue which is outcome determinative as to the sentence a defendant in a capital trial will receive must be answered unanimously by the jury; that is, the jury should answer Issues One, Three, and Four on the standard form used in capital sentencing proceedings either unanimously "yes" or unanimously "no." Therefore, the trial court did not err by refusing to instruct the jury to answer "no" to Issue Three, thus recommending a sentence of life imprisonment, if it could not unanimously agree as to whether the mitigators were sufficient to outweigh the aggravators and by informing the jury that it must be unanimous before answering either "yes" or "no" to Issue Three. **State v. McCarver,** 364.

Assuming that Issue Three on the form used in this capital sentencing proceeding could be interpreted as improperly directing the jury to answer "no" to Issue Three if unable to reach unanimity, this error was harmless because it was favorable to the defendant. **Ibid.**

The prosecutor did not misstate the law when he informed the jury in a capital sentencing proceeding that it had to be unanimous in determining that the mitigating circumstances outweighed the aggravating circumstances before it could answer "no" to Issue Three. **State v. Burr,** 263.

CRIMINAL LAW—Continued

§ 1337 (NCI4th). Capital sentencing; particular aggravating circumstances; previous conviction for felony involving violence

The trial court did not err during a first-degree murder resentencing hearing by allowing into evidence defendant's stipulation that he had previously been convicted of a felony involving the use of violence. **State v. McLaughlin,** 426.

§ 1338 (NCI4th). Capital sentencing; particular aggravating circumstances; avoiding arrest or effecting escape

There was sufficient evidence in a capital sentencing proceeding to support the trial court's submission of the aggravating circumstance that the murder was committed to avoid a lawful arrest where defendant robbed the victim and killed him to eliminate a witness who defendant felt would testify against him. **State v. McCarver,** 364.

§ 1341 (NCI4th). Capital sentencing; particular aggravating circumstances; pecuniary gain

The evidence was sufficient in the sentencing hearing for first-degree murder to submit the aggravating circumstance of pecuniary gain. **State v. Alston,** 198.

§ 1342 (NCI4th). Capital sentencing; particular aggravating circumstances; capital felony committed during, or because of, exercise of official duty

The evidence was sufficient in the sentencing hearing for first-degree murder to submit the aggravating circumstance that the murder was committed against a former witness because of the exercise of her official duty. **State v. Alston,** 198.

§ 1343 (NCI4th). Capital sentencing; particular aggravating circumstances; especially heinous, atrocious, or cruel offense; instructions

The trial court's instruction on the especially heinous, atrocious, or cruel aggravating circumstance was not unconstitutionally vague. **State v. Burr,** 263.

There was sufficient evidence in the sentencing hearing for a first-degree murder to submit the aggravating circumstance that the murder was especially heinous, atrocious or cruel. **State v. Alston,** 198.

The instruction for the especially heinous, atrocious or cruel aggravating circumstance is not inherently vague. **Ibid.**

The especially heinous, atrocious, or cruel aggravating circumstance for first-degree murder is not vague and overbroad. **State v. Simpson,** 316.

§ 1344 (NCI4th). Capital sentencing; particular aggravating circumstances; submission of especially heinous, atrocious, or cruel offense

The evidence in a capital trial permitted the inference that the murder involved psychological torture sufficient to support submission of the especially heinous, atrocious, or cruel aggravating circumstance. **State v. Frye,** 470.

§ 1347 (NCI4th). Capital sentencing; particular aggravating circumstances; murder as course of conduct

The trial court did not err during a first-degree murder sentencing hearing by allowing the State to introduce evidence of other murders as evidence tending to show the aggravating circumstance that the murder was part of a course of conduct which included other crimes of violence against another person or persons. **State v. McLaughlin,** 426.

CRIMINAL LAW—Continued

could find statutory mitigating circumstances of emotional disturbance and impaired capacity based on defendant's poor judgment, limited insight, and consumption of intoxicating substances. **State v. McLaughlin,** 426.

§ 1360 (NCI4th). Capital sentencing; particular mitigating circumstances; impaired capacity of defendant; instructions

There was no plain error in a first-degree murder resentencing hearing where defendant contended that the trial court erred by failing to instruct the jury that it could find the statutory mitigating circumstances of impaired capacity and emotional disturbance based on defendant's poor judgment, limited insight, and consumption of intoxicating substances. **State v. McLaughlin,** 426.

The trial court's instruction that the jury should find the impaired capacity mitigating circumstance if it found "that the defendant suffered from paranoid disorder, mixed substance abuse disorder, mixed personality disorder and substance abuse syndrome, and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" did not constitute plain error because of the court's use of the conjunctive where the instruction basically comported with defendant's evidence. **State v. Frye,** 470.

Assuming that the trial court erred by failing to include child abuse syndrome in its instruction on the impaired capacity mitigating circumstance, this error did not improperly restrict the jury's consideration of mitigating evidence and was harmless beyond a reasonable doubt. **Ibid.**

§ 1361 (NCI4th). Capital sentencing; particular mitigating circumstances; impaired capacity of defendant; intoxication

The trial court did not err by omitting intoxication as a factor from its instruction on impaired capacity. **State v. Frye,** 470.

§ 1362 (NCI4th). Capital sentencing; particular mitigating circumstances; age of defendant

The trial court did not err in a first-degree murder prosecution by refusing to give an instruction proffered by defendant on the statutory mitigating circumstance of age. **State v. Simpson,** 316.

§ 1363 (NCI4th). Capital sentencing; other mitigating circumstances arising from the evidence

There was no error in the sentencing hearing for first-degree murder where the jury did not find the nonstatutory mitigating circumstances that defendant was regularly employed at the time of the offense and that defendant had a supportive family structure. **State v. Alston,** 198.

The trial court in a first-degree murder prosecution did not err by instructing the jury that it must determine whether the evidence supported each nonstatutory mitigating circumstance submitted and whether it had mitigating value. **Ibid.**

The trial court did not err in a first-degree murder prosecution by refusing to submit as a nonstatutory mitigating circumstance that the State's case was largely based upon circumstantial evidence. **Ibid.**

A codefendant's criminal record is not a proper nonstatutory mitigating circumstance. **State v. Goode,** 513.

Lingering doubt as to defendant's guilt is not a proper nonstatutory mitigating circumstance. **Ibid.**

CRIMINAL LAW—Continued

The trial court did not err by refusing to submit the nonstatutory mitigating circumstance that defendant's alcohol intoxication impaired his abilities to conform his behavior to the requirements of the law since it was subsumed within the submitted and found statutory mitigating circumstance 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. **State v. Frye,** 470.

The trial court did not err in a first-degree murder resentencing hearing by not admitting evidence to establish the nonstatutory mitigating circumstance that an accomplice had received only life imprisonment. **State v. McLaughlin,** 426.

There was no error in a first-degree murder resentencing hearing where the trial court did not submit the requested nonstatutory mitigating circumstances that defendant was of low intelligence with poor judgment and limited insight, that defendant was under a pattern of substance abuse at the time of the commission of the crime, and that defendant's limited mental capacity at the time of trial significantly reduced his culpability for the offense. **Ibid.**

§ 1371 (NCI4th). Proportionality review generally

The standards set for proportionality review are not vague and arbitrary; counsel for any capitally tried defendant should well know from the case law the manner in which proportionality review is undertaken. **State v. Simpson,** 316.

§ 1373 (NCI4th). Death penalty held not excessive or disproportionate

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where defendant robbed and then killed the victim so the victim could not testify against him. **State v. McCarver,** 364.

A sentence of death imposed upon defendant for the first-degree murder of a four-month-old child was not excessive or disproportionate where the infant was cruelly murdered by being shaken and beaten to death. **State v. Burr,** 263.

A sentence of death for a first-degree murder was not disproportionate. **State v. Alston,** 198; **State v. Simpson,** 316.

A death penalty in a first-degree murder resentencing hearing was not disproportionate. **State v. McLaughlin,** 426.

Sentences of death imposed upon defendant for the first-degree murders of his elderly landlord and the landlord's wife by stabbing them to death was not disproportionate. **State v. Goode,** 513.

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where defendant stabbed the victim to death in his own home during a nighttime robbery. **State v. Frye,** 470.

DIVORCE AND SEPARATION

§ 383 (NCI4th). Grandparents' visitation rights

Grandparents do not have the right to sue for visitation rights with a minor child when the child's family is intact and no custody proceeding is ongoing. **McIntyre v. McIntyre,** 629.

§ 520 (NCI4th). Counsel fees and costs; enforcement of separation agreement

A provision in a separation agreement for the recovery of attorney fees incurred to enforce provisions of the agreement does not violate public policy and is valid. **Bromhal v. Stott,** 702.

ENERGY

EVIDENCE AND WITNESSES

EVIDENCE AND WITNESSES—Continued

There was no error in a first-degree murder prosecution arising from an armed robbery where the court admitted testimony that a crowd gathered at a club eleven days after the murder, there was some belligerence, defendant fired a gun into the air, the crowd dispersed, defendant dropped the gun as he was running away, and the gun was later recovered and identified as having been used in the murder. **State v. Grace,** 640.

§ 309 (NCI4th). Other crimes, wrongs, or acts; admissibility to show identity of defendant; robbery, generally

Evidence of defendant's participation in a robbery an hour before the robbery and two murders for which defendant was on trial was admissible to show defendant's identity as a perpetrator of the murders. **State v. Goode,** 513.

§ 320 (NCI4th). Other crimes, wrongs, or acts; admissibility to show identity; drug offenses

There was no error in a first-degree murder prosecution where the trial court admitted evidence that defendant had bought forty to forty-five dollars' worth of crack cocaine with quarters, nickels and dimes where the victim's mother had testified that the victim worked at a restaurant and received a large quantity of change in tips and that a jar in her bedroom in which she had over one hundred dollars in change was empty when the victim was found. **State v. Alston,** 198.

§ 339 (NCI4th). Other crimes, wrongs, or acts; admissibility to show malice, premeditation, or deliberation

The trial court did not abuse its discretion in a first-degree murder prosecution in the admission of testimony tending to show that defendant had previously assaulted the victim. **State v. Alston,** 198.

§ 364 (NCI4th). Other crimes, wrongs, or acts; admissibility as part of same chain of circumstances

Evidence of defendant's shooting of his former girlfriend at the time of their breakup and his conviction and sentencing arising out of that shooting was admissible to show the chain of events that led to defendant's murder of his former girlfriend's new boyfriend ten days after defendant's release from jail. **State v. Ratliff,** 610.

§ 601 (NCI4th). Requirement of authentication or identification

The trial court did not err in a first-degree murder prosecution by admitting into evidence a letter purportedly written by the victim where the victim's mother testified that she was familiar with her daughter's handwriting, that the letter was written in her daughter's handwriting, and that she recognized the signature as that of her daughter. **State v. Alston,** 198.

§ 701 (NCI4th). Evidence admissible for restricted purpose; content or sufficiency of limiting instruction

The trial court's pattern instruction that evidence of defendant's prior misconduct toward the child victim's mother was admitted solely to show the identity of the person who committed the crime charged was sufficient to limit the jury's consideration of this evidence to the issue of identity without defendant's further requested instruction that the jury was not to consider such evidence as evidence of bad character. **State v. Burr,** 263.

EVIDENCE AND WITNESSES—Continued

§ 1070 (NCI4th). Flight as implied admission; sufficiency of evidence to support instruction

The evidence was sufficient in a homicide prosection to support the trial court's instruction on flight. **State v. Johnson,** 104.

§ 1113 (NCI4th). Admissions by party opponent generally

Defendant's statement, "Honey, why did you make me do it?" while she was viewing her husband's body at the funeral home was competent as an admission by a party opponent. **State v. Lambert,** 36.

§ 1222 (NCI4th). Confessions and other inculpatory statements; matters affecting voluntariness; use of, or threat to use, polygraph or polygraph facilities

Defendant's inculpatory statement was not rendered inadmissible because officers repeatedly told defendant during interrogation that he failed a polygraph test. **State v. Thibodeaux,** 53.

§ 1240 (NCI4th). Particular statements as volunteered or resulting from the custodial interrogation; statements made during general investigation at police station

The trial court did not err in a first-degree murder prosecution in the admission of statements made by defendant while he was being processed where the evidence showed that there is no material conflict as to whether defendant was being interrogated during his fingerprint processing. **State v. Vick,** 569.

§ 1259 (NCI4th). What constitutes invocation of right to remain silent; extent of invocation

Admission of testimony by a deputy regarding defendant's statements that she had "blacked out" and could not remember anything did not violate defendant's right to silence since the statements were not the result of police interrogation and defendant's statement that she could not remember anything did not invoke her right to silence. **State v. Lambert,** 36.

§ 1289 (NCI4th). Confessions and other inculpatory statements; other exhortations that it would be beneficial to confess or tell truth

The trial court properly concluded that defendant's statements to police officers were voluntarily and freely made where a detective did not accuse defendant of lying but informed him of the crime with which he might be charged and urged him to tell the truth and think about what would be better for him. **State v. McCullers,** 19.

§ 1302 (NCI4th). Confessions and other inculpatory statements; effect of alcohol or drug use

The evidence did not show that defendant was intoxicated and mentally impaired at the time he made an inculpatory statement so as to render the statement involuntary. **State v. Thibodeaux,** 53.

§ 1406 (NCI4th). Evidence from former trial or proceeding; particular reasons for witness's unavailability; refusal to testify

The trial court did not err in a first-degree murder resentencing hearing by allowing a codefendant's testimony from a prior trial to be read into evidence where the codefendant had asserted his privilege against self-incrimination. **State v. McLaughlin,** 426.

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

ant's shirt, and further testified that in his professional opinion he would expect quite a lot of blood. **State v. Goodson,** 619.

§ 2089 (NCI4th). Opinion testimony by lay persons; emotion or mood, generally

The trial court did not err in allowing the testimony of the investigating officers which related to defendant's lack of emotion at the scene of her husband's murder. **State v. Lambert,** 36.

§ 2090 (NCI4th). Opinion testimony by lay persons; fear

Testimony by the mother of a child murder victim that another of her children was scared of defendant was relevant and admissible to demonstrate the state of the familial relationship in the brief period preceding the murder during which defendant resided in the mother's home. **State v. Burr,** 263.

§ 2101 (NCI4th). Opinion testimony by lay persons; mental condition or capacity; competence to waive rights

Officers' testimony that defendant appeared sober, showed no signs of impairment, and appeared to understand his rights did not constitute an improper legal conclusion that defendant had the legal capacity to waive his rights. **State v. Thibodeaux,** 36.

§ 2148 (NCI4th). Opinion testimony by experts generally; when allowed; requirement of relevancy

When the trial court has determined that a witness has qualified as an expert, the court must then determine whether the expert's testimony is relevant. **State v. Goode,** 513.

§ 2154 (NCI4th). Qualification of witness as expert, generally

When the court has determined that the method of proof is sufficiently reliable as an area for expert testimony, the court must then determine whether the witness is qualified as an expert to apply this method to the facts of the case. **State v. Goode,** 513.

§ 2176 (NCI4th). Basis for expert's opinion; scientific evidence; acceptability of methods used in examination or analysis; new and established methods

When a trial court is faced with a proffer of expert testimony, it must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and can properly be applied to the facts in issue. **State v. Goode,** 513.

In determining whether a scientific method of proof is reliable, a court may look to testimony by an expert relating to the reliability and may take judicial notice. **Ibid.**

§ 2210 (NCI4th). Expert testimony; existence of bloodstains; opinion as to source

A forensic serologist's testimony was sufficient to show that bloodstain pattern interpretation is an appropriate area for expert testimony. **State v. Goode,** 513.

The trial court did not err by finding that an FBI agent who was a forensic serologist was qualified to testify as an expert in bloodstain pattern interpretation. **Ibid.**

The trial court did not err by permitting an expert in bloodstain pattern interpretation to state his opinion that the lack of bloodstains on defendant would not exclude defendant as a participant in the stabbing deaths of the victims. **Ibid.**

EVIDENCE AND WITNESSES—Continued

An expert's testimony about a microscopic quantity of blood discovered on the boot worn by defendant on the night of two murders was relevant in defendant's murder trial even though the State could not show the source or type of the blood. **Ibid.**

§ 2284 (NCI4th). Expert testimony; pain and suffering

The trial court did not err in a first-degree murder prosecution by allowing the State's pathologist to testify during the guilt phase of the trial as to the pain and suffering caused by the wounds of the victims. **State v. Vick,** 569.

§ 2296 (NCI4th). Expert testimony; assessment of mental health or state of mind generally; conclusion based on reviews or examinations conducted by others

There was no error in a first-degree murder prosecution where the trial court allowed the State to cross-examine defendant's expert witness concerning the diagnosis of other mental health professionals. **State v. Simpson,** 316.

§ 2302 (NCI4th). Expert testimony; specific intent; malice; premeditation

There was no prejudicial error in a first-degree murder prosecution where a psychologist was not allowed to give an opinion as to whether defendant had the capacity to form the specific intent at the time of the shooting but defendant was only convicted of felony murder, which does not require an intent to kill as an element that must be satisfied for a conviction. **State v. Richardson,** 658.

§ 2442 (NCI4th). Subpoena duces tecum

The proper method for defendant to obtain medical records not in the possession or control of the State is by a subpoena duces tecum. **State v. Burr,** 263.

§ 2904 (NCI4th). Redirect examination; explanation of matter elicited on cross-examination; examination as to incompetent matters

Where defense counsel impeached a witness by questioning a detective about only a portion of a sentence in the witness's out-of-court statement, the State was properly allowed to rebut the inference that the witness had made inconsistent statements by having the detective read the entire sentence even if such testimony was hearsay. **State v. Ratliff,** 610.

§ 2908 (NCI4th). Redirect examination when defendant "opens door" on cross-examination

There was no error in a first-degree murder prosecution where the trial court admitted testimony by a detective regarding a statement made by the victim's mother concerning the victim's fear of defendant. **State v. Alston,** 198.

§ 2927 (NCI4th). Impeachment of own witness; prior inconsistent statement

The trial court did not err in allowing the State to impeach its own witness with her prior inconsistent statement where there was nothing to indicate that the State knew or believed prior to calling the witness that she would testify differently from her prior statement that defendant told her he had shot the victim. **State v. Williams,** 1.

§ 3027 (NCI4th). Basis for impeachment; conduct probative of untruthfulness

The trial court properly permitted the State to cross-examine defendant about false statements defendant made to hospital personnel and his commanding officer less than a year before the murders for which he was on trial since those statements are probative of defendant's character for truthfulness. **State v. Goode,** 513.

EVIDENCE AND WITNESSES—Continued

§ 3050 (NCI4th). Basis for impeachment; particular instances of conduct; robbery

There was no error in a first-degree murder prosecution arising from an armed robbery in the exclusion of evidence that an accomplice who testified against defendant had held the gun in a previous robbery. **State v. Grace,** 640.

§ 3111 (NCI4th). Corroboration; instructions

The purpose for which the jury could consider corroborating evidence was adequately explained to the jury by the trial court. **State v. Williams,** 1.

§ 3126 (NCI4th). Type of corroborating evidence; hearsay evidence

The trial court did not err in a first-degree murder prosecution by admitting the testimony of one of the investigating officers, who testified concerning prior consistent statements made by earlier witnesses. **State v. Alston,** 198.

§ 3164 (NCI4th). Corroboration; prior consistent statements; use of testifying witness's own statement

Extrinsic evidence of a witness's prior inconsistent statement was admissible to corroborate her testimony on direct examination that she had made the prior inconsistent statement. **State v. Williams,** 1.

EXECUTION AND ENFORCEMENT

§ 1 (NCI4th). Judgments enforceable by execution generally

The courts do not have the power to impose an execution against the State. **Able Outdoor, Inc. v. Harrelson,** 167.

HOMICIDE

§ 226 (NCI4th). Evidence of identity linking defendant to crime sufficient

There was substantial evidence from which the jury could conclude that defendant was the one who shot and killed her husband. **State v. Lambert,** 36.

The trial court did not err by denying defendant's motion to dismiss a first-degree murder prosecution for insufficient evidence placing him at the scene of the crime. **State v. Vick,** 569.

§ 230 (NCI4th). Sufficiency of evidence; first-degree murder generally

There was substantial evidence to support findings that defendant was the perpetrator of the crimes charged including first-degree murder. **State v. Montgomery,** 553.

§ 244 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; intent to kill, generally

There was sufficient evidence of premeditation and deliberation to support defendant's conviction for first-degree murder of her husband while he was sleeping. **State v. Lambert,** 36.

§ 253 (NCI4th). Sufficiency of evidence; first-degree murder; malice, premeditation, and deliberation; nature and execution of crime; severity of injuries, along with other evidence

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to set aside the verdict based upon insufficient evidence of pre-

meditation and deliberation where the victim did not provoke the defendant, the defendant harassed, threatened and assaulted the victim prior to the murder, the victim was rendered helpless by being bludgeoned in the face with a hammer-like instrument, and the killing was done in a brutal manner. **State v. Alston,** 198.

Even if the evidence shows that defendant entered the victim's home with the intent to rob and not to kill, the evidence supported submission to the jury of a charge of first-degree murder based on premeditation and deliberation. **State v. Frye,** 470.

§ 263 (NCI4th). Murder in perpetration of felony; proof of underlying felony

The evidence was sufficient to show that defendant committed a robbery with a dangerous weapon, the underlying felony supporting defendant's felony murder conviction, under the theory of acting in concert where defendant and his companions beat the victim with a bat and took his money. **State v. McCullers,** 19.

§ 323 (NCI4th). Sufficiency of evidence; voluntary manslaughter; killing in heat of passion

There was no error in a first-degree murder prosecution where the trial court denied defendant's motions to dismiss for insufficient evidence of premeditation and deliberation where there was no evidence which showed sufficient provocation to arouse the passion of defendant so that he could not form the intent to kill over some period of time however short, or that he was not in a cool state of blood. **State v. Goodson,** 619.

§ 382 (NCI4th). Self-defense; question whether defendant was aggressor or used excessive force

The trial court properly allowed the jury to determine whether defendant was the aggressor where the evidence tended to show that the victim initially went to defendant's home and began to argue with him but had quit the argument before she was shot to death. **State v. Cannon,** 79.

§ 393 (NCI4th). Defense of intoxication

There was insufficient evidence to require the trial court in a first-degree murder case to instruct the jury on second-degree murder because her consumption of alcohol and cocaine negated her ability to premeditate and deliberate. **State v. Lambert,** 36.

§ 493 (NCI4th). Instructions; matters considered in proving premeditation and deliberation; lack of just cause, excuse, or justification

There was no error in a first-degree murder prosecution where the trial court instructed the jury that premeditation and deliberation could be inferred from lack of provocation by the victim. **State v. Alston,** 198.

The trial court's instruction that premeditation and deliberation may be inferred from a lack of provocation did not constitute an improper expression of opinion that the absence of provocation had been proven. **State v. McCarver,** 364.

§ 552 (NCI4th). Instructions; second-degree murder as lesser included offense of premeditated and deliberated murder; lack of evidence of lesser crime

The trial court did not err in a first-degree murder prosecution by denying defendant's request to instruct the jury on second-degree murder as a lesser-included offense. **State v. Alston,** 198.

HOMICIDE—Continued

The evidence in a first-degree murder prosecution did not require the trial court to submit second-degree murder where uncontroverted evidence supported an inference of premeditation and deliberation. **State v. Frye,** 470.

§ 583 (NCI4th). Instructions; acting in concert

The trial court's instructions in a first-degree murder case did not allow the jury to apply the principle of acting in concert to convict defendant of specific intent crimes, including the underlying felony supporting felony murder, if it found that another perpetrator had the requisite mens rea to commit them. **State v. McCarver,** 364.

§ 588 (NCI4th). Instruction on imperfect self-defense

There was no error in a first-degree murder prosecution where the trial court refused to instruct the jury on imperfect self-defense on the felony murder charge. **State v. Richardson,** 658.

§ 596 (NCI4th). Self-defense; manner of giving instructions; definition of terms and use of particular words or phrases generally

The trial court did not err in a prosecution in which defendant was convicted of second-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury by instructing the jury that it could find that defendant acted in self-defense only if defendant reasonably believed that under the circumstances it was necessary "to kill" the victims. **State v. Richardson,** 585.

§ 612 (NCI4th). Instructions; defenses; apprehension of death or great bodily harm; existence of necessity to take life; reasonableness of apprehension generally

The trial court did not err by instructing the jury that it could return a verdict of voluntary manslaughter for imperfect self-defense only if defendant reasonably believed it was necessary to kill in self-defense. **State v. Richardson,** 658.

§ 707 (NCI4th). Harmless error; first degree murder; alleged error in regard to self-defense instruction

Any error in the trial court's instruction on self-defense as it relates to voluntary manslaughter was not plain error where defendant was found guilty of first-degree murder based solely on the felony murder rule. **State v. Richardson,** 658.

HOUSING, AND HOUSING AUTHORITIES AND PROJECTS

§ 74 (NCI4th). Assessments and liens

A Supplemental Declaration of Covenants and Restrictions filed by defendant time share developer was ineffective to exempt it from paying maintenance assessments. **Dune South Hownowners Assn. v. First Flight Builders, Inc.,** 125.

INDIANS

§ 7 (NCI4th). Subject matter jurisdiction of State courts; paternity, public assistance, and support

It would be an infringement on tribal sovereignty for a district court to take jurisdiction of a county's action to recover reimbursement of AFDC payments made to Cherokee Indian children and for an order for future support where a claim for sup-

INSURANCE—Continued

G.S. 20-279.21(b)(4) in an amount equal to the policy limits for bodily injury liability specified in the umbrella section. **Isenhour v. Universal Underwriters Ins. Co.,** 597.

§ 529 (NCI4th). Underinsured motorist coverage as excess or additional coverage

Where plaintiff was driving his employer's automobile at the time of an accident, the employer's fleet policy provided primary UIM coverage and plaintiff's personal policy provided secondary UIM coverage for plaintiff's injuries, and where the fleet policy provided UIM coverage exceeding plaintiff's judgment against the tortfeasor, this is not a stacking case, and the employer's fleet insurer is not absolved of liability for UIM coverage because plaintiff settled with his personal insurer for an amount less than the UIM limit under his policy. **Isenhour v. Universal Underwriters Ins. Co.,** 597.

JUDGES, JUSTICES, AND MAGISTRATES

§ 27 (NCI4th). Disqualification from criminal proceedings

The trial court did not err by not recusing itself from a first-degree murder prosecution where the judge had accepted a guilty verdict in the trial of defendant's codefendant and found coercion as a mitigating factor, but found that the aggravating factors outweighed the mitigating factors. **State v. Vick,** 569.

JURY

§ 36 (NCI4th). Order for special venire

The trial court's rescission of its prior order which required that a special venire be summoned in Mecklenburg County to try defendant's capital case did not violate defendant's constitutional rights to a fair trial, due process and freedom from cruel and unusual punishment or his statutory right to a complete recordation of the proceedings in a capital case. **State v. McCarver,** 364.

§ 64 (NCI4th). Effect of statements made during jury selection; propriety of granting new trial

The prosecutor's statement during the jury selection process in a capital trial that "there has been a previous trial of this matter" did not tend to diminish the jurors' sense of responsibility for their verdict by suggesting that the verdict might be reviewed and did not deny defendant his right to a fair trial. **State v. McCarver,** 364.

§ 102 (NCI4th). Voir dire examination; effect of perceived opinions, prejudices, or pretrial publicity

The trial court did not abuse its discretion by failing to question the remaining prospective jurors regarding their exposure to media coverage after it learned that a newspaper article about the case had been circulated around the jury assembly room where the court properly questioned the previously selected jurors and excused for cause two jurors who stated they had read the article and were not sure they could set aside that information. **State v. Frye,** 470.

§ 119 (NCI4th). Voir dire examination; cure of error in excluding question

Defendant was not prejudiced when the trial court sustained the State's objection to defense counsel's question to a prospective juror in a capital trial as to whether he could consider psychological testimony as mitigating where defendant peremptorily

challenged the juror and did not exhaust his peremptory challenges. **State v. McCarver**, 364.

§ 134 (NCI4th). Voir dire examination; ability to return verdict of guilty or not guilty

The trial court's question to each prospective juror in a capital trial, "If chosen to sit as a juror will you require the state to satisfy you of the defendant's guilt beyond a reasonable doubt before you find him guilty?" did not constitute an expression of opinion that the jury would vote to convict but was a proper attempt to ascertain whether the prospective jurors could follow the court's preliminary instructions on the burden of proof. **State v. Frye**, 470.

§ 137 (NCI4th). Voir dire examination; questions regarding race or homosexuality

There was no abuse of discretion in a first-degree murder prosecution arising from an armed robbery where defendant contended that he was not allowed to question potential jurors extensively enough as to their racial attitudes to determine whether to exercise challenges for cause or peremptory challenges. **State v. Goodson**, 619.

§ 139 (NCI4th). Voir dire examination; presumption of innocence and principle of reasonable doubt

There was no error in a first-degree murder prosecution in which the death penalty was sought where defendant contended that the prosecutor misstated the definition of reasonable doubt. **State v. Alston**, 198.

§ 141 (NCI4th). Voir dire examination; parole procedures

There was no error in a first-degree murder capital trial where defendant's motion to permit voir dire of potential jurors regarding their beliefs about parole eligibility was denied. **State v. Alston**, 198.

There was no error in a first-degree murder sentencing proceeding where the trial court refused to allow defendant to question potential jurors on voir dire concerning their attitudes or understanding regarding parole eligibility and to inform potential jurors that defendant would be ineligible for parole for twenty-seven years. **State v. Simpson**, 316.

The trial court did not err in a first-degree murder resentencing by excluding all references to parole eligibility during voir dire, the trial, and jury instructions. **State v. McLaughlin**, 426.

§ 142 (NCI4th). Voir dire examination; jurors' decision under given set of facts

The prosecutor's inquiry as to whether a prospective juror could impartially focus on defendant's guilt or innocence regardless of the child victim's living conditions and lack of motherly care was not an impermissible attempt to ascertain how the juror would vote upon a given state of facts but was a proper question to secure an unbiased jury. **State v. Burr**, 263.

§ 145 (NCI4th). Voir dire examination; in relation to cases involving capital punishment generally

Defendant was not prejudiced when the trial court sustained the State's objection to defense counsel's question to a prospective juror in a capital trial as to whether he could consider psychological testimony as mitigating where defendant peremptorily

challenged the juror, and the court's ruling did not chill defendant's subsequent inquiry as to jurors' attitudes about psychological testimony. **State v. McCarver,** 364.

§ 148 (NCI4th). Voir dire examination; propriety of prohibiting voir dire or inquiry into attitudes toward capital punishment

Defendant was not precluded from inquiring into whether a prospective juror would automatically vote for the death penalty when the trial court sustained the State's objection as to the form of defendant's question whether the juror had "a preference for the death penalty as opposed to life imprisonment." **State v. Burr,** 263.

§ 150 (NCI4th). Propriety of rehabilitating jurors challenged for cause due to opposition to death penalty

The record shows that the trial judge exercised his discretion in denying defendant's general pretrial motion seeking to rehabilitate every prospective juror challenged for cause by the State and then properly exercised his discretion in denying defendant's specific request to rehabilitate three prospective jurors after the State challenged them for cause based on their opposition to the death penalty. **State v. Burr,** 263.

There was no error in a first-degree murder trial in which the death penalty was sought in the trial court's refusal to afford defendant the opportunity to rehabilitate fifteen prospective jurors excused for cause. **State v. Alston,** 198.

§ 151 (NCI4th). Voir dire examination; jurors' beliefs as to capital punishment or imposition of death penalty

The trial court did not err during jury selection for a first-degree murder prosecution by sustaining the State's objections to questions purportedly designed to identify any prospective jurors who would automatically vote for the death penalty when the murder was premeditated. **State v. Simpson,** 316.

There was no error during jury selection in a first-degree murder prosecution where defendant contended that the trial court erred by sustaining objections to a variety of questions relating to whether the potential jurors could properly consider aggravating and mitigating circumstances. **Ibid.**

§ 173 (NCI4th). Voir dire examination; whether jurors could vote for death penalty verdict

The trial court's question to prospective jurors in a capital trial as to whether, upon proof by the State of defendant's guilt beyond a reasonable doubt, the juror would "vote to find defendant guilty of first-degree murder or would your personal convictions about the death penalty prevent or substantially impair the performance of your duty in accordance with your instructions and your oath" did not require each juror to draw a legal conclusion about his or her competence to serve or attempt to stake out jurors, but properly sought to assort those prospective jurors who were unable to find defendant guilty, regardless of the evidence, because of their views about capital punishment. **State v. Frye,** 470.

§ 187 (NCI4th). Appellate review of decisions on challenges for cause

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. Frye,** 470.

§ 194 (NCI4th). Grounds for challenge and disqualification generally

The trial court did not abuse its discretion in a first-degree murder prosecution by not dismissing for cause a juror whose traffic case was dismissed by one of the two prosecutors in the case while the trial was under way. **State v. Richardson,** 658.

ROBBERY

§ 52 (NCI4th). Sufficiency of evidence to identify defendant as perpetrator of robbery, generally

There was substantial evidence to support findings that defendant was the perpetrator of the crimes charged, including robbery. **State v. Montgomery,** 553.

SEALS

§ 1 (NCI4th). Generally

A Court of Appeals holding that a portion of plaintiff's claimed condominium maintenance assessment was time barred through application of the three-year statute of limitations for actions based on contract was reversed because the Declaration of Covenants constituted an instrument under seal subject to a ten-year statute of limitations. **Dune South Hownowners Assn. v. First Flight Builders, Inc.,** 125.

TORTS

§ 31 (NCI4th). Evidence of release or grounds for relief therefrom generally

Plaintiff's claim that defendant mechanic fraudulently concealed damages to her car were barred by a release signed by plaintiff stating that she agreed "to relinquish [defendant] of any responsibility whatsoever, of any kind for my [car] & hereby receive a refund in full of $30 for welding of vehicle pedal." **Sims v. Gernandt,** 162.

WEAPONS AND FIREARMS

§ 24 (NCI4th). Common law offense of going armed to the terror of the people

The Court of Appeals was correct in reversing defendant's felony conviction for the common law offense of going armed to the terror of the people because the allegations of the indictment were insufficient to elevate the misdemeanor charge to a felony, but the Court of Appeals erred by failing to instruct the trial court, upon remand, to enter judgment on the conviction as a misdemeanor. **State v. Rambert,** 173.

WORKERS' COMPENSATION

§ 152 (NCI4th). Compensable injuries; dual purpose rule

There was competent evidence to support the Industrial Commission's findings and the findings justify the conclusions and award denying plaintiffs' claim where plaintiffs sought an award of death benefits for a decedent who died from injuries received in an automobile accident while on his way from Raleigh to Hound Ears. **Murray v. Associated Insurers, Inc.,** 712.

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